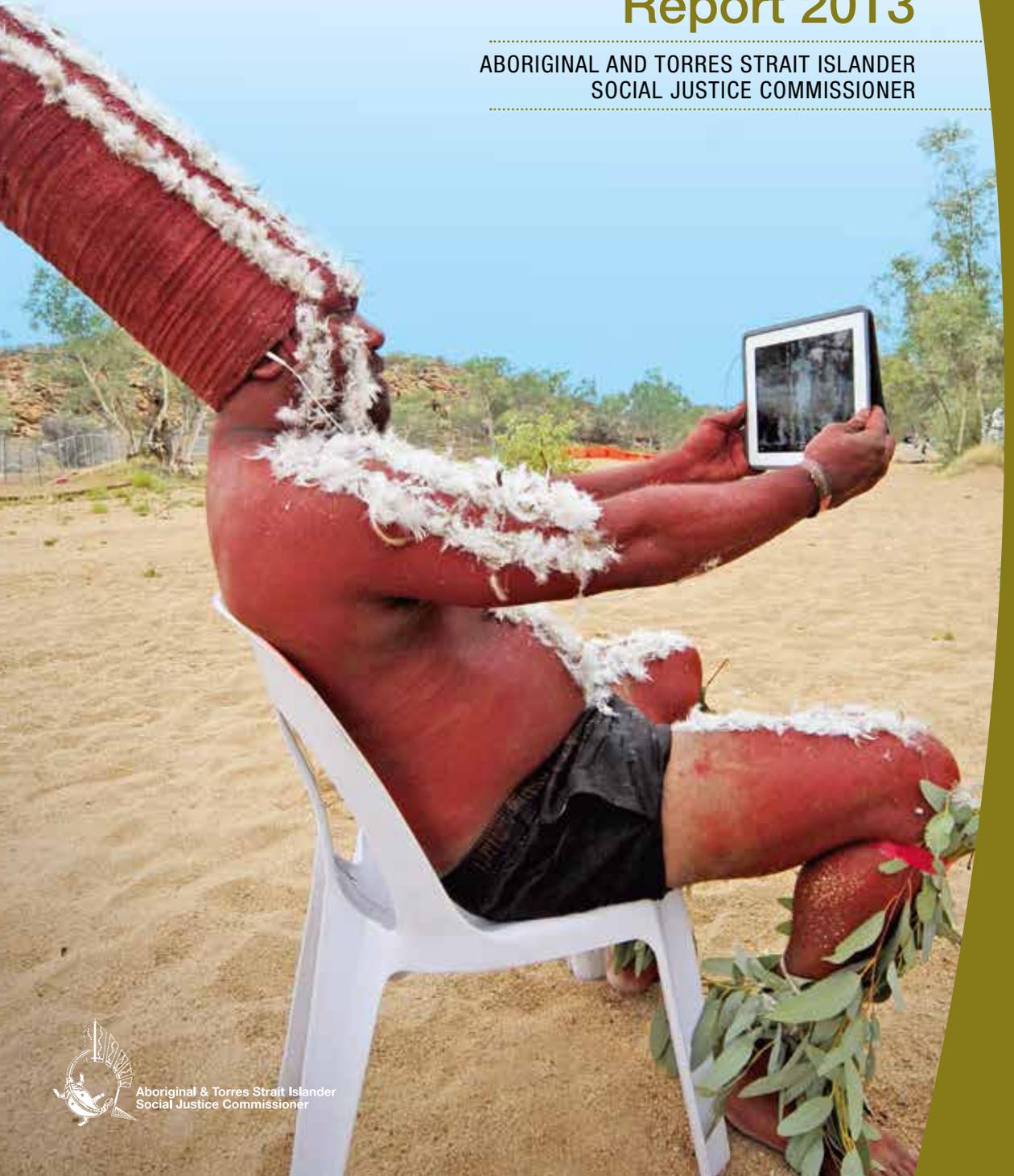




Australian
Human Rights
Commission

Social Justice and Native Title Report 2013

ABORIGINAL AND TORRES STRAIT ISLANDER
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander
Social Justice Commissioner

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Social Justice and Native Title Report 2013

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Photo by Justin Brierty (Newspix). This image is of Indigenous dancer, Farron Gorey from Santa Teresa, taking a “selfie” with his iPad before his performance on stage at the Mbantua Festival in Alice Springs, Northern Territory on 12 October 2013.

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Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Social Justice Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.



5 November 2013

Senator the Hon George Brandis QC
Attorney-General
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

Dear Attorney

Social Justice and Native Title Report 2013

I am pleased to present to you the *Social Justice and Native Title Report 2013* (the Report), which I have prepared in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) and section 209 of the *Native Title Act 1993* (Cth).

The Report examines the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples from 1 July 2012 to 30 June 2013.

This year marks 20 years since the establishment of the Aboriginal and Torres Strait Islander Social Justice Commissioner role. To highlight this significant anniversary, chapters 1 and 2 of the Report reflect on the contributions of Social Justice Commissioners in key areas of social justice and native title over this period.

Building on the lessons from the past 20 years, I set out my priorities for Aboriginal and Torres Strait Islander affairs in chapter 3, focusing on the directions I believe we need to take to ensure our communities are in control of their future. This chapter shows how the realisation of human rights can produce long term sustainable improvements in the life outcomes for Aboriginal and Torres Strait Islander peoples.

At the start of my term as Social Justice Commissioner in 2010, I stated that one of my overarching priorities is to give full effect to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

Progress toward the achievement of this priority is addressed in this Report. For instance, chapter 4 outlines how our rights in the Declaration can be practically utilised in the development of alcohol management and related policies. The chapter then profiles case studies in the Northern Territory and Queensland to demonstrate how strategies that are consistent with the Declaration can provide opportunities to improve practice and outcomes in this complex policy area.

In chapter 5, I describe the significant role of business to respect and support the human rights of Aboriginal and Torres Strait Islander peoples articulated in the Declaration. The chapter also presents case studies that illustrate the positive outcomes that occur when business engages with Aboriginal and Torres Strait Islander peoples in a way that is consistent with our human rights in the Declaration.

The Report provides 14 recommendations for your consideration.

I look forward to discussing the Report with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Gooda'.

Mick Gooda

**Aboriginal and Torres Strait Islander
Social Justice Commissioner**

Australian Human Rights Commission
ABN 47 996 232 602

Level 3, 175 Pitt Street, Sydney, NSW 2000
GPO Box 5218, Sydney, NSW 2001

General enquiries: 1300 369 711
Complaints infoline: 1300 656 419
TTY: 1800 620 241
www.humanrights.gov.au

About the

Aboriginal and Torres Strait Islander Social Justice Commissioner

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established in 1993. The office of the Social Justice Commissioner is located within the Australian Human Rights Commission.

The Social Justice Commissioner:

- reports annually on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples, and recommends action that should be taken to ensure these rights are observed
- reports annually on the operation of the *Native Title Act 1993* (Cth) and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples
- promotes awareness and discussion of human rights in relation to Aboriginal and Torres Strait Islander peoples
- undertakes research and educational programs for the purpose of promoting respect for, and the enjoyment and exercise of, human rights by Aboriginal and Torres Strait Islander peoples
- examines and reports on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal and Torres Strait Islander peoples.

Office holders

- Mick Gooda: 2010-present
- Dr Tom Calma AO: 2004-10
- Dr William Jonas AM: 1999-2000
- Zita Antonios: 1998-99 (Acting)
- Professor Mick Dodson AM: 1993-98

About the Social Justice Commissioner's logo



The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The dots placed in the Dari represent a brighter outlook for the future provided by the Commissioner's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Social Justice Commissioner and the support, strength and unity which the Commissioner can provide through the pursuit of social justice and human rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander social justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

© Leigh Harris

Mick Gooda

Aboriginal and Torres Strait Islander Social Justice Commissioner

Mick Gooda is a descendent of the Gangulu people of central Queensland and is the current Aboriginal and Torres Strait Islander Social Justice Commissioner. His term in this position commenced in February 2010.

Mick has extensive experience in Aboriginal and Torres Strait Islander affairs, having worked in remote, rural and urban environments throughout Australia for over 30 years. He has a strong record of achievement in implementing program and organisational reform and delivering strategic and sustainable results across the country.

As Commissioner, Mick builds on this experience to advocate the human rights of Aboriginal and Torres Strait Islander peoples in Australia and then promote respect and understanding of these rights among the broader Australian community.



Photo by Julie Buxton,
taken at the Yalukit Wilum
Ngargee Festival, St Kilda,
Victoria.

For information on the work of the Social Justice Commissioner, please visit:

<http://www.humanrights.gov.au/about/publications/>

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Foreword

by Professor Mick Dodson

Aboriginal and Torres Strait Islander Social Justice Commissioner 1993–98

This year marks 20 years since the establishment of the Aboriginal and Torres Strait Islander Social Justice Commissioner (Social Justice Commissioner) role under the *Australian Human Rights Commission Act 1986* (Cth). I was appointed in January 1993 as the first Commissioner. I acknowledged then that with the disparities faced by Aboriginal and Torres Strait Islander people social justice wouldn't be recognised and addressed in the life of my appointment as Commissioner. However, it was my endeavour to establish a foundation for future Social Justice Commissioners to see this achieved.

The whole process in those early years was like trying to sail a ship at the same time as we were building it. As the first Social Justice Commissioner, I had to define and design what we considered to be social justice and set the agenda for the Commissioner's role. Central to this agenda was the recognition of our rights and determining the manner in which they will be enjoyed.

I adopted a position on social justice that was grounded in the day-to-day lives of Aboriginal and Torres Strait Islander people. In a practical sense, social justice is what confronts Aboriginal and Torres Strait Islander people when they wake up. For too many of our people this is the prospect of things that are detrimental to them. What house do they wake up in? Is there adequate sanitation? Do they have the opportunity for meaningful employment and education? Does education respect and honour their cultural background?

An understanding of social justice which is explicitly based on rights to equality, and rights to fairness, together with the resources to achieve this equality, places social justice for Aboriginal and Torres Strait Islander people on its correct foundation.

From the very beginning, it was important that the Social Justice Commissioner be viewed as independent in carrying out the requirements of the office and to pursue those objectives without interference from the Australian Government and the other Commissioners. I was aware that the appointment of an Indigenous person to the office of the Social Justice Commissioner may be viewed by Aboriginal and Torres Strait Islander people as just another arm of Government. To counter this, it was my view that I should ensure the powers and functions entrusted to me as Commissioner should be pursued in a balanced and independent fashion.

Under the leadership of Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission, all the Commissioners worked in a very supportive and collegiate fashion.

During my term as the Social Justice Commissioner the range of issues that I reported on cannot be captured in this foreword. However, one of the issues that recast the landscape of the country was the recognition of native title.

In the wake of the *Mabo* decision on native title in the High Court, the Government promised a threefold

response. The first part was the Native Title Act itself and the second was the Land Acquisition Fund. The Social Justice Package was to form the third part of the Government's response. I was heavily involved in negotiations on the Social Justice Package and I advocated for a shift away from the administration of Indigenous welfare to the recognition of Indigenous rights. To this day the Social Justice Package has never been delivered.

I still reflect on the significance of the *Bringing Them Home* Report on the forcible removal of Aboriginal and Torres Strait Islander children. It validated what victims of the Stolen Generations were saying and acknowledged the generations of Aboriginal and Torres Strait Islander people separated from their families and communities. Reporting on these experiences was emotionally, physically and psychologically draining for all those involved. Yet I am so proud of the Report because the voices of the victims were heard loud and clear and their stories were finally heard and accepted.

While the establishment of the Social Justice Commissioner was in part a response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), I was concerned with the view that my role had a specific function of overseeing the process of implementing its recommendations. My work on the recommendations from the RCIADIC was solely on the two relating to community education and field officer training.

The Social Justice Commissioner position is the only role in the world dedicated to Indigenous peoples rights and fundamental freedoms within a National Human Rights Institution. It plays a leadership role internationally in promoting a model for greater recognition and protection of the rights of Indigenous peoples.

During my term as Commissioner I said that an understanding of social justice is explicitly based on our rights and access to the resources to achieve these objectives. This can be realised through the full implementation of the the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) domestically. I look forward to watching the development of a National Strategy on the Implementation of the Declaration, which is currently underway through a partnership between the National Congress of Australia's First Peoples (Congress) and the Australian Human Rights Commission's Social Justice Commissioner.

My vision for the future is that the rights of Aboriginal and Torres Strait Islander people shall be respected, promoted and fulfilled. I encourage the Government's long-term commitment to engaging in formal dialogue with Aboriginal and Torres Strait Islander peoples, the Social Justice Commissioner and Congress. And I have hope about developing a National Strategy to give full effect to the Declaration which includes the monitoring, evaluation and annual reporting to monitor the progress of such implementation. The commitment of the Government to the progression of the Declaration will be a test of substantial respect for human rights.

Finally, as I said in my first Social Justice Report in 1993, I have an unshakeable belief in Australia's potential to transcend its past.



Professor Mick Dodson



Executive summary

It is with great pleasure that I present my fourth *Social Justice and Native Title Report 2013* (the Report) as the Aboriginal and Torres Strait Islander Social Justice Commissioner.

One of my primary responsibilities is to report annually on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples, and to make recommendations on the action that should be taken to ensure that these rights are observed.¹ This responsibility is fulfilled through the submission of an annual *Social Justice Report*² to the Australian Parliament.

I also report annually on the operation of the *Native Title Act 1993* (Cth) (the Native Title Act) and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples.³ This requirement is fulfilled through the submission of the *Native Title Report*.⁴

In 2013, I have combined the reporting requirements into the *Social Justice and Native Title Report*, which will cover the period from 1 July 2012 to 30 June 2013.

In this Report, I focus on planning for the future based on the approach of our communities meaningfully participating in decisions that affect them.

I also outline a continuing agenda for Aboriginal and Torres Strait Islander peoples, with a focus on a human rights approach using the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) as the guide.

I provide a number of cases studies which illustrate why this focus is so important. These case studies demonstrate the constructive outcomes and improved relationships between Aboriginal and Torres Strait Islander peoples and business that stem from business acting in a manner that is consistent with our human rights.

Chapter 1: How far have we come? Looking back on 20 years of the Social Justice Commissioner role

This year marks 20 years since the establishment of the Aboriginal and Torres Strait Islander Social Justice

1 *Australian Human Rights Commission Act 1986* (Cth), s 46C(1)(a).

2 For previous Social Justice Reports see Australian Human Rights Commission, *Social Justice Reports*. At <http://www.humanrights.gov.au/publications/social-justice-reports-index> (viewed 24 October 2013).

3 See s 209 of the *Native Title Act 1993* (Cth).

4 For previous Native Title Reports see Australian Human Rights Commission, *Native Title Reports*. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 24 October 2013).

Commissioner (Social Justice Commissioner) role under the *Australian Human Rights Commission Act 1986* (Cth).

This chapter reflects on the journey toward the realisation of our human rights as Aboriginal and Torres Strait Islander peoples and the significant role that previous Social Justice Commissioners have played in this journey. There is no doubt that their hard work has cemented the role of the Social Justice Commissioner in the Aboriginal and Torres Strait Islander human rights and policy landscape whilst their considered approach has established a high level of credibility for this position.

I think it also appropriate that I acknowledge the staff of the Commission over these 20 years, whose energy and commitment has supported and underpinned the work of each Commissioner. For instance, Darren Dick has worked with all Commissioners while Katie Kiss commenced as a policy officer with Dr Calma and rose to the position of Director of the Social Justice Team at the beginning of my term.

The chapter then goes on to provide a snapshot of the developments and contributions of Social Justice Commissioners in the key areas outlined in the Social Justice Reports 1993-2012 including:

- Stolen Generations
- shifting government approaches to Aboriginal and Torres Strait Islander affairs
- constitutional recognition
- health equality
- criminal justice issues
- family violence
- education
- recognition of our human rights in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

By looking back over 20 years we can see there has been some progress and in many areas we're on the right track. Our progress in areas of constitutional recognition and health equality are examples of this. However, in other areas such as criminal justice and government approaches to Aboriginal and Torres Strait Islander affairs, I think it is fair to say that we still have a long way to go.

Chapter 2: Looking back on 20 years of native title and the Social Justice Commissioner role

Social Justice Commissioners have shown constant leadership and advocacy in reporting on Aboriginal and Torres Strait Islander peoples' rights to our lands and waters in the Native Title Reports written between 1994 and 2012.⁵

In this chapter, I provide a snapshot of developments and contributions of previous Social Justice Commissioners in the key areas of native title over the last 20 years including:

- the *Mabo*⁶ decision by the High Court
- negotiating the *Native Title Act 1993* (Cth) (Native Title Act)

⁵ Available at <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

⁶ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

- the objectives of the Native Title Act
- key themes in the Native Title Reports
- the Social Justice Package.

Looking back on 20 years of native title and the Social Justice Commissioner role, I am extremely concerned that the opportunities and promise of the early 1990s have not been realised. There is still much to do. A good place to start is with the outstanding recommendations for reform made by Social Justice Commissioners.

Chapter 3: How do we keep moving forward? A road map for our future

In chapter 3, I explore how those lessons learnt over the past 20 years can take us forward and how the realisation of our human rights can produce long term sustainable improvements in our life outcomes.

This chapter considers how we can give real meaning to the rhetoric of human rights by using the Declaration to guide our work towards improving the lives of Aboriginal and Torres Strait Islander peoples.

To this end, I suggest a framework to give full effect to the Declaration based on the principles of:

- self-determination
- participation in decision-making, underpinned by free, prior and informed consent and good faith
- respect for and protection of culture
- equality and non-discrimination.

I also outline the development of a comprehensive National Strategy following a series of Declaration dialogues with governments, stakeholders and Aboriginal and Torres Strait Islander communities based on these principles.

Moving forward will be about staying the course and maintaining commitments to the approaches that are working. It will also require a more fundamental shift encompassing governance, the interplay between rights and responsibilities, and the allocation of resources. All of this is underpinned by rights, relationships and responsibilities.

I also provide commentary on the significant developments related to the following:

- Reform of the Australian Constitution and the importance of getting the referendum question right with sufficient resources to support the campaign.
- The need for continued engagement and support for the National Congress of Australia's First Peoples to enable it to establish itself fully while it continues to represent the voices of Aboriginal and Torres Strait Islander people.
- To continue along the path of the Closing the Gap commitments and ensure long-term policy continuity.
- Improving efforts to reform the Native Title Act by reintroducing the Native Title Amendment Bill 2012 (Cth) and establishing a presumption of continuous connection.
- Support from our political leaders in the public discourse of racism and engaging with the National Anti-Racism Strategy.

The chapter also examines the need for our communities to be in control in order to produce the most

profound changes over time. One way of addressing this question is to look to the Declaration for guidance. I discuss the need for our communities to start exercising self-determination based on a new narrative in which a human rights-based approach is essential in providing sustainable improvements in our communities and families. This approach involves rights and responsibilities standing side-by-side and we measure its effectiveness by how the most vulnerable in our communities are engaged and heard.

While our communities need to be in control, our governance needs to be determined by us. Governments, non-government organisations (NGOs) and businesses that engage with our communities have a role to support – not to direct – our decisions and decision-making processes.

This chapter also discusses the need for effort and resources to be directed to all parts of the country rather than through the lens of the urban and remote divide. It should be the duty of policy, program and systems developers to design and implement services that cater for these differences.

I also highlight the importance of organisations and governments working within our communities to operate in a culturally secure way. If engagement is to be effective and if programs are to deliver optimum outcomes, these must be done in a way that fits our way of doing things. To put it simply, this means dealing with people who are culturally competent and working within systems that are culturally secure. NGOs have the experience to complement the capacity of the Aboriginal community controlled sector but this should not be at the expense of our own organisations delivering services. Governments also have an obligation to ensure cultural security in service delivery and cultural competency of their staff working in our communities.

If we manage to stay the course with the things that are working and make the fundamental shift to putting our communities in control, I am very optimistic that our children will be given the opportunity to grow up to be happy and healthy adults, proudly carrying our culture forward for generations to come. That is why it is so important we act now.

Chapter 4: Human rights in practice – alcohol policy

Chapter 4 considers one of the most contested and intractable issues in our legal and policy sphere – alcohol management.

Alcohol consumption, misuse and related harm are some of the most challenging issues confronting communities across the length and breadth of Australia. These challenges are not limited to Aboriginal and Torres Strait Islander communities, but confront every demographic in Australian cities and towns.

I believe a human rights-based approach is the key to solving complex social policy issues confronting Aboriginal and Torres Strait Islander peoples and again the Declaration is one of the most valuable tools we have available to us.

In this chapter, I discuss how human rights treaties and the Declaration can be used to guide the development of alcohol policy as an example of the practical effect of a human rights approach. This approach to alcohol misuse advocates neither for the free flow of alcohol into every community nor the blanket application of alcohol bans. It requires that people are empowered to make decisions about the policies adopted to manage alcohol and the damage it causes within their communities.

What we know is that policies must address the underlying social determinants of alcohol misuse, including the effects of social deprivation, poverty, lack of education and intergenerational and contemporary trauma.

The effectiveness of any response is also highly influenced by the level of buy-in from the community. Responses should include measures focussed on harm reduction, supply reduction and demand reduction.

Policies developed in line with the principles of the Declaration are likely to align with what we know is effective in addressing alcohol misuse.

After discussing a human rights-based approach to alcohol policy, I then present two case studies on alcohol management and related policies in Queensland and the Northern Territory.

Both jurisdictions have implemented pathways for communities to develop their own Alcohol Management Plans. I welcome these developments and their potential to return power to communities and effectively address alcohol misuse with community developed solutions. However, the way the Plans are implemented will ultimately determine their compatibility with human rights and their overall effectiveness.

I also raise concerns about the effect of conflicting responses to alcohol misuse by different levels of government. The implementation of compulsory alcohol rehabilitation and the potential introduction of Alcohol Protection Orders in the Northern Territory have serious human rights implications and are likely to reduce the effectiveness of other responses.

Chapter 5: Business and our human rights in the Declaration

In chapter 5 I seek to demonstrate why businesses should adopt a human rights-based approach to their operations.

I outline the potential benefits for business in embracing a human rights-based approach while arguing the legal and moral imperative for business to act in a manner that respects and protects the rights of Aboriginal and Torres Strait Islander peoples.

I believe the benefits for business are clear. Adopting a human rights-based approach can improve relationships, enhance reputations and boost employee morale. It can also provide a competitive advantage – building a stronger ‘licence to operate’ and opening access to new markets, consumers and investors.

There is a strong international framework that informs the human rights responsibilities of businesses and this chapter considers a human rights-based approach to business’ engagement with Indigenous peoples. It also highlights the role that business can play in protecting and promoting the exercise of our human rights as articulated in the Declaration.

This chapter presents five case studies of businesses adopting a human rights-based approach which includes the following:

- Supply Nation and the promotion of self-determination through economic development.
- KPMG and good business practices creating better opportunities for Aboriginal and Torres Strait Islander people.
- Rio Tinto and how the extractive industry can engage with the human rights of Aboriginal and Torres Strait Islander people.
- The Bourke Aboriginal Community Working Party and Lend Lease partnership supporting community led development.
- Westpac supporting the social and financial inclusion of Aboriginal and Torres Strait Islander people.

I am heartened by the work undertaken by some businesses in respecting and promoting our human rights. This chapter illustrates the positive outcomes that occur when engagement with Aboriginal and Torres Strait Islander peoples is based upon our rights as set in the Declaration.

Appendices

I also include two appendices, which report on the international mechanisms addressing Indigenous peoples' human rights and key developments in native title for the reporting period from 1 July 2012 to 30 June 2013.

Conclusion

As we chart a road map for the future the opportunities are great. Never before have we seen the level of bipartisanship and commitment around addressing Aboriginal and Torres Strait Islander disadvantage and constitutional recognition.

However, the challenge is to ensure that we as Aboriginal and Torres Strait Islander people are not just passengers for this journey but are sitting in the driving seat.

Since the beginning of my term, I have seen the Declaration as that compass to guide me in 'reviewing the impact of policies and laws on, and monitoring the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander people'.⁷

It is time to breathe life into the Declaration and make it more practical for our everyday lives. It is my hope that as we further consider what the Declaration means to us, it will become a more powerful tool for Aboriginal and Torres Strait Islander peoples to advocate for our rights and improve the lives of our people.

⁷ *Australian Human Rights Commission Act 1986* (Cth), s 46C(1)

Recommendations

I make the following recommendations to Government:

(i) Support for existing policies and programs

Recommendation 3.1: The Australian Government continues the multi-party approach in Aboriginal and Torres Strait Islander affairs and any change to existing policies and programs is based on rigorous evidence and occurs in consultation with communities.

(ii) The United Nations Declaration on the Rights of Indigenous Peoples

Recommendation 3.2: The Australian Government agrees to engage with the National Implementation Strategy to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3.3: The Australian Government amends the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the *United Nations Declaration on the Rights of Indigenous Peoples* in the definition of human rights.

(iii) Constitutional recognition

Recommendation 3.4: The Australian Government commits to the conduct of the referendum within this Parliamentary term by:

- treating the development of the referendum question and date as a matter of urgency, including by reconstituting the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples as soon as possible to ensure that progress to a referendum can continue with limited interruption
- ensuring the campaign to raise popular awareness and support of this issue is properly resourced.

Recommendation 3.5: If constitutional amendments proposed are different to those recommended in the Expert Report, the Australian Government consults with Aboriginal and Torres Strait Islander peoples prior to going to Referendum.

(iv) National Congress of Australia's First Peoples

Recommendation 3.6: The Australian Government continues to engage with the National Congress of Australia's First Peoples in accordance with the principles and protocols set out in *A Framework for Engagement between Australian Government Agencies and The National Congress of Australia's First Peoples* dated 5 September 2012.

Recommendation 3.7: The Australian Government invites the National Congress of Australia's First Peoples to participate in relevant COAG processes.

(v) Closing the Gap

Recommendation 3.8: The Australian Government commits to the Closing the Gap agenda and the annual Closing the Gap Reporting to Parliament.

Recommendation 3.9: The Australian Government negotiates through COAG a new *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes*, with a minimum Commonwealth investment of \$777 million over the next three years.

Recommendation 3.10: The Australian Government commits to supporting and implementing the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* in partnership with

Aboriginal and Torres Strait Islander peoples and their representatives.

Recommendation 3.11: The Australian Government finalises targets as part of the Closing the Gap Strategy focused on increasing community safety, reducing imprisonment rates and improving outcomes in child protection for Aboriginal and Torres Strait Islander peoples.

(vi) Native title reform

Recommendation 3.12: The Australian Government reintroduces the Native Title Amendment Bill 2012 (Cth) and supports its passage through the Parliament.

Recommendation 3.13: The Australian Government considers the following outstanding recommendations in the *Native Title Report 2009*:

1. That the *Native Title Act 1993* (Cth) be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
2. That the *Native Title Act 1993* (Cth) provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.

(vii) Racism

Recommendation 3.14: The Australian Government continues to support the National Anti-Racism Strategy.

Chapter 1:

How far have we come? Looking back on 20 years of the Social Justice Commissioner role

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1.1 Introduction

This year marks 20 years since the establishment of the Aboriginal and Torres Strait Islander Social Justice Commissioner (Social Justice Commissioner) role under the *Australian Human Rights Commission Act 1986* (Cth).

When I first started in this position I was asked if any of the previous Commissioners had left any words or notes of advice. I answered them 'no, but they all left very big shoes to fill'. So it is with some trepidation and a big dose of humility that I have continued the work of this office, knowing that the bar has been set pretty high.

Text Box 1.1:

Aboriginal and Torres Strait Islander Social Justice Commissioners

- Professor Mick Dodson AM: 1993-98
- Ms Zita Antonios: 1998-99 (Acting)
- Dr William Jonas AM: 1999-2004
- Dr Tom Calma AO: 2004-10

In the state of flux that marks Aboriginal and Torres Strait Islander affairs, Social Justice Commissioners have been unwavering in their consistent commitment to our communities. They have provided fearless leadership, advocacy and vision, established partnerships and ensured accountability of governments to our communities. There is no doubt that their hard work has cemented the role of the Social Justice Commissioner in the Aboriginal and Torres Strait Islander human rights and policy landscape whilst their considered approach has established a high level of credibility for this position.

This chapter reflects on the journey toward the realisation of our human rights as Aboriginal and Torres Strait Islander peoples in the last 20 years and I take this opportunity to honour the guiding role that the previous Social Justice Commissioners have taken in this journey.

This is not an exhaustive review of this period. Rather it is a snapshot of the developments and contributions of Social Justice Commissioners in the key areas of:

- Stolen Generations
- government approaches to Aboriginal and Torres Strait Islander affairs
- constitutional recognition
- family violence and violence against women
- health equality
- criminal justice issues
- education
- the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

All of these issues are still as relevant today as they were 20 years ago. We have seen improvements in some areas but sadly, little measurable improvement has occurred in others. Often the more things have changed, the more they have stayed the same.

1.2 Looking back on 20 years of the Social Justice Commissioner

(a) Creation of the Social Justice Commissioner role

The Australian Government created the role of the Social Justice Commissioner in 1992 in response to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the National Inquiry into Racist Violence.¹

Text Box 1.2:

Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence

Royal Commission into Aboriginal Deaths in Custody (RCIADIC)²

Investigating the death of 99 Aboriginal and Torres Strait Islander people in custody between 1980-89, the RCIADIC exposed not only the underlying causes of Aboriginal and Torres Strait Islander over-representation in the criminal justice system, but also the profound lack of social justice facing Aboriginal and Torres Strait Islander communities.

The RCIADIC found that while Aboriginal and Torres Strait Islander people did not die in custody at a higher rate than non-Indigenous Australians, they did enter custody at a much higher rate. Reporting in 1991, the RCIADIC made 339 recommendations, ranging from very specific measures to reduce risk of harm in custody, to imprisonment as a last resort, to more general measures to enhance social justice and reconciliation.

National Inquiry into Racist Violence (National Inquiry)³

The National Inquiry was established in 1988 following a series of attacks against church and community leaders, as well as complaints from Aboriginal and Torres Strait Islander peoples and cultural groups.

The National Inquiry found racist violence against Aboriginal and Torres Strait Islander peoples was endemic, with racist attitudes and practices ingrained in many institutions.

The National Inquiry released its report in 1991. A key recommendation of the Inquiry's report was the need for legal protection against racial hatred. In 1995, the *Racial Discrimination Act 1975* (Cth) was amended to make racial vilification against the law.

This was a time when non-Indigenous Australia seemed to be waking up to its Aboriginal and Torres Strait Islander history. The *Mabo* judgement had just been handed down by the High Court,⁴ the *Native Title Act 1993* (Cth) (Native Title Act) was being negotiated,⁵ Prime Minister Paul Keating gave the famous Redfern

1 Australian Human Rights Commission, *Aboriginal and Torres Strait Islander Social Justice Commissioner*. At http://humanrights.gov.au/social_justice/index.html (viewed 25 September 2013).

2 Royal Commission into Aboriginal Deaths in Custody, *Final Report, vol 1-5* (1991). At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 25 September 2013).

3 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991). At <http://www.humanrights.gov.au/publications/racist-violence-1991> (viewed 25 September 2013).

4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

5 *Native Title Act 1993* (Cth).

address,⁶ and it was the early and optimistic days of the Aboriginal and Torres Strait Islander Commission (ATSIC).

Professor Mick Dodson was appointed to the Social Justice Commissioner role on 22 January 1993. From his involvement as Counsel assisting the RCIADIC and with a solid background as a legal advocate, he was uniquely qualified to take up the position. However, it was not a position that he took lightly. From the beginning, he negotiated the complexity of the position:

I am acutely conscious that to be identified as an 'Aboriginal leader' and appointed by the Commonwealth to a position of influence may be viewed by some Aboriginal and Torres Strait Islanders as being co-opted by government.⁷

Professor Dodson explained this tension in its historical context:

It is a measure of the experience of indigenous Australians, as the subjects not only of harsh government policies but also (more insidiously) well-intentioned paternalistic government policies, that there continues a deep distrust of governmental policies and appointees.⁸

Professor Dodson was very clear that the way through these challenges was by consulting with Aboriginal and Torres Strait Islander communities and acknowledging:

to my country men and women...it is not appropriate that my views should be substituted for their own direct voices or that I can presume to speak for any person's particular traditional country.⁹

This commitment from Professor Dodson represents the very consultative, engaging and open leadership style that Social Justice Commissioners have provided over the years.

Despite the changes that have occurred over the past 20 years, the way the first *Social Justice Report* explains social justice and human rights for Aboriginal and Torres Strait Islander peoples is just as relevant today. Professor Dodson argued:

Social justice must always be considered from a perspective which is grounded in the daily lives of indigenous Australians. Social justice is what faces you when you get up in the morning. It is awakening in a house with an adequate water supply, cooking facilities and sanitation. It is about the ability to nourish your children and send them to a school where their education not only equips them for employment but reinforces their knowledge and appreciation of their cultural inheritance. It is the prospect of genuine employment and good health: a life of choices and opportunity, free from discrimination.

This is not an ideal. It is the commonplace experience for most Australians. The primary task of my Commission is to monitor the gap between the life experience of indigenous and non-indigenous Australians, to ensure that certain absolute minimum standards are achieved and then exceeded, to make equality an experience and not an ideal.¹⁰

As we reflect on some of the key events of the past 20 years, I believe you can see this guiding vision in all the work undertaken by the Social Justice Commissioners.

6 P Keating, *Redfern Speech: Year of the World's Indigenous People* (Speech delivered at Redfern, 10 December 1992). At http://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf (viewed 25 September 2013).

7 M Dodson, *Social Justice Report 1993*, Human Rights and Equal Opportunity Commission (1993), p 3. At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 25 September 2013).

8 M Dodson, *Social Justice Report 1993*, Human Rights and Equal Opportunity Commission (1993), p 4. At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 25 September 2013).

9 M Dodson, *Social Justice Report 1993*, Human Rights and Equal Opportunity Commission (1993), p 4. At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 25 September 2013).

10 M Dodson, *Social Justice Report 1993*, Human Rights and Equal Opportunity Commission (1993), p 10. At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 25 September 2013).

(b) Stolen Generations

(i) *Bringing Them Home* Report

In 1995, Professor Mick Dodson, together with Sir Ronald Wilson, President of the Human Rights and Equal Opportunity Commission,¹¹ commenced the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families. Over three years, with a total of 777 people and organisations providing evidence or a submission,¹² the Inquiry traversed testimonies of grief, loss, tenacity and resilience. These hearings culminated in the *Bringing Them Home* Report (the Report) in 1997.¹³

The Report estimated that between one in three and one in ten Aboriginal and Torres Strait Islander children were removed from their families between 1910 and 1970.¹⁴ The severity of the damage is described in the Report:

Indigenous families and communities have endured gross violations of their human rights. These violations continue to affect Indigenous people's daily lives. They were an act of genocide, aimed at wiping out Indigenous families, communities and cultures, vital to the precious and inalienable heritage of Australia.¹⁵

The Report also considered the contemporary forms of forced separation through the child protection and juvenile justice systems.

The impact of this Inquiry cannot be underestimated in 'validating the stories of generations of Indigenous people who until now have carried the burden of one of Australia's greatest tragedies.'¹⁶ It was the first step in acknowledging the terrible violations of our human rights, and healing for both the Stolen Generations and the nation as a whole.

(ii) Achieving justice for the Stolen Generations

Following the release of the Report and its 54 recommendations, momentum to deliver justice to the Stolen Generations began to build. While it is not within the scope of this chapter to evaluate the implementation of all of these recommendations, I will focus on Recommendation 3 as it provided a framework for achieving justice based on international principles:¹⁷

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- 11 The Australian Human Rights Commission was formerly known as the Human Rights and Equal Opportunity Commission (1986–2009).
 - 12 Human Rights and Equal Opportunity Commission, *Community Guide* (1997). At http://www.austlii.edu.au/au/other/IndigLRes/stolen_summary/2.html (viewed 25 September 2013).
 - 13 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997). At http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (viewed 25 September 2013).
 - 14 Human Rights and Equal Opportunity Commission, *Community Guide* (1997). At http://www.austlii.edu.au/au/other/IndigLRes/stolen_summary/2.html (viewed 25 September 2013).
 - 15 Human Rights and Equal Opportunity Commission, *Community Guide* (1997). At http://www.austlii.edu.au/au/other/IndigLRes/stolen_summary/13.html (viewed 25 September 2013).
 - 16 Human Rights and Equal Opportunity Commission, *Community Guide* (1997). At http://www.austlii.edu.au/au/other/IndigLRes/stolen_summary/13.htm (viewed 25 September 2013).
 - 17 The principles referred to in the *Bringing Them Home* Report were a revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Theo van Boven: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997), app 8. At http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (viewed 25 September 2013). The principles have been further developed and now adopted by the United Nations General Assembly: *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Resolution 60/147, UN Doc A/RES/60/147 (2005). At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/RES/60/147> (viewed 25 September 2013).

That, for the purposes of responding to the effects of forcible removals, 'compensation' be widely defined to mean 'reparation'; ... Reparation should consist of;

1. acknowledgment and apology,
2. guarantees against repetition,
3. measures of restitution,
4. measures of rehabilitation, and
5. monetary compensation.¹⁸

It is encouraging to see that in the 16 years since the Report was released, some of these principles have been put into practice. However, there are still glaring omissions, especially in relation to monetary compensation.

Acknowledgement and apology

One of the landmark moments in our recent history was the national apology delivered by then Prime Minister Kevin Rudd as a bipartisan act of Parliament on 13 February 2008. Although all the States and Territories provided formal apologies in their Parliaments between 1997 and 2001, the significance of a national apology ran deep.

I believe the apology has become one of those defining moments in a nation's history where people remember where they were and who they were with at that time. The emotion was palpable, people had travelled from all parts of the country to be in Canberra because it was an event in history that non-Indigenous Australians shared as well. It was a true act of reconciliation.

Dr Tom Calma AO, the Social Justice Commissioner at that time, was present for the apology and had the honour of addressing Parliament on that day. His remarks sum up the impact on the nation:

By acknowledging and paying respect, Parliament has now laid the foundations for healing to take place and for a reconciled Australia in which everyone belongs.

For today is not just about the Stolen Generations – it is about every Australian.

Today's actions enable every single one of us to move forward *together* – with joint aspirations and a national story that contains a shared past and future.¹⁹

Guarantees against repetition

Key actions to prevent another Stolen Generation have included the establishment of the Indigenous Child Placement Principles, provision of community education about the impacts of the Stolen Generation and incorporation of the *Convention on the Prevention and Punishment of the Crime of Genocide*²⁰ into Australian law.²¹ These measures have all contributed to a greater awareness of the practices that led to the Stolen

18 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997), p 245. At http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (viewed 25 September 2013).

19 T Calma, *Let the Healing Begin: Response to government to the apology to the Stolen Generations* (Speech delivered at the Members Hall, Parliament House, Canberra, 13 February 2008). At <http://www.humanrights.gov.au/news/speeches/response-government-national-apology-stolen-generations> (viewed 25 September 2013).

20 *Convention on the Prevention and Punishment of the Crime of Genocide*, 1948. At <http://treaties.un.org/> (viewed 1 October 2013).

21 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2008), p 158. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

Generations. Governments across Australia have all adopted child protection policies that recognise the importance of connection to family and culture.

Many of the recommendations in the *Bringing Them Home* Report were aimed at improving the way the child protection system operates for our Aboriginal and Torres Strait Islander children to guarantee against repetition. Like so many areas of policy endeavor in Aboriginal and Torres Strait Islander affairs, there has been a lot of effort but the indicators suggest that outcomes have remained the same: see Text Box 1.3.

Text Box 1.3:

Aboriginal and Torres Strait Islander child protection statistics – then and now

In 1993, Aboriginal and Torres Strait Islander children nationally were seven times more likely to be in out of home care than their non-Indigenous counterparts.²²

Almost 20 years later we have seen this rate grow.

In 2012, Aboriginal and Torres Strait Islander children nationally were ten times more likely to be in out of home care than their non-Indigenous counterparts.²³

There is no denying the complexity of the issues at play with Aboriginal and Torres Strait Islander children. It has been argued that the recommendations of the Report have created a culture of inaction where child protection authorities are reluctant to remove children from family and culture because we have seen the damage that removing children creates in our communities.²⁴ I think this is very simplistic way of looking at a complex issue.

The 'best interests' of the child should always be a primary consideration.²⁵ However, the well-being of the child or young person is always going to be strengthened by providing real support to struggling families at the earliest possible point. It seems to me and a coalition of advocates led by the Secretariat of National Aboriginal and Islander Child Care (SNAICC)²⁶ that this is something we urgently need to do better.²⁷

Measures of restitution

Restitution is about returning something to its rightful owner. In this context, we have seen continued funding

22 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report on the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997). At <http://www.gwb.com.au/gwb/news/sorry/stolen46.html> (viewed 25 September 2013).

23 Australian Institute of Health and Welfare, *Child Protection 2011-2012* (2013), p 32. At <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542752> (viewed 25 September 2013).

24 For example, see M Devine, 'Why little Kiesha had no hope from the start', *Sunday Herald Sun*, 21 July 2013.

25 *Convention on the Rights of the Child*, 1989, art 3. At <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (viewed 1 October 2013).

26 Secretariat of National Aboriginal and Islander Child Care (SNAICC) is a peak body that represents Aboriginal and Torres Strait Islander child care and child protection organisations. SNAICC is a key advocate for improving Aboriginal and Torres Strait Islander child protection outcomes.

27 SNAICC, *National Initiative to address the over-representation of Aboriginal and Torres Strait Islander children and young people in the child protection system*. At <http://www.snaicc.org.au/policy-advocacy/dsp-default-e.cfm?loadref=279> (viewed 25 September 2013).

of family tracing and reunion services through the Link Up service,²⁸ and the protection of historical records. Restitution measures also include the provision of cultural and language centres to keep culture alive, especially where it was disrupted by removal.

Measures of rehabilitation

The social and emotional well-being needs of Stolen Generations' members and their families have been well documented. Since the Report, we have seen the development and resourcing of a range of therapeutic programs with varied degrees of support and success.

We know that the hurt runs deep in our communities and that holistic healing is needed. The *Social Justice Report 2008* specifically recommended an Aboriginal and Torres Strait Islander controlled healing body to implement a coordinated national Indigenous Healing Framework.²⁹

The establishment of the Healing Foundation in 2009 was a significant step in the right direction. It is an independent Aboriginal and Torres Strait Islander organisation that, through community-based healing initiatives, addresses the legacy of colonisation, forced removals and other past government policies. These programs range from establishing local healing centres, holding men's and women's gatherings, traditional healing and cultural renewal, to developing resources to heal trauma, loss and grief. The Healing Foundation also conducts training and education, evaluation and research. Since its establishment the Healing Foundation has funded 90 projects aimed at helping our communities to heal.³⁰

I am pleased to see that the 2013 Budget included an amount of \$26.4 million over four years to continue the important work of the Healing Foundation.³¹

Monetary compensation

Tasmania is still the only state that has provided a compensation scheme to members of the Stolen Generations and their families.

The Tasmanian scheme was set up under the *Stolen Generations of Aboriginal Children Act 2006* (Tas). Applications were open for six months from the commencement of the Act on 15 January 2007 and a total of 151 claims were received, of which 106 were eligible for payment. Some 84 members of the Stolen Generations received \$58 333.33 each and 22 descendants either \$5 000 or \$4 000 each depending on how many people were within the particular family group.³²

Members of the Stolen Generations have been able to make claims in compensation schemes for former wards of state who suffered institutional abuse in Tasmania (2003), Western Australia (2007), Queensland (2007) and South Australia (2009).³³ While this is a welcome development, generalised redress schemes stop short of acknowledging the specific harm done to the Stolen Generations.

28 The Link Up program provides a national network of 11 Link Up Services supporting and assisting Indigenous people affected by past removal policies to trace their genealogy and family history and potentially reunite with their families.

29 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2008), p 197. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

30 Healing Foundation, *Funding*. At <http://healingfoundation.org.au/funding/> (viewed 25 September 2013).

31 R Weston, 'NACCHO health news: Healing Foundation welcomes \$26.4 million funding announcement' (Media Release 23 May 2013). At <http://nacchocommunique.com/2013/05/23/naccho-health-newshealing-foundation-welcomes-26-4-million-funding-announcement/> (viewed 4 November 2013).

32 Office of the Stolen Generations Assessor, *Stolen Generations of Aboriginal Children Act – Report of the Stolen Generations Assessor*, Department of Premier and Cabinet (2008), p 2. At http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf (viewed 3 October 2013).

33 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), pp 161-165. At <http://www.humanrights.gov.au/publications/chapter-4-beyond-apology-agenda-healing-social-justice-report-2008> (viewed 3 October 2013).

In the Courts, *Trevorrow*³⁴ still stands as Australia's only successful Stolen Generation litigation. Incomplete government documentation stands as a barrier to successful litigation in this area as do access to justice issues including the cost of litigation. Bruce Trevorrow was removed from his family at 13 months of age when he went to hospital for treatment of gastroenteritis. Mr Trevorrow was awarded \$525 000 in compensation. Sadly, he died only one year after the payment was awarded, reinforcing how critical it is that governments act now before members of the Stolen Generation get older and pass away. Despite an appeal by the South Australian Government, the original decision was upheld.³⁵

Trevorrow demonstrates that redress for some members of the Stolen Generations is possible through the court system. However, other cases have proven protracted, expensive and have potentially played a role in revisiting the trauma of removal.³⁶ Given this, a system of *ex gratia* payments for common experiences suffered by members of the Stolen Generations would provide a 'swifter, more appropriate and less damaging alternative to court processes.'³⁷

I believe that the Australian Government should prioritise compensation for the Stolen Generations. The Commission has previously recommended that the Australian Government, through the Council of Australian Governments (COAG), should engage with State and Territory governments to develop a nationally consistent approach with joint funding mechanisms in the provision of financial redress for the Stolen Generations.

The failure to adequately compensate Aboriginal and Torres Strait Islander peoples 'who were removed from their families and communities remains a significant human rights issue in Australia'.³⁸

Former Senator Trish Crossin, a longtime advocate of compensation for the Stolen Generations, notes that there are only around 380 surviving members of the Stolen Generation alive in the Northern Territory today.³⁹ It is crucial that the Government acts before it is too late.

(c) Shifting government approaches to Aboriginal and Torres Strait Islander affairs

The past 20 years has seen many changes to the administration of Aboriginal and Torres Strait Islander affairs. In fact, I think it is fair to say that one of the few constants over this period has been change itself. This uncertainty and constant churn has, in my view, hindered the progress we could have made in the past 20 years.

However, as a counter balance to this ongoing change, I believe the other constant has been the advocacy of Social Justice Commissioners to make sense of these changes and their impact on the human rights of Aboriginal and Torres Strait Islander peoples.

34 *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136.

35 *South Australia v Trevorrow-Lampard* (2010) 106 SASR 331.

36 Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008* (9 April 2008), para 13. At <https://www.humanrights.gov.au/inquiry-stolen-generation-compensation-bill-2008> (viewed 25 September 2013).

37 Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008* (9 April 2008), para 15. At <https://www.humanrights.gov.au/inquiry-stolen-generation-compensation-bill-2008> (viewed 25 September 2013).

38 Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008* (9 April 2008), para 2. At <https://www.humanrights.gov.au/inquiry-stolen-generation-compensation-bill-2008> (viewed 25 September 2013).

39 Commonwealth of Australia, *Parliamentary Debates*, Senate, 6 February 2013, p 367 (Senator Trish Crossin). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fcd49be4a-f16b-4de0-b0f2-bf0168a14644%2F0293%22> (viewed 25 September 2013).

This section will tell the story of some of the major, primarily federal-level, policy shifts.

(i) Aboriginal and Torres Strait Islander Commission

ATSIC was established in 1990⁴⁰ and hailed by some as a ‘revolution’⁴¹ in Aboriginal and Torres Strait Islander affairs. As a consequence, it attracted great controversy and took two years to come to fruition. At the time the legislation to establish ATSIC was passed, it was the second most amended piece of legislation to pass the Parliament since Federation.⁴² The Coalition opposed the legislation and there were misconceptions around how this version of self-determination would work. For instance some thought that ATSIC was a sort of ‘black parliament’⁴³ that would threaten Australia’s sovereignty.

ATSIC was made up of an elected ‘arm’ and an administrative ‘arm’. This enabled ATSIC to function as both a peak representative body and a program delivery organisation. All Aboriginal and Torres Strait Islander people on the Australian electoral roll were eligible to vote in ATSIC elections.

The elected arm was based on 35 Regional Councils and the Torres Strait Regional Authority (TSRA), with Aboriginal and Torres Strait Islander people eligible to vote for councillors on these Regional Councils.⁴⁴ The Regional Councils were grouped into 16 zones plus the TSRA, each electing a Commissioner to the ATSIC Board.⁴⁵ The Minister for Indigenous Affairs appointed the Chair of the ATSIC Board until 1999 after which time the Chair was elected by the Board.⁴⁶

The administrative arm of ATSIC was responsible for service delivery in key areas of economic and social development through programs such as the Community Development Employment Project (CDEP), and the Community Housing and Infrastructure Program (CHIP). ATSIC received annual funding of around \$1 billion.⁴⁷ As well as service delivery, ATSIC was an advocate for the advancement of Aboriginal and Torres Strait Islander rights nationally and internationally.

(ii) Abolition of ATSIC

In 2004, a series of coincidental events began the demise of ATSIC. A Government review of ATSIC was underway and its Board was dogged by a number of controversies involving the personal conduct of a minority of Commissioners. There was a range of internal governance failings, a relatively new Leader of the Opposition who was, in my view, in search of a distraction, and finally a Prime Minister whose antipathy

40 The date of assent of the ATSIC Act was 27 November 1989 and ATSIC opened its doors on 5 March 1990.

41 T Rowse, ‘The Revolution in Aboriginal Affairs’ (1990) 9 (3) *Australian Society*, pp 151-158.

42 A Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Parliament of Australia (2003). At http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (viewed 25 September 2013).

43 A Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Parliament of Australia (2003). At http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (viewed 25 September 2013).

44 A map of the ATSIC regions can be found at: http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/about_atxic/Regional_Councils/map.html.

45 A Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Parliament of Australia (2003). At http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (viewed 25 September 2013).

46 A Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Parliament of Australia (2003). At http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (viewed 25 September 2013).

47 A Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Parliament of Australia (2003). At http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (viewed 25 September 2013).

toward the organisation was already well known.⁴⁸

The then Opposition Leader, Mark Latham was the first to announce his intention to abolish ATSIC; a decision that was quickly supported by then Prime Minister, John Howard. Legislation supporting this decision was passed through Parliament in 2005.⁴⁹

Over the years, much has been said and written about the demise of ATSIC and as the last Chief Executive Officer of ATSIC, I too have my own views. However, what I want to focus on here is the role that the then Social Justice Commissioner, Dr Bill Jonas assumed by filling some of void left by the abolition of ATSIC.

Despite acknowledging that ATSIC faced some governance and accountability challenges, Dr Jonas was strident in his criticism of its abolition. He argued that that the Australian Government was 'scapegoating' ATSIC for the Government's own failures. He made important points about funding and service delivery:

The vast majority of ATSIC's funding has been quarantined for particular programme responsibilities, with limited ability to address a range of key issues facing Indigenous peoples. ATSIC is now being blamed for the lack of progress by government in addressing issues for which it has no programme responsibility.⁵⁰

Dr Jonas was also critical of the Government's 'intolerance to advice or analysis that is critical of their own approach'.⁵¹

The regional structures of ATSIC, Regional Councils, facilitated local decision-making. This important way for communities to organise and make their voices heard was completely lost in the abolition of ATSIC.

Significantly, without ATSIC there was no clear national representative voice of Aboriginal and Torres Strait Islander peoples. The role of the Social Justice Commissioner became the sole remaining national Aboriginal and Torres Strait Islander statutory advocacy role in a position to engage with Government.

(iii) 'New arrangements'

The changes to Aboriginal and Torres Strait Islander affairs announced by the Government in 2004 became known as the 'new arrangements for the administration of Indigenous affairs'. This was a complex set of reforms, which apart from the abolition of ATSIC included:

- Transferring responsibility for the delivery of all Aboriginal and Torres Strait Islander specific programs to mainstream government departments.
- The adoption of whole-of-government approaches, with a greater emphasis on regional service delivery.
- The establishment of new structures; the Office of Indigenous Policy Coordination (OIPC) to coordinate policy nationally and Indigenous Coordination Centres (ICCs) at the regional level.
- A process of negotiating agreements at the local and regional level through Shared Responsibility Agreements (SRAs) and Regional Partnership Agreements (RPAs).⁵²

48 J Hannaford, J Huggins and B Collins, *In the Hands of the Regions: A new ATSIC*, Canberra, The Review Panel (2003).

49 *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

50 W Jonas, 'Statement on ATSIC: Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner' (Media Release 16 April 2004). At <http://www.humanrights.gov.au/news/media-releases/statement-atsic> (viewed 25 September 2013).

51 W Jonas, 'Statement on ATSIC: Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner' (Media Release 16 April 2004). At <http://www.humanrights.gov.au/news/media-releases/statement-atsic> (viewed 25 September 2013).

52 W Jonas, *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission (2005), ch 3. At <http://www.humanrights.gov.au/publications/social-justice-report-2004> (viewed 17 October 2013).

Change of any description breeds uncertainty, but when significant changes such as the abolition of ATSIC and the 'new arrangements' took place, it was inevitable that it was accompanied by a fair degree of distrust.

The sheer scope and pace of change was also a major challenge for our communities as well as for government bureaucrats, with Dr Calma remarking:

I received a lot of feedback that reports provide excellent documentation on what the new arrangements actually are, and this is being used by a number of public servants as a 'bible'. This is good. But it also reflects one of the most basic problems of the new arrangements – a lack of information delivered down to the local level for both bureaucrats who are supposed to be implementing the new approach and most crucially for communities.⁵³

Both Dr Calma and Dr Jonas applied a human rights-based approach to the 'new arrangements', highlighting particular concerns about the lack of engagement with Aboriginal and Torres Strait Islander peoples.

The 'new arrangements' brought into sharp relief the importance of the principle of free, prior and informed consent to effective policy. For instance, Shared Responsibility Agreements (SRAs) were agreements between government and Aboriginal and Torres Strait Islander communities or groups to provide a discretionary benefit in return for community obligations. These discretionary benefits took the form of extra services, capital or infrastructure over and above essential services or basic entitlements.⁵⁴

SRAs were a controversial aspect of the new arrangements, with suspicion by some communities about the underlying concept of mutual obligations where communities were required to do something in exchange for a benefit, rather than receive it on the basis of a general citizenship right or entitlement.⁵⁵ Questions were also raised about whether communities were in a position to exercise their free, prior and informed consent in relation to the agreements and whether it impacted on the exercise of self-determination.⁵⁶ These concerns intensified when some of the SRAs came to light: Text Box 1.4 discusses the Mulan SRA.

Text Box 1.4:

The Mulan Shared Responsibility Agreement⁵⁷

A SRA was entered into by the Mulan community in the Kimberley, the Australian Government and the Western Australian Government. Part of the agreement was that the Australian Government would contribute \$175 000 towards a petrol bowser if the community undertook certain hygiene measures such as the daily face washing of children.

53 T Calma, *Launch of the Social Justice Report 2005 and Native Title Report 2005* (Speech delivered at Launch of the Social Justice and Native Title Reports 2005, Museum of Sydney, 31 March 2006). At <http://www.humanrights.gov.au/news/speeches/site-navigation-30> (viewed 25 September 2013).

54 T Calma, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005), p 147. At <http://www.humanrights.gov.au/publications/social-justice-report-2005-home> (viewed 25 September 2013).

55 K Collard, H D'Antoine, B Henry, G Mooney, D Eggington and C Martin, "'Mutual' obligation in Indigenous health: can shared responsibility agreements be truly mutual?" (2005) 182 (10) *Medical Journal of Australia*, pp 502-504. At <https://www.mja.com.au/journal/2005/182/10/mutual-obligation-indigenous-health-can-shared-responsibility-agreements-be> (viewed 25 September 2013).

56 R McCausland, *Briefing Paper No 1: Shared Responsibility Agreements*, Jumbunna Indigenous House of Learning Research Unit (2005). At http://www.jumbunna.uts.edu.au/pdfs/Shared_Responsibility_Agreements_Briefing1.pdf (viewed 3 October 2013).

57 Australian Government, *Mulan 'Economic Strength and Healthy Kids' Shared Responsibility Agreement*. At <http://www.atns.net.au/agreement.asp?EntityID=3012> (viewed 25 September 2013).

While the Mulan SRA raised concerns⁵⁸ and was more complex than portrayed in the media, it was inevitably used as a partisan device. All sides of politics used this SRA as an opportunity to push their own agendas for Aboriginal and Torres Strait Islander affairs. In this environment, the following analysis provided by Dr Calma was invaluable because it adopted a human rights approach:

My conclusions on these issues may surprise some people. In particular, I find that if properly done, Shared Responsibility Agreements can provide a useful tool for realising the human rights of Indigenous peoples. When I say 'properly done,' I mean that the process through which agreements are struck is on the basis of free, prior and informed consent; and is supportive of Indigenous communities and builds their capacity to engage with government. For agreements to be 'properly done' they must not make the delivery of basic human rights subject to conditions, nor impose conditions on Indigenous peoples that are not applied to other citizens.⁵⁹

Dr Calma continued to monitor the 'new arrangements' in an attempt to keep the Government accountable. By 2006, these arrangements had been considered in the past four *Social Justice Reports*. This 'continuity of focus'⁶⁰ in *Social Justice Reports* was one of the only systematic attempts to track the implementation of the new arrangements. Dr Calma was forthright in his assessment:

After four years...it is clear that there are significant problems with...Indigenous affairs at the federal level. Primarily this is due to an 'implementation gap' between the rhetoric of government and its actual activities.⁶¹

This 'implementation gap' applied strongly to the area of Aboriginal and Torres Strait Islander participation and representative structures with a disappointing lack of progress on regional representative arrangements. According to Dr Calma, the 'absence of a framework for Indigenous representation at all levels of decision-making undermines and contradicts the aims of the new arrangements.'⁶²

(iv) Northern Territory Emergency Response

On 21 June 2007, the policy landscape shifted once again with the announcement of the Northern Territory Emergency Response (NTER). Then Prime Minister John Howard and Indigenous Affairs Minister Mal Brough announced the measures⁶³ as a response to the Northern Territory Board of Inquiry Report into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: Little Children are Sacred*.⁶⁴ The legislation was passed rapidly and with no consultation with the effected communities. This was despite the Report's first recommendation saying, in part, that 'governments commit to genuine consultation with

58 For example, I Anderson, 'Mutual obligation, shared responsibility agreements and indigenous health strategy' (2006) 3 (10) *Australia and New Zealand Health Policy*. At <http://www.anzhealthpolicy.com/content/3/1/10#B38> (viewed 25 September 2013).

59 T Calma, *Launch of the Social Justice Report 2005 and Native Title Report 2005* (Speech delivered at Launch of the Social Justice and Native Title Reports 2005, Museum of Sydney, 31 March 2006). At <http://www.humanrights.gov.au/news/speeches/site-navigation-30> (viewed 25 September 2013).

60 T Calma, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006), p 1. At <http://www.humanrights.gov.au/publications/social-justice-report-2006-report-contents> (viewed 25 September 2013).

61 T Calma, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006), p 15. At <http://www.humanrights.gov.au/publications/social-justice-report-2006-report-contents> (viewed 25 September 2013).

62 T Calma, *Launch of the Social Justice Report 2005 and Native Title Report 2005* (Speech delivered at Launch of the Social Justice and Native Title Reports 2005, Museum of Sydney, 31 March 2006). At <http://www.humanrights.gov.au/news/speeches/site-navigation-30> (viewed 25 September 2013).

63 M Brough, 'National emergency response to protect children in the NT' (Media Release, 21 June 2007).

64 National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle Little Children are Sacred* (2007). At http://www.inquiryisaac.nt.gov.au/pdf/bipacsa_final_report.pdf (viewed 25 September 2013).

Aboriginal people in designing initiatives for Aboriginal communities'.⁶⁵

The legislation underpinning the NTER was enacted on 17 August 2007.⁶⁶ Initially, the measures applied to 73 communities and the legislation had a five year sunset clause.

These measures included:

- compulsory welfare quarantining
- compulsory alcohol restrictions
- the compulsory acquisition of land
- changes to the permit system to enter Aboriginal land
- the removal of customary law and cultural practice as a mitigating factor in bail or sentencing
- licensing of stores in prescribed areas
- banning of pornography in prescribed areas.⁶⁷

Initially there was also to be compulsory health checks of all children under 16 years old, but this strategy was abandoned following strong protests from medical practitioners.

Dr Calma welcomed the announcements to protect the rights of Aboriginal and Torres Strait Islander women and children, but was critical of the lack of connection between Australia's human rights obligations and some aspects of the NTER, especially the suspension of the *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act):

This was of great concern to me as I have always maintained that human rights are universal and indivisible. This means that human rights apply to everyone, everywhere, everyday and that different types of rights have equal importance. Good policy always upholds human rights.⁶⁸

Dr Calma also voiced concerns about consistency with the 'new arrangements' in which the Government had invested so much, saying:

One of the things that I was immediately struck by the announcement of the government these past weeks was the similarity between them and the government's announcements in 2004 to abolish ATSIC and introduce the new arrangements. The announcement of the abolition of ATSIC was clearly made on the run. The commitments made at the time were sweeping in their scope. What my reports have shown is that to date the government still hasn't been able to bed down a system that can deliver these commitments.⁶⁹

65 National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle Little Children are Sacred* (2007), Recommendation 1. At http://www.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf (viewed 25 September 2013).

66 *Northern Territory National Emergency Response Act 2007* (Cth), *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), *Appropriation (Northern Territory National Emergency Response Act (No 1) 2007–2008)* (Cth), *Appropriation (Northern Territory National Emergency Response) Act (No 2) 2007–2008* (Cth).

67 For a more comprehensive list of the NTER measures, see T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), p 199. At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (viewed 25 September 2013).

68 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 2. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

69 T Calma, 'Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory' (Speech delivered at the launch of the Social Justice Report and Native Title Report 2006, 3 July 2007, Sydney). At <https://www.humanrights.gov.au/news/speeches/site-navigation-12> (viewed 25 September 2013).

A fundamental concern was also the lack of consultation and engagement with Aboriginal communities in the Northern Territory. Dr Calma reported on the deep feelings of disengagement and division in the affected communities which became linked with an unhealthy discourse that stifled debate, ‘framed in such a way that you are either with us or against us,’⁷⁰ or in other words, if you don’t support us you must support the abuse of children.

As well as a broad coalition of people and organisations across Australia noting similar concerns and the United Nations also highlighting the human rights shortcomings of the NTER,⁷¹ Dr Calma was singled out for sustained personal attacks in the media about his approach.⁷² Again, I commend Dr Calma for taking a principled stand for our human rights and maintaining the integrity of this position, particularly where we are tasked with monitoring and promoting the enjoyment and exercise of human rights of Aboriginal and Torres Strait Islander Australians.⁷³

(v) Closing the Gap

In 2008, the Council of Australian Governments (COAG) agreed to a partnership to achieve targets in *Closing the Gap in Indigenous Disadvantage*. These targets were expressed in the National Indigenous Reform Agreement and are outlined in Text Box 1.5 together with the underpinning ‘building blocks’ that support their achievement.

The work of the Close the Gap Campaign for Indigenous health equality was very influential in the development of the Closing the Gap agenda. I discuss this in further detail later in this chapter.

Text Box 1.5:

The Closing the Gap Framework⁷⁴

The Closing the Gap Framework commits to timeframes for achieving six targets:

- To close the life-expectancy gap within a generation.
- To halve the gap in mortality rates for Indigenous children under five within a decade.
- To ensure access to early childhood education for all Indigenous four years olds in remote communities within five years.
- To halve the gap in reading, writing and numeracy achievements for children within a decade.
- To halve the gap in Indigenous Year 12 achievement by 2020.
- To halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

70 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2010), p 1. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

71 Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010). At <http://www.un.org/Docs/journal/asp/ws.asp?m=CERD/C/AUS/CO/15-17> (viewed 25 September 2013).

72 G Ring, ‘The Oz attacks Tom Calma’ *New Matilda*, 20 February 2008. At <https://newmatilda.com/2008/02/20/oz-attacks-tom-calma> (viewed 25 September 2013).

73 *Australian Human Rights Commission Act 1986* (Cth), s 46C(1).

74 Council of Australian Governments, *National Indigenous Reform Agreement* (2008). At http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx (viewed 25 September 2013).

Meeting the Closing the Gap targets involves major effort in seven building blocks:

- Early Childhood
- Schooling
- Health
- Economic Participation
- Healthy Homes
- Safe Communities
- Governance and Leadership.

Closing the Gap has now become a central strategy in Aboriginal and Torres Strait Islander affairs. I discuss it further in relation to health equality in this chapter and consider future directions in chapter 3.

(vi) A new national representative body

The Closing the Gap Framework offered a shift in how governments would work together but without a national representative body, it was unclear how governments would work with Aboriginal and Torres Strait Islander peoples to meet the targets.

In December 2008, Minister Macklin tasked Dr Calma with chairing an Independent Steering Committee to research models for a new national representative body, consult with communities and make recommendations. A report was released in November 2009⁷⁵ setting out recommendations for a model of a representative body that has now evolved into the National Congress of Australia First Peoples (Congress).

Again, I believe the respect for Dr Calma's leadership was a key factor in bringing people together. Questions of governance and representation are inevitably political and given the history of ATSIC, it was a great achievement to come to a clear resolution.

Congress was incorporated in 2010. I wrote extensively about Congress in the *Social Justice Report 2012*,⁷⁶ and consider steps to secure our national voice in chapter 3.

(vii) Changes to the Northern Territory Emergency Response

Against this background of the reform, the NTER largely continued following the change of Government at the 2007 election. However, the Government initiated a review in 2008.

An independent Review Board, led by Peter Yu, was appointed in June 2008 and completed their report in October 2008.⁷⁷ This report noted some positive progress from the NTER; for example an increased police presence, measures to reduce alcohol-related violence, and an improvement in the quality and availability of

75 Steering Committee for the creation of a new National Representative Body, *Our Future in Our Hands*, Australian Human Rights Commission (2009). At <http://www.humanrights.gov.au/publications/our-future-our-hands-2009> (viewed 25 September 2013).

76 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 183-199. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 25 September 2013).

77 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008). At <http://www.nterreview.gov.au/report.htm> (viewed 25 September 2013).

housing, health and education. However, it also noted that some measures had not succeeded because the NTER failed to engage with the very people for which it was intended.⁷⁸

The suggestions for improvement made by the Review Board echoed the recommendations made by Dr Calma in the *Social Justice Report 2007*.⁷⁹ The three overarching recommendations made by the Review Board were that:

- The Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory.
- In addressing these needs, both the Australian and Northern Territory Governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership.
- Government actions affecting Aboriginal communities must respect Australia's human rights obligations and conform to the Racial Discrimination Act.⁸⁰

The Australian Government provided an initial response in October 2008 that agreed with these main recommendations and outlined the intention to continue the 'stabilisation' phase of the NTER for 12 months before transitioning to a long term development phase.⁸¹ Following consultation with Indigenous communities in the Northern Territory, the Australian Government released its policy statement on the proposed redesign of the NTER measures.⁸²

In essence, the core elements of the NTER remained in place⁸³ although there was a focus on redesigning the NTER measures so they were 'more clearly special measures or non-discriminatory within the terms' of the Racial Discrimination Act.⁸⁴

In 2010, the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) repealed the provisions which had suspended the operation of the Racial Discrimination Act in relation to the NTER.⁸⁵ The Commission welcomed these amendments but noted some concerns as the legislation 'authorised the continuation of some measures that had a discriminatory and

78 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), pp 9-11. At <http://www.nterreview.gov.au/report.htm> (viewed 25 September 2013).

79 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007). At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (viewed 25 September 2013).

80 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 12. At <http://www.nterreview.gov.au/report.htm> (viewed 25 September 2013).

81 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At <http://www.formerministers.dss.gov.au/14874/response-to-the-nter-review/> (viewed 9 October 2013).

82 Australian Government, *Policy Statement : Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory-including-northern-territory-emergency-response/policy-statement-landmark-reform-to-the-welfare-system-reinstatement-of-the-racial-discrimination> (viewed 25 September 2013).

83 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline.

84 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline.

85 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 1, items 1-3. This also repealed the sections exempting the operation of the Northern Territory's anti-discrimination laws.

negative impact upon the rights of Aboriginal and Torres Strait Islander peoples.⁸⁶

(viii) Stronger Futures

As the NTER legislation approached its expiry in 2012, the Australian Government conducted a six week consultation process on the development of the legislation to take its place. This process was extremely disappointing given there had been consistent calls for meaningful and effective consultation with Aboriginal and Torres Strait Islander peoples as the proposed legislation would have wide-ranging impacts on communities. In my view, the six week consultation period did not do justice to the issues in question given their complexity and their potential impacts on communities.

Nonetheless, based on these consultations the Government introduced three Bills, which passed through Parliament on 29 June 2012.⁸⁷ I will refer to these collectively as the Stronger Futures legislation. Text Box 1.6 summarises the features of the Stronger Futures legislation.

Text Box 1.6: Stronger Futures legislation

The Stronger Futures legislation:

- Repeals the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act).⁸⁸
- Retains existing alcohol bans in prescribed Northern Territory communities but introduces the mechanism of community 'alcohol management plans'.⁸⁹
- Amends laws relating to alcohol abuse, including by adding six months imprisonment as an available penalty for possession of less than 1350ml of alcohol in an alcohol protected area.⁹⁰
- Introduces a new power which allows the Australian Government to make regulations to modify Northern Territory laws relating to leasing on town camp and community living area land.⁹¹
- Repeals the provisions relating to the acquisition of extensive statutory rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)⁹² and provisions relating to the acquisition of compulsory five-year leases.⁹³
- Amends the licensing regime for community stores, extending licencing requirements beyond stores which accept income managed funds, and providing for more rigorous assessment of store practices and more robust enforcement of regulations.⁹⁴

86 Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee* (6 February 2012), para 132. At <http://www.humanrights.gov.au/submission-stronger-futures-northern-territory-bill-2011-2012> (viewed 29 August 2013).

87 Stronger Futures in the Northern Territory Bill 2011 (Cth), Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), Social Security Legislation Amendment Bill 2011 (Cth).

88 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), sch 1 item 1.

89 *Stronger Futures in the Northern Territory Act 2012* (Cth), pt 2.

90 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 8.

91 *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 34–35.

92 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), sch 2, pt 3.

93 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), sch 1, item 1.

94 *Stronger Futures in the Northern Territory Act 2012* (Cth), pt 4.

- Amends the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) to continue existing pornography bans and require communities to be consulted if they are to be subject to a new ban or if bans are to be removed.⁹⁵
- Amends the *Crimes Act 1914* (Cth) to introduce an exception to the rule preventing consideration of customary law or cultural practice in bail and sentencing (as amended by the NTNER Act) for certain offences involving cultural heritage.⁹⁶
- Amends sections of the social security legislation which enable a new process for dealing with unsatisfactory school attendance⁹⁷ (this change accompanied the policy announcement that the School Enrolment and Attendance Measures (SEAM) which allow for the suspension of welfare payments, would be expanded).⁹⁸
- Amends the operation of the Income Management scheme by allowing recognised state/territory authorities to refer people to Income Management.⁹⁹

Stronger Futures has provided ten-year funding commitments and while I welcomed the long term investment that this provides, I echo the key message that Social Justice Commissioners have been making for the past 20 years: work must be done in consultation and in partnership with our communities, and it must be in accordance with our human rights.¹⁰⁰

At the time the legislation passed, I harboured concerns about the legitimacy of the characterisation of some of the Stronger Futures measures as special measures.¹⁰¹ I also had concerns about the potential for other measures, such as the School Enrolment and Attendance Measure (SEAM), to be indirectly discriminatory in their application. Then Race Discrimination Commissioner, Dr Helen Szoke and I stressed that the way these measures were implemented would determine whether or not they were compatible with obligations not to discriminate on the basis of race.¹⁰²

The Parliamentary Joint Committee on Human Rights (JCHR) produced an examination of the Stronger Futures legislation in June 2013. Its report raised concerns about the lack of evidence to support the assertion that certain measures are not racially discriminatory. In relation to the Government's assertion that alcohol measures were a special measure, the JCHR did not 'consider that the measures are appropriately classified as special measures within the meaning of ICERD [International Convention on the Elimination of All Forms

95 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), sch 3.

96 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), sch 4.

97 *Social Security Legislation Amendment Act 2012* (Cth), sch 2.

98 Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012), pp 32-40. At <http://www.humanrights.gov.au/submission-stronger-futures-northern-territory-bill-2011-2012> (viewed 29 August 2013).

99 *Social Security Legislation Amendment Act 2012* (Cth), s 10.

100 M Gooda, 'Long-term funding commitment welcomed but Stronger Futures still must change', (Media release 28 March 2012). At http://humanrights.gov.au/about/media/media_releases/2012/23_12.html (viewed 25 September 2013).

101 Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills* (6 February 2012).

102 Commonwealth, *Official Committee Hansard*, Senate, Community Affairs Legislation Committee: Stronger Futures in the Northern Territory Bill 2012, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011, 1 March 2012, pp 1-4. At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id:%22committees/commsen/00403cc9-35dc-4cfb-86ab-87ca376c7e79/0000%22> (viewed 25 September 2013).

of Racial Discrimination].¹⁰³ However, the report suggested that the implementation of alcohol management plans could create evidence to justify such classification.

The JCHR found SEAM would have an impact predominantly on Aboriginal communities and therefore might constitute racial discrimination as defined by ICERD.¹⁰⁴ It also found that SEAM involved a limitation of a number of other rights.¹⁰⁵ Consequently the JCHR suggested that SEAM ‘must be justified as a proportionate measure based on objective and reasonable criteria’ adopted to achieve the ‘legitimate goal’ of promoting the right of education of Aboriginal children in the Northern Territory.¹⁰⁶ The JCHR further suggested that it is the responsibility of the Government to clearly demonstrate SEAM is justified based on ‘reliable empirical evidence, that the measures are having a significant impact on reducing low school attendance’.¹⁰⁷ I am concerned that the Government is yet to produce the necessary evidence to satisfy these considerations.¹⁰⁸

I am of the view that the way to establish legitimacy and ensure the effectiveness of these measures is through meaningful engagement with Aboriginal and Torres Strait Islander communities respecting the right to free, prior and informed consent.

The Stronger Futures legislation is in force until 2022.¹⁰⁹ The challenge for the next ten years is its implementation. Again, I have argued that a human rights framework as articulated in the Declaration should guide this work. I will discuss this in more detail in chapter 4.

(d) Constitutional recognition

The fact that the Constitution of Australia contains sections that anticipate discrimination on the basis of race and fails to recognise Aboriginal and Torres Strait Islander peoples remains a stain on our nation. As the most recent uses of these provisions relate to Aboriginal and Torres Strait Islander peoples, Social Justice Commissioners have consistently campaigned strongly to redress this injustice.

103 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Public Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 10 October 2013).

104 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Public Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 74. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 10 October 2013).

105 Including rights to social security, privacy and family, an adequate standard of living and the rights of the child: *Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Public Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 74. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 10 October 2013).

106 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Public Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 74. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 10 October 2013).

107 Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Public Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 74. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 10 October 2013).

108 The progress report on Stronger Futures does not meet this threshold: Australian Government, *Stronger Futures in the Northern Territory: Six-Monthly progress Report 1 July 2012 to 31 December 2012*. At <http://www.dss.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/stronger-futures-in-the-northern-territory-six-monthly-progress-report> (viewed 10 October 2013).

109 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 118.

(i) A history of campaigning

Social Justice Commissioners have continued to build on the proud history of campaigning and community advocacy for constitutional recognition of Aboriginal and Torres Strait Islander peoples. A groundswell of public support, generated by grassroots advocacy, was a key factor in the success of the 1967 referendum. Despite the positive outcomes of this referendum, there remained unfinished business. Text Box 1.7 considers the importance of the 1967 referendum.

Text Box 1.7:

The 1967 Referendum

The 1967 referendum provided the previous generation with a nation building moment. Receiving 90.77% support at the ballot box, it was the most strongly supported referendum proposition in history. The great public support for this referendum, created through decades of campaigning by some of our greatest champions, established a launching pad for reconciliation between Indigenous and non-Indigenous Australians.

However, it only went part of the way in creating a Constitution that is inclusive of all Australians. Dr Tom Calma said:

the overwhelming support for the 1967 Referendum gave the Commonwealth government the power and responsibility to address the catastrophic conditions under which Aboriginal people lived.

However, in my opinion the Referendum only 'half-worked' in certain fields but not enough to achieve the referendum's implied promise of equality.¹¹⁰

The *Social Justice Report 1995* explored the value of constitutional change and possible options for reform.¹¹¹ Professor Dodson explained the need for constitutional reform stemming from the original drafting process:

In 1901, the 'founding fathers', white, male and bearded, saw no reason to place the rights of Indigenous peoples on the Constitutional agenda. They totally excluded Indigenous peoples from the process of forming the Constitution.¹¹²

He also identified that 'recognition will have great benefits over time in changing non-Indigenous social attitudes towards Aboriginal peoples and Torres Strait Islanders.'¹¹³

The *Social Justice Report 2008* explored the potential for constitutional reform in the changed political context

110 T Calma, *Reflection on the 1967 Referendum and the Commissioner's Multiculturalism position paper* (Speech delivered at The Ethnic Communities' Council of Victoria annual general meeting, Melbourne, 27 November 2007). At <https://www.humanrights.gov.au/news/speeches/reflection-1967-referendum-and-commissioner-s-multiculturalism-position-paper> (viewed 25 September 2013).

111 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), ch 4. At http://www.humanrights.gov.au/pdf/social_justice/sj_report95.pdf (viewed 25 September 2013).

112 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 70. At http://www.humanrights.gov.au/pdf/social_justice/sj_report95.pdf (viewed 25 September 2013).

113 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 71. At http://www.humanrights.gov.au/pdf/social_justice/sj_report95.pdf (viewed 25 September 2013).

after the 2007 election, and suggested options for the substance and process of reform.¹¹⁴ In this Report, Dr Calma identified the need for constitutional change as ‘unfinished business.’¹¹⁵ He stated that constitutional reform:

...is about ensuring that our founding document sets out ambitions and expectations for all Australians that reflect a modern, twenty first century Australia by providing a legal foundation for reconciliation, where human rights are respected at all levels of government...Without constitutional change, Aboriginal and Torres Strait Islander peoples will continue to be vulnerable to the enactment of racially discriminatory laws in Australia. No other reform to our legal system can address this fundamental problem.¹¹⁶

In my first *Social Justice Report* in 2010 I picked up the issue again, identifying the critical factors necessary for a successful referendum. I considered the existing inadequacies of provisions in the Constitution and traced the history of the campaign for reform. I also outlined the benefits that constitutional recognition would bring to Aboriginal and Torres Strait Islander peoples, and to the nation as a whole.¹¹⁷

Constitutional recognition, to my way of thinking, is for all Australians:

Australians have a rare opportunity to stand together as one people, united in recognition of the contribution of Aboriginal and Torres Strait Islander peoples to this land and this nation, in the past, the present and into the future. What is at stake is an inclusive national identity and a path towards a truly reconciled nation.¹¹⁸

This history of campaigning by Social Justice Commissioners also included submissions, lobbying and involvement in other processes and inquiries.

The most recent example of this work was my involvement as an ex-officio member of the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel).

In December 2010, then Prime Minister Gillard appointed the Expert Panel with a mandate to explore how the Constitution could be changed to recognise Aboriginal and Torres Strait Islander peoples. The Panel consisted of Members of Parliament, legal experts, and Aboriginal and Torres Strait Islander and non-Indigenous community leaders.¹¹⁹

Between May and October 2011, the Expert Panel conducted 250 public consultations across Australia, heard from over 4 000 people and received over 3 500 submissions. The Expert Panel visited many Aboriginal and Torres Strait Islander communities, holding consultations based on a discussion paper that was translated into 15 Indigenous languages.¹²⁰

The Expert Panel was a significant and genuine attempt to gain a wide range of authoritative views on the need for constitutional recognition. I hope that we look back at the work of the Expert Panel as one of the defining moments that garnered support for a successful referendum to provide this recognition.

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- 114 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 25 September 2013).
- 115 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 25 September 2013).
- 116 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 65. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 25 September 2013).
- 117 M Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2011), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 25 September 2013).
- 118 M Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2011), p 32. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 25 September 2013).
- 119 A full list of members of the Expert Panel is available here: Recognise, *The Expert Panel*. At <http://www.recognise.org.au/about/expert-panel> (viewed 25 September 2013).
- 120 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012), pp 5-7. At <http://www.recognise.org.au/expert-panel-report> (viewed 25 September 2013).

The Expert Panel's report was presented to the Prime Minister in January 2012 and it lays out sound, well considered recommendations to present to the Australian people at a referendum. The recommendations should provide the foundation for any proposal taken to the people.

Significantly, cross-party support for constitutional recognition of Aboriginal and Torres Strait Islander peoples has been achieved.

Considering this achievement, many people consider that progress to reform the Constitution has been too slow. However, there are a couple of key advances that demonstrate real progress towards a referendum.

(ii) Beyond the Expert Panel

The passing of the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) by Parliament was an important first step towards the main goal of constitutional reform. As then Prime Minister Gillard stated:

...no gesture speaks more deeply to the healing of our nation's fabric than amending our nation's founding charter, so I commend this bill to the House as a deed of reconciliation in its own right, and as a sign of good faith for the referendum to come.¹²¹

The then Opposition Leader Tony Abbott supported the Prime Minister's message:

I honour the millions of Indigenous people, living and dead, who have loved this country yet maintained their identity and who now ask only that their existence be recognised and their contributions be acknowledged.¹²²

Another important mechanism for progressing constitutional recognition has been the establishment of the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples in November 2012. The Committee operates with the mandate to 'work to build a secure strong multi-partisan Parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition'.¹²³ It produced its first report on the Inquiry into the Aboriginal and Torres Strait Islander Peoples Recognition Bill in January 2013.¹²⁴

The progress report, delivered by the Committee in June 2013, provided clear direction on the steps and timeframes required to ensure that momentum towards a referendum is maintained and built upon following the September 2013 election.¹²⁵ It was pleasing to note that the report again clearly demonstrated cross-party commitment to constitutional recognition.

The progress report also provided a strong endorsement of the work and recommendations of the Expert Panel, stating that 'the work of the Expert Panel provides a solid foundation for the process of constitutional reform'.¹²⁶

121 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2013, p 1121 (The Hon Julia Gillard MP, Prime Minister).

122 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2013, p 1123 (The Hon Tony Abbott MP, Leader of the Opposition).

123 Parliament of Australia, *Information about the establishment of the Committee*. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/jsatsi/index (viewed 16 October 2013).

124 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012* (January 2013), ch 3. At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F4943%22> (viewed 16 October 2013).

125 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (June 2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/jsatsi/consultation/index (viewed 16 October 2013).

126 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (June 2013), p 7. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/jsatsi/consultation/index (viewed 16 October 2013).

Consistent with the recommendations of the Expert Panel, the Committee also committed to ‘consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views’ if a proposal other than that of the Expert Panel is being considered.¹²⁷ The continued engagement of Aboriginal and Torres Strait Islander peoples is crucial to ensure any proposal is meaningful and supported by us as First Peoples.

(iii) Public education campaign

In examining the previous attempts to change the Constitution, and their successes and failures, we cannot underestimate the importance of public education. We need to bring people along with us if constitutional recognition is to be successful.

An education campaign began in July 2012 to raise public awareness of the need to recognise Aboriginal and Torres Strait Islander peoples in the Constitution. The campaign builds on the continued advocacy since the successful referendum in 1967, which itself launched from the platform created by the 1967 Yes Campaign. The campaign, which can be seen as a vital element of this advocacy, is called *Recognise* and is supported by Reconciliation Australia with funding from the Australian Government.¹²⁸

I joined with many high profile Australians including Michael Long, Aden Ridgeway, Lowitja O’Donoghue, Mick Dodson, Marcia Langton, Jason Glanville and Tim Costello, along with then Minister for Families, Community Services and Indigenous Affairs Jenny Macklin and now Prime Minister Tony Abbott, to begin the ‘Journey of Recognition’ in Melbourne on 26 May 2013. The Journey is travelling around the country talking about the importance of constitutional recognition. This is just one of a number of community advocacy measures that are building momentum towards a referendum.

By the end of September 2013, almost 152 000 people pledged their support for constitutional recognition of Aboriginal and Torres Strait Islander peoples according to the *Recognise* website.¹²⁹ This show of commitment is a strong display of public support for constitutional reform and engagement with the campaign.

Polling has also shown that 81% of eligible voters support the recognition of Aboriginal and Torres Strait Islander peoples in the Constitution.¹³⁰ Recent polling also indicated strong support for a key recommendation of the Expert Panel which is the inclusion of a clause which would prohibit discrimination on the basis of race.¹³¹

This support is promising and I consider the next steps needed to achieve constitutional recognition in chapter 3.

(e) Health equality

Addressing the unacceptable gap in health and life expectancy equality between Aboriginal and Torres Strait Islander people and the broader Australian public has been a priority of successive Social Justice

127 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (June 2013), p 7. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/jsatsi/consultation/index (viewed 16 October 2013).

128 Reconciliation Australia, ‘Reconciliation Australia Welcomes Support for Constitutional Recognition’ (Media Release, 15 February 2012). At <http://www.recognise.org.au/media/press-releases> (viewed 25 September 2013).

129 *Recognise*, *Get involved*. At <http://www.recognise.org.au/> (viewed 25 September 2013).

130 Newspoll, *Recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution – National Survey* (November 2011).

131 Essential Vision, *Essential Report – 23 July 2013*. At <http://essentialvision.com.au/referendum> (viewed 25 September 2013).

Commissioners.¹³² The life expectancy gap remains a major challenge for the nation:

In 2005–07, life expectancy for Aboriginal and Torres Strait Islander peoples was estimated to be 11.5 years lower than that of the non-Indigenous population for males (67.2 compared with 78.7 years) and 9.7 years lower for females (72.9 compared with 82.6 years).¹³³

I am proud of the contribution that Social Justice Commissioners have made to drive action and reform to address this concern. The ground-breaking *Social Justice Report 2005* set out a human rights-based approach to Aboriginal and Torres Strait Islander health equality. In the Report, Dr Calma called on the ‘governments of Australia to commit to achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander people within 25 years.’¹³⁴

The crux of the call was that governments have an obligation to ensure that Aboriginal and Torres Strait Islander peoples have an equal opportunity to be as healthy as the broader Australian population. This human rights based-approach also required governments to develop a comprehensive long-term plan of action and to set timeframes and benchmarks to measure progress in achieving health equality.

I continue to advocate for health equality in my role as Co-Chair of the Close the Gap Campaign.

(i) Close the Gap: A campaign for health equality

Following the release of the *Social Justice Report 2005*, under the leadership of Dr Calma, key stakeholders in Aboriginal and Torres Strait Islander health began meeting to:

- achieve a common understanding of a strategy to health equality for Aboriginal and Torres Strait Islander Australians (the *Social Justice Report 2005* outlined the proposed strategy)
- commit to working together to achieve Aboriginal and Torres Strait Islander health equality within 25 years.¹³⁵

These meetings led to the formation of a coalition called the Close the Gap Campaign that united to push for health equality. Members of this Coalition then formed a Steering Committee to drive the Campaign.

In April 2007, Patrons Catherine Freeman and Ian Thorpe launched the Campaign. Coinciding with the launch, the Campaign published an open letter to all Australian governments in the media calling for health equality.

At the same time the public was invited to sign the Close the Gap Pledge.¹³⁶ Over the years this has resulted in over 188 000 Australians committing their support with this year’s annual National Close the Gap Day involving more than 140 000 people, and a dedicated Close the Gap National Rugby League Round.

The Campaign has engaged with a broad range of stakeholders. As founding Chair of the Campaign, Dr Calma played a key role in bringing the various health bodies, Indigenous and non-Indigenous, to the table to form the Campaign. Since its inception it has also been strongly bipartisan and closely engaged with all sides

132 For example, see M Dodson, *Social Justice Report 1994*, Human Rights and Equal Opportunity Commission (1995), ch 3. At <http://www.austlii.edu.au/au/other/IndigLRes/1994/2/index.html> (viewed 17 October 2013).

133 Australian Health Ministers’ Advisory Council, *Aboriginal and Torres Strait Islander Health Performance Framework 2012* (2012), p 57. At <http://www.health.gov.au/internet/publications/publishing.nsf/Content/oatsih-hpf-2012-toc> (viewed 29 October 2013).

134 T Calma, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005) Recommendation 1. At <http://www.humanrights.gov.au/publications/social-justice-reports-index#2005> (viewed 25 September 2013).

135 See T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 5. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 25 September 2013); Close the Gap Campaign Steering Committee, *Close the Gap Campaign Evaluation Report* (2011).

136 Oxfam Australia, *Sign the Close the Gap Pledge*. At <https://www.oxfam.org.au/my/act/sign-the-close-the-gap-pledge> (viewed 25 September 2013).

of politics.

(ii) National Indigenous Health Equality Summit

In March 2008, the Campaign hosted the *National Indigenous Health Equality Summit* in Canberra. The Summit produced two key outcomes: the *National Indigenous Health Equality Targets* and the *Statement of Intent* and was one of the formative events in building support.

The *National Indigenous Health Equality Targets*¹³⁷ set out the consensus view from Campaign members and Aboriginal and Torres Strait Islander health experts on what needs to be done to achieve health equality by 2030. These targets still have as much relevance now and should inform the development of a national implementation plan for the *National Aboriginal and Torres Strait Islander Health Plan 2013–2023* (Health Plan).¹³⁸

The *Statement of Intent* was signed by all major federal parties at the summit and has subsequently been signed by most States and Territories and committed parties to working together to achieve health equality by 2030. It also set out the blueprint to achieve this goal which includes the development of a long-term plan of action in partnership with Aboriginal and Torres Strait Islander peoples and their representatives.

Both Dr Calma and myself as Social Justice Commissioners and the Campaign Chairs¹³⁹ have used the *Statement of Intent* as key pillars in our advocacy. The *Social Justice Report 2008* provided a detailed review of the impact of the early years of the Campaign and updates have been provided in subsequent reports.¹⁴⁰

(iii) Reforming Aboriginal and Torres Strait Islander health policy

In 2007, having indicated support for Close the Gap approach, the Australian Government adopted the Closing the Gap policy platform.¹⁴¹ This resulted in a number of positive reforms including:

- In December 2007, COAG adopted a target to achieve Aboriginal and Torres Strait Islander life expectancy equality within a generation. This was supported by a target to halve the mortality rate of under-five year old Aboriginal and Torres Strait Islander children within ten years. By mid-2009, a

137 Close the Gap Campaign Steering Committee, *National Indigenous Health Equality Targets: Outcomes from the National Indigenous Health Equality Summit*, Canberra (18-20 March 2008). At <http://www.humanrights.gov.au/publications/closing-gap-national-indigenous-health-equality-targets-2008> (viewed 25 September 2013).

138 These targets were revised by the Campaign Steering Committee as part of their submission to the Health Plan: Close the Gap Campaign Steering Committee, *Submission to the National Aboriginal and Torres Strait Islander Health Plan* (December 2012), Appendix 3. At http://www.humanrights.gov.au/sites/default/files/20121220_CTG_Health_Plan_Submission%20Final.pdf (viewed 25 September 2013).

139 I note that I have been Co-Chair; Dr Calma was the Chair of the Campaign in his own right whilst Social Justice Commissioner.

140 For a detailed history of the early years of the Close the Gap Campaign, see T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 5. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

141 'Close the Gap' was adopted as the name of the human rights based campaign for Aboriginal and Torres Strait Islander health equality led by the Campaign Steering Committee in 2006. The term 'closing the gap' entered the policy lexicon as a result of campaign's activities and has since been used to tag COAG and Australian Government Aboriginal and Torres Strait Islander policy-specific initiatives aimed at reducing disadvantage — from the COAG Closing the Gap Targets to the National Partnership Agreement to Closing the Gap on Indigenous Health Outcomes. As a general rule, any initiative with 'closing the gap' in the title is an Australian Government or COAG initiative. There is a very important difference in the meaning and intention between 'close the gap' and 'closing the gap' and it is important to note that closing the gap does not necessarily reflect the human rights-based approach of the Close the Gap Campaign, nor does the use of the term reflect an endorsement of them by the Close the Gap Campaign Steering Committee.

total of six COAG 'closing the gap' targets had been announced.¹⁴²

- In 2009, the *National Partnership Agreement (NPA) on Closing the Gap in Indigenous Health Outcomes* with a focus on chronic disease and the *NPA on Indigenous Early Childhood Development* with a focus on child and maternal health were signed.¹⁴³

The Closing the Gap reforms have also increased transparency and public accountability. This is consistent with the Campaign's advocacy and a human rights-based approach as it enables progress to be tracked over time. Of particular importance is the Prime Minister's annual report and address to Parliament on progress towards achieving the Closing the Gap targets. The Campaign produces an annual 'Shadow Report' coinciding with the Prime Minister's report. It has become a welcome tradition that the Prime Minister meets with Campaign representatives and exchanges reports on the day that the Prime Minister's report is tabled in Parliament.

(iv) National Health Leadership Forum

In August 2011, the National Health Leadership Forum (NHLF) was established within Congress. The NHLF is comprised of the Aboriginal and Torres Strait Islander health peak bodies on the Campaign Steering Committee and was established to partner with the Australian Government in the development, implementation and monitoring of national health policy including a plan of action. I set out the NHLF as a case study in the *Social Justice Report 2012* as an example of effective governance at the national level.¹⁴⁴

(v) National Aboriginal and Torres Strait Islander Health Plan 2013–2023

Following the formation of the NHLF, then Health Minister Nicola Roxon and the Minister for Indigenous Health Warren Snowdon announced a process for the development of the Health Plan.¹⁴⁵ The NHLF worked in partnership with the Australian Government in the development of the Health Plan which was finalised in July this year.¹⁴⁶

The Close the Gap Campaign welcomed the Health Plan as a crucial step towards closing the gap in health equality.¹⁴⁷ It is pleasing that the Health Plan:

- has an overarching goal of closing the life expectancy gap by 2030
- adopts a human rights-based approach and addresses racism at both the individual and systemic levels
- adopts a holistic definition of health including recognition of the impacts of past policies and the ongoing cycle of trauma on the health of Aboriginal and Torres Strait Islander people and the role of healing

142 The COAG targets are contained in the National Indigenous Reform Agreement: Council of Australian Governments, *National Indigenous Reform Agreement*. At http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf (viewed 25 September 2013).

143 There are four other Indigenous specific National Partnership Agreements attached to the NIRA.

144 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 199-205. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 16 October 2013).

145 The Hon N Roxon MP, Minister for Health and Ageing and The Hon W Snowdon MP, Minister for Indigenous Health, 'New National Aboriginal and Torres Strait Islander Health Plan' (Media release, 3 November 2011).

146 For more information on the Health Plan see: Department of Health and Ageing, *National Aboriginal and Torres Strait Islander Health Plan (NATSIHP)*. At <http://www.health.gov.au/natsihp> (viewed 25 September 2013).

147 Close the Gap Campaign Steering Committee, 'Aboriginal and Torres Strait Islander health plan a crucial step forward' (Media release, 23 July 2013). At <https://www.humanrights.gov.au/news/stories/aboriginal-and-torres-strait-islander-health-plan-crucial-step-forward> (viewed 25 September 2013).

- recognises the central role of culture and social and emotional wellbeing to the physical and mental health of Aboriginal and Torres Strait Islander people
- is comprehensive and addresses the wide range of social and cultural determinants of health inequality
- includes a commitment to develop targets and benchmarks to measure progress.¹⁴⁸

However, to be effective this plan of action must be implemented in partnership with Aboriginal and Torres Strait Islander peoples and their representative organisations.¹⁴⁹ I consider actions for the future in chapter 3.

(f) Criminal justice issues

Given that the RCIADIC was part of the impetus for the creation of the Social Justice Commissioner role, it is not surprising that criminal justice issues have been a significant focus over the last 20 years. Unfortunately, the statistics over time have grown worse: see Text Box 1.8.

Text Box 1.8:

Aboriginal and Torres Strait Islander criminal justice statistics – then and now

While it is difficult to directly compare statistics from 1993 to today due to different methodologies around Indigenous identification, a very rough analysis shows a disturbing trend.

In 1993, Aboriginal and Torres Strait Islander young people nationally were 17 times more likely to be in detention than their non-Indigenous counterparts.¹⁵⁰

This number has significantly increased.

In 2012, Aboriginal and Torres Strait Islander children nationally were 25 times more likely to be in detention than their non-Indigenous counterparts.¹⁵¹

And in 1993, the crude rate of imprisonment¹⁵² for Aboriginal and Torres Strait Islander adults showed that they were 14 times more likely to be imprisoned than their non-Indigenous counterparts.¹⁵³ In 2012, this crude rate of imprisonment for adult Aboriginal and Torres Strait Islanders had increased to 18.4 times more likely than non-Indigenous Australians to be imprisoned.¹⁵⁴

148 *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*, Department of Health and Ageing (2013). At <http://www.health.gov.au/natsihp> (viewed 25 September 2013).

149 See Close the Gap Campaign Steering Committee, *Building on the Close the Gap platform: Commitments for an incoming government* (2013), p 8. At <https://www.humanrights.gov.au/close-gap-indigenous-health-campaign> (viewed 25 September 2013).

150 Australian Institute of Criminology, *Trends and Issues: detaining Aboriginal juveniles as a last resort* (1996), p 1. At <http://www.aic.gov.au/documents/4/3/9/%7b43950229-E7E1-422B-9645-00293E7A2318%7dti64.pdf> (viewed 25 September 2013).

151 Australian Institute of Health and Welfare, *Youth Justice in Australia – An Overview 2011-2012* (2013), p 10. At <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543208> (viewed 25 September 2013).

152 The crude rate does not provide age standardisation which is a more robust measure. We have provided the crude rate as the age standardised measure was not used in 1993.

153 Australian Institute of Criminology, *Prisoners in Australia 1993*, Table 3.

154 Australian Bureau of Statistics, *Prisoners in Australia 2012* (2013), p 34. At [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/\\$File/45170_2012reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/$File/45170_2012reissue.pdf) (viewed 25 September 2013).

Social Justice Commissioners have been actively involved in trying to explain why our people make up the majority of Australia's prison populations and how we can remedy this. Some of this has been in response to particular policies, such as mandatory detention, whilst other work has considered the particular needs of groups such as women and offenders with cognitive impairments and/or mental health issues. And of course, there is the issue of general disadvantage facing our people as a result of colonisation and subsequent trauma.

(i) Mandatory sentencing

Over the past 20 years, opposition to mandatory sentencing laws has been a key area of advocacy for Social Justice Commissioners because the application of these laws has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

When we place mandatory sentencing in the social context of Aboriginal and Torres Strait Islander offenders, we see for example:

Aboriginal juveniles appearing in court are significantly more likely to have a previous offending history and are more likely to be among those with extensive offending histories than are non-Aboriginal people. Thus mandatory sentencing regimes, although they appear to be racially neutral, are *foreseeably* discriminatory in their impact.¹⁵⁵

Mandatory sentencing was first introduced in Western Australia in 1996 and the Northern Territory in 1997.¹⁵⁶

The Northern Territory laws required a Court to impose a period of at least 14 days imprisonment for an offender guilty of a property offence.¹⁵⁷ In Western Australia, if a person was a repeat offender at the time of committing a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment or detention.¹⁵⁸

These laws were sharply critiqued by then Social Justice Commissioner, Dr Jonas who referred to them as the 'antithesis of social justice'.¹⁵⁹ Serious concerns were raised by a number of United Nations human rights treaty bodies about the compatibility of the laws with Australia's human rights obligations.¹⁶⁰ The human impact of these laws helped turn the tide of public opinion. For instance, as shown in Text Box 1.9 below, there were numerous examples of disproportionate sentencing of Aboriginal people in the Northern Territory.

155 C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (2002), p 288.

156 Mandatory sentencing laws were enacted in Western Australia in 1996 (through amendments to the *Criminal Code 1913* (WA)) and in the Northern Territory in 1997 (through amendments to the *Sentencing Act 1995* (NT) and the *Juvenile Justice Act 1993* (NT)).

157 *Sentencing Act 1995* (NT), s 78A, later amended by *Sentencing Amendment Act (No 3) 2001* (NT).

158 *Criminal Code 1913* (WA), s 401(4).

159 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (2000). At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 24 September 2013).

160 See Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia* (2000) UN Doc A/55/40. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40.paras.498-528.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/A.55.40.paras.498-528.En?OpenDocument) (viewed 25 September 2013); Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations Of The Committee On The Elimination Of Racial Discrimination: Australia* (2000) UN Doc CERD/C/304/Add.101. At <http://www.un.org/Docs/journal/asp/ws.asp?m=CERD/C/304/Add.101> (viewed 25 September 2013).

Text Box 1.9:

Mandatory sentencing case studies¹⁶⁰

- A 29 year old homeless man wandered into a backyard when he was drunk and took a \$15 towel. It was his third minor property offence and he was imprisoned for a year.
- An 18 year old man was sentenced to 90 days in prison for stealing 90 cents from a car.
- A 15 year old girl was detained for 28 days for unlawful possession of a vehicle. In fact she was only a passenger in a stolen vehicle.
- Robert was first referred to the Department of Family, Youth and Children's Services when he was 12 years old due to a lack of parental support. Since the age of 14, Robert has mostly looked after himself. He attempted suicide while in police custody, having been arrested for a mandatory detention offence. The offence was one of property damage. He broke a window after hearing about the suicide of a close friend.
- Tragically, in 2000 a 15 year old boy committed suicide whilst in custody on a mandatory sentence of 28 days for stealing textas and paint.

In 2001, the Northern Territory mandatory sentencing laws for property offences were repealed.¹⁶²

Looking back, researchers have been able to show that appearances before the Northern Territory courts that led to imprisonment were 50% higher during the period of mandatory sentencing, compared with the period immediately after the repeal of the legislation.¹⁶³ In terms of the impact on crime, property crime actually increased during the mandatory sentencing regime and then decreased once it was repealed.¹⁶⁴

Mandatory sentencing regimes are still in place in Western Australia. In fact, the Western Australian Government has promised to expand mandatory sentencing terms to 15 years for some offences and double home burglary minimum terms to two years for all offenders over the age of 16 years.¹⁶⁵

The Northern Territory introduced new mandatory sentencing laws in 2008¹⁶⁶ and has further extended the mandatory sentencing regime to a range of violent offences in 2013.¹⁶⁷

I am extremely disappointed that despite powerful legal, moral, economic and human rights arguments, some Australian jurisdictions still resort to mandatory sentencing 20 years after the RCIADIC stated that imprisonment should be a measure of last resort. In my view, mandatory sentencing results in harsh, unfair

161 Australian Human Rights Commission, *Mandatory Detention Laws in Australia* (2001). At <http://www.humanrights.gov.au/publications/mandatory-detention-laws-australia-2001> (viewed 25 September 2013).

162 *Sentencing Amendment Act (No 3) 2001* (NT).

163 S Jackson and F Hardy, *The Impact of Mandatory Sentencing on Indigenous Offenders* (Paper presented at Sentencing Conference, Canberra, 6-7 February 2010), p 1. At <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/Jackson-Hardy%20.pdf> (viewed 25 September 2013).

164 Smart Justice, *Mandatory Sentencing*. At http://www.smartjustice.org.au/resources/SMART_Mandatory.pdf (viewed 25 September 2013).

165 National Aboriginal and Torres Strait Islander Legal Services, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment in Australia* (March 2013), p 7. At http://vals.org.au/static/files/assets/1884b5ec/NATSILS_Submission_Justice_Reinvestment.pdf (viewed 25 September 2013).

166 *Sentencing Act 2008* (NT), s 78BA as amended by *Sentencing Amendment (Violent Offences) Act 2008* (NT).

167 *Sentencing Act 2008* (NT), s 78BA as amended by *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT).

sentences and does not increase community safety.

(ii) Women in corrections

The rate of Aboriginal and Torres Strait Islander women in custody has grown more quickly than any other demographic group during the past 20 years. Between 2000 and 2010 alone there has been a 59% increase in Aboriginal and Torres Strait Islander female imprisonment, compared to a 35% increase for Aboriginal and Torres Strait Islander males. Aboriginal and Torres Strait Islander women are 21.5 times more likely to be imprisoned than their non-Indigenous counterparts.¹⁶⁸

It is not just these alarming statistics but the significant needs and disadvantage of Aboriginal and Torres Strait Islander women in custody that have driven a human rights approach to this issue. Research in the *Social Justice Reports* in 2002 and 2004 highlighted the strong links between victimisation and offending, with one study finding 67% of Aboriginal women in custody in Western Australia had experienced abuse as an adult or child.¹⁶⁹

This group of women faces a very high level of homelessness, mental health treatment needs and consequent requirement for holistic post-release support services.¹⁷⁰ With 80% of Aboriginal and Torres Strait Islander women in Western Australia having children,¹⁷¹ the need for support extends across the generations to try and rebuild strong families which can help break the cycle of offending.

There have been some welcome developments in the past 20 years. As an example, we now have women and child units in some prisons; however, these initiatives are the exception rather than the rule.

Regardless, this sort of intervention is at the wrong end of the spectrum – we need more support services in order to prevent offending in the first place.

(iii) People with disabilities

One of the strengths of the Social Justice Commissioner's role is the ability to advocate for the most vulnerable. Aboriginal and Torres Strait Islander people with cognitive impairment,¹⁷² psychosocial disability, hearing impairment or other disability in the criminal justice system are by any measure some of the most vulnerable people in our community.

Research has shown that Aboriginal and Torres Strait Islander young people with a cognitive impairment have earlier contact with police and progress more quickly to custody from this contact, compared to the non-Indigenous group.¹⁷³

168 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage, Key Indicators 2011*, Productivity Commission (2011), p 4.133.

169 W Jonas, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), p 150. At http://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf (viewed 25 September 2013).

170 W Jonas, *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission (2005), pp 11-65. At <http://www.humanrights.gov.au/publications/social-justice-report-2004> (viewed 3 October 2013).

171 W Jonas, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2002), p 148. At http://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf (viewed 25 September 2013).

172 In using the word 'cognitive impairment', I am referring to a 'range of disorders relating to mental processes of knowing, including awareness, attention, memory, perception, reasoning and judgement'. I include intellectual disabilities, learning disabilities, acquired brain injury, foetal alcohol spectrum disorders, dementia, neurological disorders and autism disorders.

173 E Baldry, L Dowse and M Clarence, *People with Intellectual and other Cognitive Disability in the Criminal Justice System*, NSW Family and Community Services, Ageing, Disability and Home Care (2012), p 4. At http://www.adhc.nsw.gov.au/_data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf (viewed 25 September 2013)

Dr Calma produced a research report on the needs of this group of Aboriginal and Torres Strait Islander young people and made a number of recommendations around better practice in 2008,¹⁷⁴ which built on earlier work of the Commission in 2005.¹⁷⁵

Together with the Disability Discrimination Commissioner, Graeme Innes, I have continued to advocate on these issues. In some Australian jurisdictions,¹⁷⁶ when people with cognitive impairment are found to be unfit to plead to criminal charges, they become subject to mental health legislation. The result for some Aboriginal and Torres Strait Islander people with cognitive impairment has been indefinite detention.

The *Social Justice Report 2012* highlighted the cases of Marlon Noble and Christopher Leo.¹⁷⁷ Both of these men have been held in indefinite detention, although Marlon Noble, having already served over ten years of imprisonment, was released with strict conditions in 2011 following a sustained campaign for this freedom. Sadly these are not the only instances. Recent research has noted that there are 20 Aboriginal and Torres Strait Islander people being held indefinitely in the Northern Territory and Western Australia.¹⁷⁸

This indefinite detention of people with cognitive impairment is on the extreme end of the spectrum of barriers to access for justice for Aboriginal and Torres Strait Islander people with disabilities. More broadly we are seeing a criminalisation of care, where the criminal justice system is being used in the absence of adequate health and disability support services. For instance, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) have reported:

an increased use of Apprehended Violence Orders being used to control behavioural issues by schools, care workers and parents, rather than referring people displaying difficult behaviours to more appropriate health and welfare services because they are unavailable.¹⁷⁹

If treatment and services are not available, situations quickly escalate and can lead to criminal justice interventions.

This year, I have been involved in assisting with Commissioner Innes' work on access to justice for people with disability who need communication supports or who have complex and multiple support needs.¹⁸⁰ I have attended public meetings in Sydney, Perth, Port Hedland and Roebourne. A report on this work will be released in 2014.

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- 174 T Calma, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Australian Human Rights Commission (2008). At <http://www.humanrights.gov.au/publications/preventing-crime-and-promoting-rights-indigenous-young-people-cognitive-disabilities> (viewed 25 September 2013).
- 175 T Calma, *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems*, Human Rights and Equal Opportunity Commission (2005). At <http://www.humanrights.gov.au/publications/indigenous-young-people-cognitive-disabilities-and-australian-juvenile-justice-systems> (viewed 25 September 2013).
- 176 Detention can occur in prisons in Western Australia under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) and in the Northern Territory under the *Criminal Code Act 1983* (NT), Part IIA. Detention occurs in psychiatric hospitals in Queensland under the *Mental Health Act 2000* (Qld) and the *Forensic Disability Act 2011* (Qld) and in Tasmania under the *Tasmania Criminal Justice (Mental Impairment) Act 1999* (Tas).
- 177 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012). At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 25 September 2013).
- 178 M Sotiri, P McGee and E Baldry, *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, University of New South Wales (2012). At <http://www.pwd.org.au/systemic/adjc.html> (viewed 25 September 2013).
- 179 National Aboriginal and Torres Strait Islander Legal Services, *Submission to the Australian Human Rights Commission: Access to justice in the criminal justice system for people with a Disability* (August 2013), p 5.
- 180 Australian Human Rights Commission, *Access to justice in the criminal justice system for people with disability – Issues Paper* (2013). At <http://www.humanrights.gov.au/publications/access-justice-criminal-justice-system-people-disability-issues-paper-april-2013> (viewed 25 September 2013).

(iv) Justice reinvestment

Justice reinvestment is a criminal justice policy approach that diverts a portion of the funds from imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities.

Dr Calma was one of the first proponents of justice reinvestment in Australia, introducing the concept in the *Social Justice Report 2009*.¹⁸¹ Since 2009, justice reinvestment has been the subject of recommendations in a number of reports.¹⁸²

Most recently, the Senate Legal and Constitutional Affairs References Committee Inquiry into the value of a justice reinvestment approach to criminal justice in Australia made recommendations that the Australian Government should support justice reinvestment trials.¹⁸³

Justice reinvestment has been the subject of strong community advocacy. Along with high profile community members including NSW Governor Professor Marie Bashir, I have been a 'Champion' for the *Justice Reinvestment Campaign for Aboriginal Young People* in NSW.¹⁸⁴ Campaigns are also underway in Victoria, Western Australia, Queensland and the ACT.¹⁸⁵ NATSILS and Congress are leading the work at the national level.

At the community level, we are seeing some really exciting work about what justice reinvestment could look like in Australia. The Bourke community in far western NSW has invited me to work with them around justice reinvestment. I've visited twice this year and had some fantastic discussions about some of the challenges they are facing in terms of crime and imprisonment. I anticipate this work will be fully explored in next year's *Social Justice and Native Title Report*.

(g) Family violence

Perhaps more than any other issue, family violence in Aboriginal and Torres Strait Islander communities has sparked controversy and outrage. And with good reason – the levels of family violence in our communities are unacceptable.

181 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009). At http://humanrights.gov.au/social_justice/sj_report/sjreport09/index.html (viewed 25 September 2013).

182 Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/report/index.htm (viewed 25 September 2013); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing: Indigenous youth in the criminal justice system* (June 2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm (viewed 25 September 2013); Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (April 2010). At <http://indigenousjustice.gov.au/db/publications/285011.html> (viewed 25 September 2013); Legal and Constitutional Affairs References Committee, *Access to Justice* (December 2009). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/access_to_justice/report/index.htm (viewed 25 September 2013).

183 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013), pp xi-xii. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index (viewed 25 September 2013).

184 *Justice Reinvestment Campaign for Aboriginal Young People*. At <http://justicereinvestmentnow.net.au/> (viewed 25 September 2013).

185 See the Smart Justice Project in Victoria. At <http://www.smartjustice.org.au/> (viewed 14 February 2013); Justice Reinvestment Implementation Committee in Western Australia. At <http://www.deathscustody.org.au/prisonovercrowding> (viewed 25 September 2013); Project 10% in Queensland. At <http://www.project10percent.org.au/> (viewed 25 September 2013) and Justice Reinvestment Forum in the ACT. At http://ncis.anu.edu.au/events/past/jr_forum.php (viewed 25 September 2013).

Over the past 20 years, volumes have been written on the subject, with shocking findings in major inquiries in every jurisdiction in the country.¹⁸⁶ Social Justice Commissioners have added their voices to the chorus of condemnation but more importantly, they have contributed thoughtful research on the complexities of this issue.

The *Social Justice Report 2003* looked at the incidence, dynamics and government action on family violence.¹⁸⁷ This report was written at a time when ATSIC still existed and was working to address family violence at a national as well as regional level.

Dr Calma brought together research and consultation to develop a human rights-based approach to addressing family violence and abuse: see Text Box 1.10.

Text Box 1.10:

A human rights-based approach to addressing family violence and abuse in Aboriginal and Torres Strait Islander communities – key challenges¹⁸⁸

- turn government commitments into action
- ensure Indigenous participation
- support Indigenous community initiatives and networks
- provide human rights education in Indigenous communities
- don't forget our men and don't stereotype them as abusers
- look for positives and celebrate the victories
- re-assert our cultural norms and regain respect in our communities
- ensure robust accountability and monitoring mechanisms
- change the mindset of government from an approach which manages dysfunction to one that supports functional communities
- target need.

These challenges articulate the holistic, human rights based-approach that is still needed to guide work in this area.

186 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 359-411. At <http://www.humanrights.gov.au/publications/social-justice-report-2007-appendix-2> (viewed 25 September 2013).

187 W Jonas, *Social Justice Report 2003*, Human Rights and Equal Opportunity Commission (2003). At <http://www.humanrights.gov.au/publications/social-justice-report-2003-chapter-5-addressing-family-violence-indigenous-communities> (viewed 25 September 2013).

188 T Calma, *Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander communities - Key issues*, Human Rights and Equal Opportunity Commission (2006), pp 5-6. At <http://www.humanrights.gov.au/publications/ending-family-violence-and-abuse-aboriginal-and-torres-strait-islander-communities-key> (viewed 25 September 2013).

(i) Key Government initiatives

In 2003, then Prime Minister John Howard hosted a national roundtable on family violence. Consequently, COAG agreed to a *National Framework for Preventing Family Violence and Child Abuse in Indigenous Communities* in June 2004, which formed the beginning of bilateral agreements. COAG recommitted to this framework in 2006 and announced additional funding for a range of measures.¹⁸⁹

The release of the *Little Children are Sacred* Report in 2007 proved to be a game changer, leading to the introduction of the NTER, which has been discussed in section 1.2(c) above.

Efforts to address family violence and abuse have also been bolstered with the *National Plan to Reduce Violence Against Women and their Children*¹⁹⁰ in 2011 and the *National Framework for Protecting Australia's Children 2009–2020*.¹⁹¹ While these policies are not Indigenous specific, they have a significant focus on Aboriginal and Torres Strait Islander peoples. Early reporting on the implementation of these plans has been promising, although I note that we are yet to see any formal evaluation of their impact.

(ii) Access to justice

The specific legal needs of Aboriginal and Torres Strait Islander victims of family violence and abuse have been well documented over the past 20 years, but sadly, they are still poorly met.

Family Violence Prevention Legal Services (FVPLS) have been the main provider in this area. Despite the critical work that these services do in supporting victims, there are only 14 FVPLS in Australia covering 31 regional and remote areas.¹⁹² The funding guidelines restrict services in urban areas. As noted by the Congress, this is:

a major concern...given that 33% of Aboriginal and Torres Strait Islander people now live in capital cities. The policy of limiting the program to rural and remote locations fails to recognise many of the barriers that Aboriginal women face with trying to access mainstream services providers and FVPLS experience numerous cases where women who live in rural and remote locations relocate to urban areas for safety.¹⁹³

Additionally, I am told many women and children feel they are unable to access Aboriginal and Torres Strait Islander Legal Services (ATSILS) due to conflicts arising from these services taking on the representation of alleged offenders. In most cases, it will be the offender rather than the victim who is eligible for legal aid through ATSILS. This is because when a criminal charge is laid, most often it is the offender who will come to the attention of the ATSILS first and become a client of the service. The ATSILS are then unable to offer assistance to the victim.¹⁹⁴

189 COAG, *Communiqué – Meeting 14 July 2006* (2006). At http://archive.coag.gov.au/coag_meeting_outcomes/2006-07-14/index.cfm (viewed 25 September 2013).

190 COAG, *National Plan to Reduce Violence Against Women and their Children* (2011). At <http://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children> (viewed 25 September 2013).

191 COAG, *National Framework for Protecting Australia's Children 2009–2020* (2009). At http://www.fahcsia.gov.au/sites/default/files/documents/child_protection_framework.pdf (viewed 25 September 2013).

192 National Congress of Australia's First Peoples, *National Justice Policy* (2013), p 21. At <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (viewed 3 September 2013).

193 National Congress of Australia's First Peoples, *National Justice Policy* (2013), p 21. At <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (viewed 3 September 2013).

194 Australian Human Rights Commission, *Submission to Senate Legal and Constitutional Affairs Committee on Access to Justice* (20 October 2009), para 23. At <http://www.humanrights.gov.au/inquiry-access-justice-2009> (viewed 25 September 2013).

(iii) Telling positive stories about addressing family violence and abuse

One of the things missing in the rush to implement the NTER was a consideration of the positive actions of Aboriginal and Torres Strait Islander communities to address family violence and abuse themselves. In the *Social Justice Report 2007*, Dr Calma provided 19 diverse case studies in the areas of:

- Community education and community development
- Healing
- Alcohol management
- Men's groups
- Family support and child protection
- Safe Houses
- Offender Programs.¹⁹⁵

This shows a depth of capacity, commitment and tenacity in our communities and challenges the stereotype of our people as passive victims unable to deal with problems.

Given the negative stereotypes around Aboriginal and Torres Strait Islander men as violent perpetrators, it has also been important to recognise the strong stand many men have taken against violence. In particular, in July 2008 a summit on Indigenous men's health in Alice Springs issued the Inteyerrkwe Statement:

We the Aboriginal males from Central Australia and our visitor brothers from around Australia gathered at Inteyerrkwe in July 2008 to develop strategies to ensure our future roles as husbands, grandfathers, fathers, uncles, nephews, brothers, grandsons, and sons in caring for our children in a safe family environment that will lead to a happier, longer life that reflects opportunities experienced by the wider community. We acknowledge and say sorry for the hurt, pain and suffering caused by Aboriginal males to our wives, to our children, to our mothers, to our grandmothers, to our granddaughters, to our aunts, to our nieces and to our sisters.¹⁹⁶

This statement is just one example of the positive contributions that men are making in this area.

I've carried this vision of telling positive stories into my term as well. After taking on the role of Social Justice Commissioner, one of my first visits was to Fitzroy Crossing. I saw the courageous steps that the communities of Fitzroy Valley had taken to address issues of alcohol abuse and its related harms including violence. I saw transformative change as a result of community-initiated alcohol restrictions. This was led by strong women such as June Oscar and Maureen and Emily Carter, and was supported by the cultural leadership of the communities through Kimberley Aboriginal Law and Culture Centre and some of the men of the Fitzroy Valley.

(h) Education

Education is a complex topic that could easily fill this entire report. Like previous Social Justice Commissioners, I am concerned about school attendance and access to quality education services. It has

195 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007). At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (25 September 2013).

196 Aboriginal Male Health Summit 2008, 'Inteyerrkwe Statement' (Media release 3 July 2008). At http://www.nirs.org.au/images/stories/Feature_material/malehealthsummit2008sorry.pdf (viewed 25 September 2013).

been pleasing to see education elevated through its inclusion into the Closing the Gap targets¹⁹⁷ and given the attention it deserves as a mechanism for breaking the cycle of disadvantage in our communities.

However, past *Social Justice Reports* have primarily concentrated on access to bilingual education, remote education and the impact of the NTER on education. Concerns have been raised about the right to education for Aboriginal and Torres Strait Islander peoples – particularly through access to bilingual education – and the role that education should play in the preservation of our languages and culture.

(i) Bilingual education

Bilingual education programs involve the teaching of Aboriginal and Torres Strait Islander children in traditional Aboriginal and Torres Strait Islander languages.¹⁹⁸ Given that English might be the second, third or even fourth language for some children, primarily from remote communities, it makes sense to me that we start teaching these children in a way to which they can relate. Further, there is clear evidence that bilingual education is vital to children's psychomotor, affective and cognitive development.¹⁹⁹

Bilingual education is an important means of maintaining and revitalising language and cultural traditions through the formal education system. It has been shown to be an appropriate model for the delivery of educational services and outcomes to Indigenous children.²⁰⁰

Bilingual education had its beginning back in the Whitlam era. It began in the Northern Territory as a Federal Labor initiative in December 1972. By March 1973, the first Northern Territory bilingual education programs were being implemented.²⁰¹

The Northern Territory is the only place in Australia where there has been a formal Australian Government policy to implement bilingual education. In most of Australia's other states and territories, implementation of language programs is left to the discretion of local school administrations and school principals.²⁰²

In 1998, the Northern Territory Government announced that bilingual education programs in Aboriginal communities would be phased out. Reflecting concerns about this approach, Dr Jonas wrote in the *Social Justice Report 1999* about the importance of bilingual education in relation to our rights to an education, appropriate recognition of cultural difference, and self-determination.²⁰³ The right to education means there must be proper recognition and attempts to incorporate cultural and linguistic traditions.²⁰⁴

In an analysis of bilingual education programs, Dr Jonas considered the obligation of governments to realise

197 See chapter 3 for discussion of Closing the Gap framework.

198 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), p 104. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

199 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), p 105. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

200 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), p 103. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

201 B Devlin, *NT Bilingual education: The debate about its effectiveness and value*, (Paper for the AIATSIS Research Symposium on Bilingual Education in the Northern Territory: Principles, policy and practice, Canberra, 26 June 2009), p 4. At http://www.abc.net.au/4corners/special_edts/20090914/language/docs/Devlin_paper.pdf (viewed 25 September 2013).

202 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 59. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

203 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), ch 4. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

204 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), p 116. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

the full enjoyment of the right to education.²⁰⁵ He also examined how realising this right is intrinsically linked to promoting a form of education that is accessible.²⁰⁶ Dr Jonas concluded that the removal of bilingual education programs does not meet the human rights obligation to ensure that education is accessible.²⁰⁷

Bilingual education was further dismantled in 2008, with the Northern Territory Government implementing a policy that would mandate that the first four hours of school be conducted in English.²⁰⁸ Dr Calma reported in the *Social Justice Report 2009* that:

The policy means language and culture activity is relegated to the last hour and a half of the school day... a time when quality learning is challenging. The four hours of English policy does not claim to abolish bilingual education, though there is no doubt that it will have that effect.²⁰⁹

In 2012, the *Framework for Learning English as an Additional Language* replaced the policy of compulsory teaching in English. This policy has a focus on learning in English, while home/local languages can be used where appropriate.²¹⁰ I welcome this more flexible approach but am concerned that any language programs need to be adequately resourced.

(ii) The right to education under the NTER

In 2007, the announcement of the NTER included income management measures to ensure that children attended school. However, the income management scheme presupposed that children in the Northern Territory had access to ordinary educational opportunities.

At the time the number of school-aged children without access to primary and secondary education was 'significant'.²¹¹ The combined Aboriginal Peak Organisations of the Northern Territory (APO NT) reported a severe shortage of educational services such as class rooms, teachers and preschool options.²¹²

Dr Calma emphasised the importance of providing children with incentives to learn and he argued that methods of teaching that resonate with Aboriginal and Torres Strait Islander students are preferable to measures that penalise parents.²¹³

(iii) Remote Education

Aboriginal and Torres Strait Islander students in remote schools often experience significant educational

205 As set out in the *International Covenant on Economic, Social and Cultural Rights*, 1966, art 13. Also see art 2(2) which requires that States undertake to guarantee that the rights in the Covenant, such as education, can be exercised without discrimination as to race, colour or other status.

206 See the *Convention on the Rights of the Child*, 1989, art 29(1)(c), which states that the education of a child shall be directed to the 'development of respect for the child's parents, his or her own cultural identity, language and values...'

207 W Jonas, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission (1999), p 118. At <http://www.humanrights.gov.au/publications/1999-social-justice-report> (viewed 25 September 2013).

208 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 7. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

209 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), p 93. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

210 Department of Education and Training, *Framework for Learning English as an Additional Language*, Northern Territory Government (2011), p 1. At <http://www.education.nt.gov.au/about-us/policies/documents/schools/framework-for-learning-english-as-an-additional-language> (viewed 25 September 2013).

211 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), p 279. At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (viewed 25 September 2013).

212 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), p 279. At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (viewed 25 September 2013).

213 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), ch 3. At <http://www.humanrights.gov.au/publications/social-justice-report-2007> (viewed 25 September 2013).

disadvantage. Consequently, their English literacy and numeracy skills are at lower levels than those of other Australian students.²¹⁴

In 2008, Dr Calma highlighted large gaps in the provision of education services in remote Australia and encouraged governments to assess the availability of quality education services in remote Australia.²¹⁵

Remoteness limits access to educational services as well as other resources such as libraries and information technology. Road access may be limited during particular times of the year and during wet season periods, there may be no access for months on end.²¹⁶

Each school and each community is unique with its own strengths and challenges.²¹⁷ In remote communities many of the resources and options we take for granted in urban communities simply don't exist. Pre and post-school options are often limited or non-existent and there is likely to be limited employment in the region.²¹⁸

While I welcome the significant investment in preschool education through Closing the Gap, the gap in education outcomes between Aboriginal and Torres Strait Islander and non-Indigenous students is still confounding. For example, the National Indigenous Reform Agreement reported that there were no significant improvements in Indigenous numeracy in any year or jurisdiction between 2008 and 2012. The gap between Indigenous and non-Indigenous students widened further in Years 3, 5 and 7 between 2008 and 2012.²¹⁹ However, the gap in literacy between Indigenous and non-Indigenous student showed a decline between 2008 and 2012 for Years 3, 5 and 7 but increased in Year 9.²²⁰

Dr Calma advocated for a partnership between Aboriginal and Torres Strait Islander people and governments to improve education in remote Australia. Decisions about educational approaches and resources must be made at the community level and bureaucracies must be in a position to respond to requirements on a community-by-community basis.²²¹

(iv) Aboriginal and Torres Strait Islander educators

The recruitment and retention of Aboriginal and Torres Strait Islander teaching staff is a significant challenge for education. While Aboriginal and Torres Strait Islander culture can be supported through appropriate curricula, Aboriginal and Torres Strait Islander staff are essential to our children engaging and participating in the education system.²²²

214 COAG Reform Council, *Indigenous Reform 2011-12: Comparing Performance Across Australia* (2013), p 37. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 25 September).

215 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 96. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

216 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 98. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

217 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 103. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

218 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 106. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

219 COAG Reform Council, *Indigenous Reform 2011-12: Comparing performance across Australia, Key Findings*. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 25 September 2013).

220 COAG Reform Council, *Indigenous Reform 2011-12: Comparing performance across Australia, Key Findings*. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 25 September 2013).

221 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 107. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

222 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 121. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

While Aboriginal and Torres Strait Islander teachers represent the gold standard of education delivery, overall teacher shortages have meant that getting consistent teaching staff has been a challenge. This has impacted on regional and remote schools for decades and has had a disproportionately negative impact on Aboriginal and Torres Strait Islander students because shortages are more likely to be in remote locations.²²³

There is an imperative for government and non-government education providers to act on recruitment and retention strategies for Aboriginal and Torres Strait Islander and non-Indigenous teachers in remote areas. Education providers should ensure they attract the best, brightest and most appropriate teachers to remote schools where the education challenges are greatest.²²⁴

(v) Aboriginal and Torres Strait Islander human rights and the Australian Curriculum

Learning about our culture, languages and histories is not just for Aboriginal and Torres Strait Islander children and young people. Education can also be the first step towards greater understanding and reconciliation. The national Australian Curriculum provides significant opportunities for all children and young people to learn about Aboriginal Torres Strait Islander histories and cultures, and develop knowledge and understanding about the human rights of Aboriginal and Torres Strait Islander peoples.

The Commission has been engaged in the curriculum development process and has advocated for the inclusion of curriculum content that promotes and protects the rights of Aboriginal and Torres Strait Islander peoples. The Commission is also developing human rights education resources for teachers and students that are linked to the Australian Curriculum.

The Australian Curriculum also includes a *Framework for Aboriginal and Torres Strait Islander Languages* (Framework).²²⁵ The Framework provides a basis for all schools in Australia to support the teaching and learning of Aboriginal and Torres Strait Islander languages.

The Commission welcomes the Framework and its specific reference to the Declaration.²²⁶ However, I am concerned that it does not address issues such as the availability of financial resources to compensate relevant communities for developing, implementing or teaching local languages and the need for State and Territory governments to develop and implement supportive policies. These are consistent with issues raised by Dr Calma in the *Social Justice Report 2009*.²²⁷

While there are still significant challenges in implementing the Framework, I am optimistic about the opportunities that it presents for all Australian students. Learning about our shared history, our cultures and our languages is one of the first steps in building strong relationships. I am a firm believer that the future starts with our children.

223 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 126. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

224 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), pp 132-33. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

225 ACARA, *Draft Framework for Aboriginal and Torres Strait Islander Languages* (2013).

226 ACARA, *Draft Framework for Aboriginal and Torres Strait Islander Languages* (2013), p 3; *United Nations Declaration on the Rights of Indigenous Peoples* GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 25 September 2013).

227 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2010), ch 3. At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 25 September 2013).

(i) Recognition of our human rights in the *United Nations Declaration on the Rights of Indigenous Peoples*

The connection between international human rights standards and the everyday challenges facing our people has been one of the unique contributions of Social Justice Commissioners. Having the office of Social Justice Commissioner sit within Australia's National Human Rights Institution (NHRI) ensures that the position is 'uniquely placed to operate as a bridge between the international human rights system and the on-the-ground reality experienced by indigenous peoples.'²²⁸ It also ensures that the Commission maintains a specific agenda on Indigenous rights at all times and has been described as 'an exceptional model for advancing the recognition and protection of the rights of Indigenous peoples'.²²⁹

Social Justice Commissioners have been heavily involved in the development of the Declaration over the last 20 years. More than two decades in the making, it is perhaps the most significant milestone for Indigenous rights at the international level.

(i) Drafting the Declaration

The Declaration had its genesis as far back as the 1960s but gained traction in the United Nations Economic and Social Council Working Group on Indigenous Populations (Working Group). The Working Group had a mandate to develop international standards concerning the rights of Indigenous peoples and in 1985, it began drafting the Declaration on the Rights of Indigenous Peoples.

During his term as Social Justice Commissioner, Professor Dodson attended the Working Group and reported on the progress of the draft Declaration. He outlined the challenges in the drafting of the Declaration in the *Social Justice Report 1993*:

From its inception the United Nations reflected the Western European values and perspectives of its founding Member States, which were predominantly colonial powers or States descended from them. Member States articulated respect for individual rights of citizens within their countries without regard for the distinctive position and cultures of the original inhabitants who were caught inside these imposed nation States.²³⁰

While the challenges were great, the Working Group's draft Declaration, as passed to the Sub-Commission on the Promotion and Protection of Human Rights, provided that Indigenous peoples have the right to self-determination, and used the same language as that contained in Article 1 of both the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.²³¹ The draft Declaration also had a heavy emphasis on the recognition of the collective rights as opposed to individual rights.

Text Box 1.11 outlines the major developments in the drafting the Declaration.

228 Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (2013), p 40. At <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> (viewed 21 October 2013).

229 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: The situation of indigenous peoples in Australia*, UN Doc A/HRC/15/37Add.4 (2010), para 78. At <http://unsr.jamesanaya.org/PDFs/Australia3.pdf> (viewed 25 September 2013).

230 M Dodson, *Social Justice Report 1993*, Human Rights and Equal Opportunity Commission (1993), p 110. At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 21 October 2013).

231 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 62. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 21 October 2013).

Text Box 1.11:A timeline of drafting the Declaration²³²

Year	Development
1971	The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities appointed Martinez Cobo as Special Rapporteur to conduct a comprehensive study on discrimination against indigenous populations.
1982	The United Nations Economic and Social Council Working Group on Indigenous Populations was established.
1993	The Working Group completed the Draft Declaration and it began its passage to the Commission on Human Rights.
2004	At the tenth session of the inter-sessional working group of the Commission on Human Rights, a group of countries led by New Zealand and Norway introduced an amended text of the Draft Declaration for negotiation.
2005- 2006	The 'Chairman's Text' formed the basis of negotiations at the eleventh session of the inter-sessional working group of the Commission on Human Rights in 2005 and 2006.
2006	The Draft Declaration was adopted by the Human Rights Council.
2007	The Declaration was adopted by the United Nations General Assembly.
2009	The Australian Government formally supported the Declaration. ²³³

232 Unless otherwise specified, information in this table is drawn from Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (2013), p 4. At <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf> (viewed 25 September 2013); C Charters and R Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (2009). At <http://www.internationalfundations.org/documents/MakingtheDeclarationWork.pdf> (viewed 25 September 2013).

233 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009).

(ii) Indigenous participation

Indigenous participation was critical to the drafting of the Declaration so it was concerning when procedural issues potentially became a barrier for that participation. At the time, United Nations' procedures dictated that the draft Declaration would pass through the Sub-Commission on the Promotion and Protection of Human Rights, then to the Commission on Human Rights and to the Economic and Social Council before it would be put to the General Assembly for adoption.²³⁴ Unlike the Working Group on Indigenous Populations, the Commission on Human Rights was a body comprised of States, which meant a greater role for States in the drafting of the Declaration. For many Indigenous peoples, this was seen as a major risk and there were strong views that Indigenous people needed to be present to represent our views and advocate our rights. Professor Dodson articulated those concerns in the *Social Justice Report 1995*:

For many Indigenous peoples, asking them to trust their governments to take over the drafting is asking them to trust the very people who murdered their people, sold-off their land and destroyed their environment.²³⁵

To allay some of these concerns, the Commission on Human Rights adopted a resolution to set up the open-ended inter-sessional Working Group allowing for Indigenous organisations without Economic and Social Council status to participate in the Commission on Human Rights Working Group.²³⁶ The final resolution also authorised the Commission on Human Rights to elaborate a new draft Declaration taking into consideration the existing draft. Indigenous peoples feared that the existing draft, a product of 12 years of intensive negotiation with and among Indigenous peoples, would be cast to the side, and then States would proceed to develop a new declaration.²³⁷

In 1995, Professor Dodson wrote about the strength of the Australian Government's position both on supporting Indigenous peoples' participation in the process and its overall support of the Draft Declaration and willingness to lobby other governments.²³⁸ He emphasised the need for the Australian Government to maintain its current position and not undermine the process and 'sell-out' when it came to the crunch.²³⁹

(iii) Adoption of the Declaration

The draft Declaration was sent to the General Assembly for adoption in 2006. It was at this point in the negotiations that the Australian Government presented its objections to the draft Declaration in a joint statement with the governments of New Zealand and the United States of America. The objections related specifically to 'concerns over provisions on self-determination, land and resources rights and the language giving indigenous peoples a right of veto over national legislation and State management of resources.'²⁴⁰

234 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 62. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 21 October 2013).

235 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 89. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 25 September 2013).

236 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 92. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 25 September 2013).

237 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 93. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 25 September 2013).

238 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), pp 93-94. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 25 September 2013).

239 M Dodson, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), p 94. At <http://www.humanrights.gov.au/publications/1995-social-justice-report> (viewed 25 September 2013).

240 United Nations Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward Towards Human Rights For All, Says President', sixty first General Assembly Meeting, UN Doc GA/10612, (Media Release 13 September 2007). At <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (viewed 21 October 2013).

There were also concerns that the provisions on lands, territories and resources were particularly unworkable by requiring the ‘recognition of Indigenous rights to lands now lawfully owned by other citizens.’²⁴¹

Dr Calma rejected these concerns on the basis that they were not interpreting the Declaration according to the principles of good faith, respect for human rights and equality and non-discrimination.²⁴² The Global Indigenous Peoples Caucus had played a persistent role in lobbying the States during the drafting process; they maintained that:

One of the most important outcomes has been that throughout all of our expressions, sometimes in our own languages, we have succeeded in educating the international community about the status, rights and lives of indigenous peoples in every corner of the world.²⁴³

The Declaration was adopted in 2007. At the time of its passage, Australia was one of only four countries to vote against the Declaration in the General Assembly.²⁴⁴ This was despite the Australian Government stating prior to the 2007 federal election, that its official position would be to maintain its long-term policy of support for the Declaration.²⁴⁵

Following its adoption by the United Nations General Assembly, Dr Calma advocated continuously on the need for the Australian Government to publicise their support for the Declaration and that further actions of support should include:

- a range of social and cultural steps to support the use of the Declaration as a standard within Australia
- using the Declaration as a tool to guide legal reform for Australian human rights protection mechanisms.²⁴⁶

The Australian Government reversed its decision and formally gave its support for the Declaration in 2009.

(iv) Implementing the Declaration

I have said time and time again, the Declaration should be used as the overarching framework to guide the realisation of the rights of Aboriginal and Torres Strait Islander peoples and as the benchmark against which the actions of the Australian Government are assessed.²⁴⁷ Despite years of advocacy by former Social Justice Commissioners, it is time to breathe life into the Declaration and give full effect to the rights contained within it.

241 A Eide, ‘The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples’, in C Charters and R Stavenhagen (eds), *Making the Declaration Work* (2009), p 40. At <http://www.internationalfund.org/documents/MakingtheDeclarationWork.pdf> (viewed 25 September 2013).

242 T Calma, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2006), p 237. At <http://www.humanrights.gov.au/publications/social-justice-report-2006-report-contents> (viewed 25 September 2013).

243 Global Indigenous Peoples’ Caucus, *Closing statement – Human Rights Council* (30 June 2006). At <http://www.humanrights.gov.au/publications/declaration-rights-indigenous-peoples-indigenous-peoples-caucus-closing-statement> (viewed 25 September 2013).

244 Australia along with Canada, New Zealand and the United States of America voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in the General Assembly in New York on 13 September 2007. United Nations Department of Public Information, ‘General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward Towards Human Rights For All, Says President’, sixty first General Assembly Meeting, UN Doc GA/10612 (Media Release 13 September 2007). At <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (viewed 21 October 2013).

245 T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 30. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

246 See T Calma, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 31. At <http://www.humanrights.gov.au/publications/social-justice-report-2008> (viewed 25 September 2013).

247 M Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2011), p 10. At <http://www.humanrights.gov.au/publications/social-justice-report-2010> (viewed 25 September 2013).

Australia has an opportunity to demonstrate international leadership by committing to a comprehensive plan for implementing the Declaration. Since my appointment in 2010, I have continually made recommendations to the Australian Government to work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the full implementation of the Declaration.

I will further discuss the practical aspects of the implementing the Declaration including the development of a national implementation strategy in chapter 3.²⁴⁸

248 I report on the international mechanisms for the Report Period of 1 July 2012 to 30 June 2013 in Appendix 2.

1.3 Conclusion

In April 2013, I attended a Governance Summit convened by the APO NT in Tennant Creek at which men, women and young people from across the Territory came together to talk about the importance of governance within their communities and organisations.²⁴⁹ The key theme that I took away from the Summit was the need to learn from our past in order to create a strong future. I have set out to do something similar in this chapter, albeit in a modest way, by looking back over the past 20 years of the Social Justice Commissioners' role.

I am pleased that there has been some progress. However, it is not across the board. We simply cannot be satisfied because our life chances do not equal those of the rest of the Australian population; we are not recognised in the Australian Constitution; and our human rights are not realised to the same extent as those of other Australians.

There is great deal we can learn by studying the progress reported in this chapter. I am struck by the constant churn of change and the consequences of not giving good programs the time and freedom from interference to make measurable impacts.

I also see three consistent themes: rights, relationships and responsibilities.

Many of the issues in this chapter have been about our rights not being met – whether this is through the examples of health inequality, discrimination in terms of our over-representation in the criminal justice system, or the failure of governments to recognise our right to self-determination.

Relationships underpin much of the positive change we have seen in this period. For instance, the apology helped heal the relationship between Aboriginal and Torres Strait Islander peoples and the broader Australian public. And I believe constitutional recognition will be the next step in strengthening this relationship.

Finally, responsibilities are what the Government must do to meet their obligations to ensure we achieve equity with the rest of the Australian population. But it is also about Aboriginal and Torres Strait Islander peoples taking responsibility. For example, looking at the NTER, the Government further disempowered Aboriginal people through its policies, rather than putting us in control and supporting us to take responsibility for the issues facing our communities.

These three themes – rights, relationships and responsibilities – will help us to define the way forward as I outline a roadmap for the future in chapter 3.

249 Aboriginal Peak Organisations Northern Territory, *Strong Aboriginal Governance Report* (2013). At <http://apont.org.au/index.php/governance-summit.html> (viewed 14 October 2013).

Chapter 2:

Looking back on 20 years of native title and the Social Justice Commissioner role

2.1 Introduction **72**

2.2 Looking back on 20 years of native title **73**

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2.1 Introduction¹

Successive Aboriginal and Torres Strait Islander Social Justice Commissioners (Social Justice Commissioners) have always shown constant leadership and advocacy in reporting on Aboriginal and Torres Strait Islander peoples' rights to our lands and waters in the 19 *Native Title Reports* written between 1994 and 2012.² These Reports consistently show that social justice is entwined with our relationship to our lands and waters, and our right to protect and respect culture.

Native Title Reports by Social Justice Commissioners over the past 20 years reflect the statutory requirement in section 209 of the *Native Title Act 1993* (Cth) (Native Title Act) for the role of the Commissioner to report on the effect of the Act 'on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders'.³

Professor Dodson, in the first *Native Title Report*, remarked that while there are other statutory bodies that also report on native title, the role of the Social Justice Commissioner is:

uniquely charged with monitoring the legislation in terms of its impact on the human rights of Aboriginal and Torres Strait Islander peoples. I undertake this responsibility as an Aboriginal person and as the Social Justice Commissioner from the perspective of Indigenous Australians.⁴

However, the *Native Title Reports* represent far more than Social Justice Commissioners simply complying with legislation. As Aboriginal and Torres Strait Islander peoples who have lived continuously in this country for more than 70 000 years, our relationships to our lands, territories and resources are the foundation of our cultural, social and economic lives. And so for Social Justice Commissioners, reporting on native title is a crucial part of reporting on the exercise and enjoyment of our human rights.

Looking back at 20 years of Reports provides a remarkable view of native title. It illustrates our celebrations, but also our frustrations, to access our rights to traditional lands and waters.

1 A report on the key developments in native title for the period 1 July 2012 to 30 June 2013 is set out in Appendix 3.

2 Available at <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

3 *Native Title Act 1993* (Cth), s 209(1).

4 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 2. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

2.2 Looking back on 20 years of native title

(a) The *Mabo* decision

In 1992, the *Mabo*⁵ decision by the High Court established a fundamental change to how our rights and interests in our traditional lands and waters were – and continue to be – considered by governments, courts, industry and the wider Australian community.

Mabo overturned the myth of *terra nullius* by finding that native title had survived the British occupation of our lands. Importantly, it acknowledged our human rights as Indigenous peoples to the lands and waters that we have traditionally owned and occupied.

As the first Social Justice Commissioner appointed shortly after the *Mabo* decision, Professor Dodson explained the significance of the High Court judgement for Aboriginal and Torres Strait Islander peoples:

[We] have been here for a long, long time. The British came along, took our country without our consent, decimated the population, and ignored any rights we may have had. They asserted in fact that we had no rights. That was wrong of course. And that remained unaddressed for two centuries or more. That's what *Mabo* meant [for Aboriginal and Torres Strait Islander peoples] – *Mabo* addressed that wrong.⁶

Mabo recognised at common law what Indigenous Australians already knew; that we have maintained native title to our lands and waters in accordance with our laws and customs. And we have done this despite enduring more than 200 years of colonisation and government policies that removed many Aboriginal and Torres Strait Islander peoples from their traditional lands.

But it was the *Mabo* decision that instigated the Australian Government to deliver the Native Title Act which recognised in legislation the continuing connection of Aboriginal and Torres Strait Islander peoples to our lands and waters.

(b) Negotiating the Native Title Act

Following *Mabo*, then Prime Minister Paul Keating led the process to develop a legislative framework that would protect the integrity of the *Mabo* decision and establish a system that would deal with future native title claims.⁷

As I recalled in chapter 1, the early 1990s were days of hope and optimism for Aboriginal and Torres Strait Islander peoples. And this optimism was strengthened further by the *Mabo* decision. But while *Mabo* and the Prime Minister's subsequent proposal to support native title in legislation was welcomed by many Australians, it also triggered scare-mongering amongst others – particularly state governments, and mining and pastoralist groups – who feared that native title would harm their interests in land.⁸

It was within this context of high emotions and conflicting interests that the Prime Minister commenced negotiations for the proposed Native Title Act.

5 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

6 M Dodson, 'Judgement Day', ABC Four Corners (7 May 2012). At <http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm> (viewed 20 September 2013).

7 P Keating, 'Judgement Day', ABC Four Corners (7 May 2012). At <http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm> (viewed 20 September 2013).

8 See 'Judgement Day', ABC Four Corners (7 May 2012). At <http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm> (viewed 20 September 2013).

These negotiations brought together Aboriginal leaders who were invited to directly reach a deal with the Prime Minister. The Social Justice Commissioner at the time, Professor Dodson, played a leadership role in these negotiations. He has observed that the negotiation process was ‘something different for the [Aboriginal] leadership, probably the first time when we had such a huge issue being directly negotiated with the Prime Minister.’⁹

Following a protracted negotiation process that involved both public protests by Aboriginal and Torres Strait Islander peoples and private negotiations between the Prime Minister and Aboriginal leaders, the Native Title Act passed through Parliament 18 months after the *Mabo* decision.

(c) The objectives of the Native Title Act

The Native Title Act, as it was written in 1993, ‘endeavoured to accommodate the realities of the past and provide a fair way to deal with land in the future, based on contemporary notions of justice’.¹⁰ This is reflected in the Preamble to the Native Title Act which states that in enacting the law, the people of Australia intend:

- a. to rectify the consequences of past injustices...for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- b. to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.¹¹

As observed by Professor Dodson, the provisions of the Native Title Act ‘constitute an attempt to balance many competing interests.’¹² Again this is shown in the Preamble to the Act, which acknowledges that it is ‘particularly important to ensure that native title holders are now able to enjoy fully their rights and interests’; but also states that ‘native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates’.¹³

Sadly, the Native Title Act as it was drafted in 1993 reflects the high water mark in terms of our native title. I will discuss later how the interaction of case law and the political context led to subsequent amendments to the Act.

(d) Key themes in the Native Title Reports

The *Native Title Reports* show the inextricable connection between native title and our lands, territories and resources by not only reporting on the native title system but also by discussing a wide range of matters that affect these lands, territories and resources. For example, Social Justice Commissioners have addressed the following topics in the Reports:

- Provisions in the Native Title Act and legislative amendments to the Act. This has included explaining provisions in the legislation, highlighting deficiencies in the legislation that affect the

9 M Dodson, ‘Judgement Day’, ABC Four Corners (7 May 2012). At <http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm> (viewed 20 September 2013).

10 Z Antonios, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), p 11. At <http://www.humanrights.gov.au/publications/native-title-reports#1998> (viewed 14 October 2013).

11 *Native Title Act 1993* (Cth), preamble.

12 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 11. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

13 *Native Title Act 1993* (Cth), preamble.

rights of Aboriginal and Torres Strait Islander peoples, and recommending changes to rectify these deficiencies.

- Native title processes such as the registration test, future acts, the right to negotiate and Indigenous Land Use Agreements (ILUAs). For example, in the *Native Title Report 1996*, the right to negotiate was highlighted as an essential mechanism to balance Indigenous and non-Indigenous interests through the Native Title Act.¹⁴
- The organisations that operate in the native title system. These include Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), Prescribed Bodies Corporate (PBCs),¹⁵ the National Native Title Tribunal, the Federal Court of Australia, and federal and state government agencies.¹⁶
- Climate change and water rights. The *Native Title Report 2008* analysed climate change policies and legislation, particularly focusing on the impact of climate change on Aboriginal and Torres Strait Islander peoples, and opportunities from climate change policies for native title holders.¹⁷ This Report also discussed access to cultural water rights to fulfil cultural responsibilities (such as environmental conservation) and the lack of protection of these rights to water under the legislative framework that governs water resources.¹⁸
- Economic development and resource management. A number of *Native Title Reports* have considered how to balance competing economic interests within the native title system.¹⁹ This has included issues such as the desire for certainty over land tenure by mining and pastoralist interests, and opportunities for using native title to achieve economic development for Aboriginal and Torres Strait Islander peoples.
- Protecting Indigenous knowledge and developing protocols around the use, access and ownership of Indigenous knowledge that includes a protection regime similar to copyright and patenting.²⁰

Reviewing these topics, the Social Justice Commissioners reflect on the following key themes throughout the Reports.

14 Also see M Dodson, *Native Title Report 1995*, Human Rights and Equal Opportunity Commission (1995), chs 3 and 4; M Dodson, *Native Title Report 1996*, Human Rights and Equal Opportunity Commission (1996), chs 2 and 5; W Jonas, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2000), ch 4; W Jonas, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission (2001), ch 1. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

15 A Prescribed Body Corporate may also be referred to as a Registered Native Title Body Corporate: *Native Title Act 1993* (Cth), s 253.

16 For example, see W Jonas, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission (2001), ch 2; T Calma, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2007), chs 3 and 5. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

17 For example, see T Calma, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2009), chs 4 and 5. At <http://www.humanrights.gov.au/publications/native-title-report-2008> (viewed 13 September 2013).

18 For example, see W Jonas, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2000), ch 3; T Calma, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2009), ch 6. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

19 For example, see M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1995), ch 5; T Calma, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2005), chs 1 and 3; T Calma, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), chs 2, 3, 5 and 6. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

20 For example, see T Calma, *Native Title Report 2008*, Human Rights and Equal Opportunity Commission (2009), ch 7. At <http://www.humanrights.gov.au/publications/native-title-report-2008> (viewed 13 September 2013).

(i) Native title recognises our fundamental human rights to our lands, territories and resources as the First Australians

The High Court decision in *Mabo* was founded on human rights. Justice Brennan said in his judgement:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.²¹

This was also observed by Professor Dodson, who stated that the ‘recognition of native title [i]s more than a recognition of Indigenous property interests, it is also about the recognition of our human rights’.²² He further remarked that the international instruments of human rights ratified by Australia are ‘relevant to native title in that they protect property against arbitrary and discriminatory interference and...provide rights to the free exercise of culture’.²³

The international human rights instruments – including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *International Convention on the Elimination of all forms of Racial Discrimination* – have been consistently used by Social Justice Commissioners to assess the status of the native title system.

More recently, I have reported on native title in view of our human rights set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration). In the *Native Title Report 2010*, I considered how consultation and our right to free, prior and informed consent apply in the native title system;²⁴ and the *Native Title Report 2012* looked at the governance of PBCs through the human rights lens of the Declaration.²⁵

Notably, international human rights mechanisms have criticised the Australian Government in relation to the Native Title Act. In 2010, the Committee for the Elimination of Racial Discrimination (CERD) reiterated:

...in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5).²⁶

(ii) Common law decisions and amendments to the Native Title Act have diminished our rights and interests in native title

The promise of the *Mabo* decision and the Native Title Act as drafted in 1993 has not been fully realised. Subsequent decisions made in the Federal and High Courts, and successive amendments made to the Native Title Act by governments have played a key role in the failure of the native title system to meet expectations.

21 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

22 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 12. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

23 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 12. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

24 M Gooda, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 57–102. At <http://www.humanrights.gov.au/publications/native-title-report-2010> (viewed 13 September 2013).

25 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 101–126. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 13 September 2013).

26 Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by states parties under article 9 of the convention*, seventy seventh session UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/> (viewed 14 October 2013).

Explaining the effect of common law decisions on the Native Title Act, Professor Dodson remarked that:

A notable feature of the NTA [Native Title Act] is its dependence on the common law to give substance to its provisions. For example, the crucial definition of native title in the Act is open-ended, it picks up the common law as articulated by the judges in *Mabo [No.2]* but it does not guide or restrict the development of that definition in future judicial decisions. Another important example of the NTA's deference to common law is that it does not make any provision about the effect on native title of valid past grants of interests.²⁷

Nonetheless, while the High Court decision in *Wik Peoples v Queensland*²⁸ in 1996 laid a foundation for the co-existence of shared interests in land, the Government's responding amendments to the Native Title Act in 1998 created "'bucketloads" of extinguishment'.²⁹ It also ensured the 'exercise of powers unambiguously authorised by the NTA [Native Title Act] is freed from the constraints of the RDA [Racial Discrimination Act]'.³⁰

Reviewing the effect of the 1998 amendments to the Native Title Act after a period of ten years, Dr Calma commented in the *Native Title Report 2009* that:

Many of these [1998] amendments were justified on the basis of pursuing formal equality. Yet it is now widely accepted that the amendments seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander people.³¹

As I mentioned earlier, these amendments to the Native Title Act in 1998 were – and continue to be – widely criticised internationally by the CERD and the United Nations Human Rights Committee.³²

Decisions by the High Court in *Yorta Yorta v Victoria (Yorta Yorta)*³³ and *Western Australia v Ward (Ward)*³⁴ in 2002 further limited our opportunities for native title. In *Yorta Yorta*, the High Court set out the onerous requirements to demonstrate native title, which involves the native title claim group proving they have maintained a continuous connection to their traditional lands in accordance with their traditional (pre-sovereignty) laws and customs;³⁵ while *Ward* established the principles for the partial and permanent extinguishment of native title rights and interests.³⁶

Reflecting on these decisions in the *Native Title Report 2002*, Dr Jonas observed that:

Emerging from the High Court is a concept of recognition as not simply the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather one where the law becomes a barrier to their enjoyment and protection. It is appropriate, now that the law has been crystallised by the High Court, to consider whether the way in which Australia has chosen to give recognition to Indigenous relationships

27 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 7. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

28 *Wik Peoples v Queensland* (1996) 187 CLR 1.

29 M Dodson, *Native Title Report 1997*, Human Rights and Equal Opportunity Commission (1997), pp 59–60. At <http://www.humanrights.gov.au/publications/native-title-reports#1997> (viewed 14 October 2013).

30 Z Antonios, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), p 19. At <http://www.humanrights.gov.au/publications/native-title-reports#1998> (viewed 14 October 2013).

31 T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 6. At <http://www.humanrights.gov.au/publications/native-title-report-2009-0> (viewed 12 September 2013).

32 See, for example, Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by states parties under article 9 of the convention*, seventy seventh session UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/> (viewed 14 October 2013). Also see Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (viewed 14 October 2013).

33 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

34 *Western Australia v Ward* (2002) 213 CLR 1.

35 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444–447, 456–457.

36 *Western Australia v Ward* (2002) 213 CLR 1.

to land is consistent with the human rights standards Australia has undertaken to uphold.³⁷

Despite further amendments to the Native Title Act in 2007, 2009 and 2010 (see Text Box 2.1), none of these amendments have mitigated the onerous burden for us to prove our native title following the *Yorta Yorta* decision or have acknowledged the negative impact on our communities of extinguishing native title post-*Ward*.

Instead, decisions made by the courts and amendments to the Native Title Act by the Government have been viewed as 'clarifying' the native title process. But, as demonstrated by the 1998 amendments to the Act and the *Yorta Yorta* and *Ward* decisions by the High Courts, these changes have further diminished native title rights and interests in our lands, territories and resources. More recent amendments to the Native Title Act have been relatively minor and have provided no substantive benefits to native title claim groups: see Text Box 2.1.

Text Box 2.1:

Amendments to the Native Title Act³⁸

1998: Extensive amendments to the Native Title Act included:

- Significant extinguishment of native title.
- Changes to the right to negotiate provisions, which authorised States and Territories to introduce legislation that diminished the right to negotiate by introducing schemes which provide for exceptions to the right. The amendments also changed the right to negotiate in the Native Title Act itself, generally replacing it with the lesser rights to comment or be notified.
- Changes to the registration test that established a higher threshold for the test – this required that the Registrar of the National Native Title Tribunal be satisfied that certain procedures had been undertaken and merits fulfilled by the claimants.
- Provisions for Indigenous Land Use Agreements (ILUAs) which provided an opportunity for parties to negotiate voluntary and binding agreements about native title matters.
- Changes to the functions of Native Title Representative Bodies (NTRBs).³⁹

2007: Further amendments were made to the Native Title Act,⁴⁰ which expanded the powers and functions of the National Native Title Tribunal in relation to mediation of native title matters. In addition, technical amendments were made to the Act to address some procedural issues.⁴¹

2009: The Native Title Act was amended to enable both the Federal Court and the National Native Title

37 W Jonas, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2003), p 11. At <http://www.humanrights.gov.au/publications/native-title-report-2002> (viewed 12 September 2013).

38 This text box is intended to provide a snapshot of amendments to the Native Title Act. I note that there have been a number of minor administrative amendments to the Native Title Act. For example, the Native Title Act was amended in 2013 to implement institutional reforms between the National Native Title Tribunal and the Federal Court of Australia – see Appendix 3.

39 *Native Title Amendment Act 1998* (Cth). Also see Z Antonios, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), pp 73–116; T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 4–7. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

40 *Native Title Amendment Act 2007* (Cth). Also see T Calma, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 24–25; T Calma, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 24–39. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 14 October 2013).

41 *Native Title Amendment (Technical Amendments) Act 2007* (Cth).

Tribunal to mediate and allow the Court to refer an application to another ‘appropriate person or body’ to mediate.⁴²

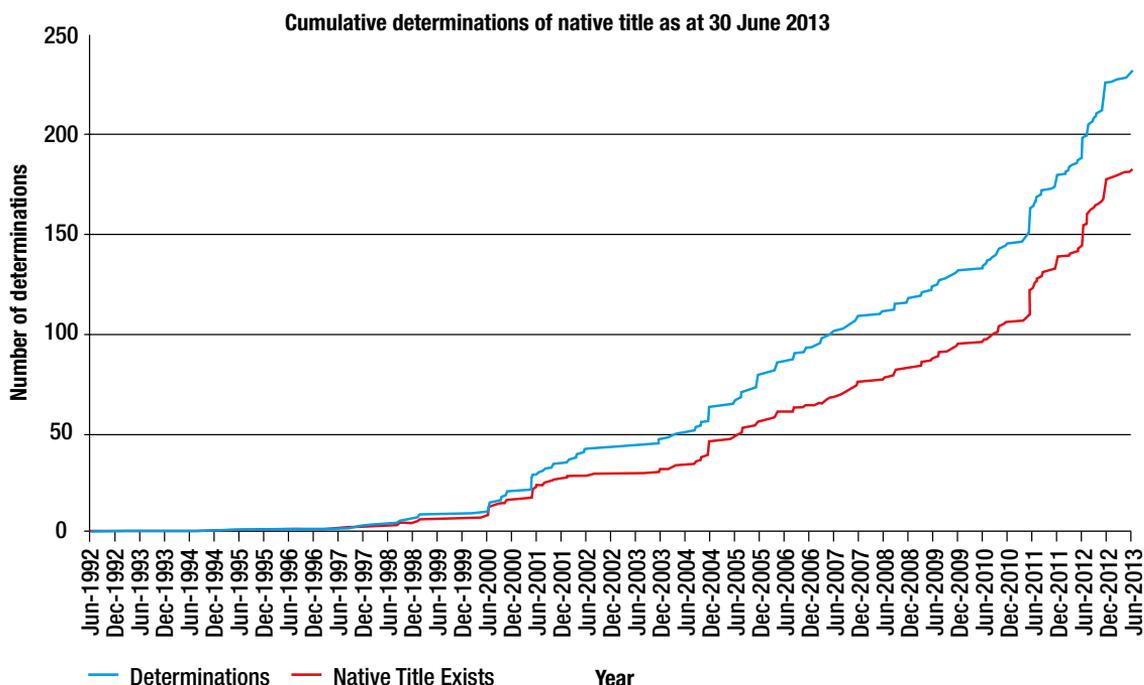
2010: Amendments to the Native Title Act created a new future act process for the construction of public housing and facilities on native title land.⁴³

(iii) Native title has created opportunities but also stresses for our communities

Native title has produced many opportunities for Aboriginal and Torres Strait Islander peoples. At its most basic, it has acknowledged our rights as Aboriginal and Torres Strait Islander peoples, and has enabled us to gain social and economic opportunities by providing a ‘seat at the negotiation table’ with stakeholders who want to access native title lands.

Diagrams 2.1 and 2.2 show the determinations that have recognised our native title and the ILUAs that have been negotiated with native title groups across the country.

Diagram 2.1: Total determinations of native title as at 30 June 2013⁴⁴



42 *Native Title Amendment Act 2009* (Cth). See T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 17–18. At <http://www.humanrights.gov.au/publications/native-title-report-2009-0> (viewed 12 September 2013).

43 *Native Title Amendment Act (No 1) 2010* (Cth). Also see M Gooda, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 36–37. At <http://www.humanrights.gov.au/publications/native-title-report-2010> (viewed 12 September 2013).

44 Diagram provided by the National Native Title Tribunal.

Diagram 2.1 shows the cumulative number of determinations of native title between 1992 and June 2013.

The long-term trend shows a reasonably consistent increase in native title determinations after June 2000, with a significantly higher number of determinations post-2010.

However, there are two notable periods of uncertainty where there is no or minimal increase in the number of native title determinations: from June 1998 to June 2000, following the 1998 amendments to the Native Title Act; and between June 2002 and December 2003, after the *Yorta Yorta* and *Ward* decisions by the High Court.

Diagram 2.2: Registered Indigenous Land Use Agreements per financial year 1998–2013⁴⁵

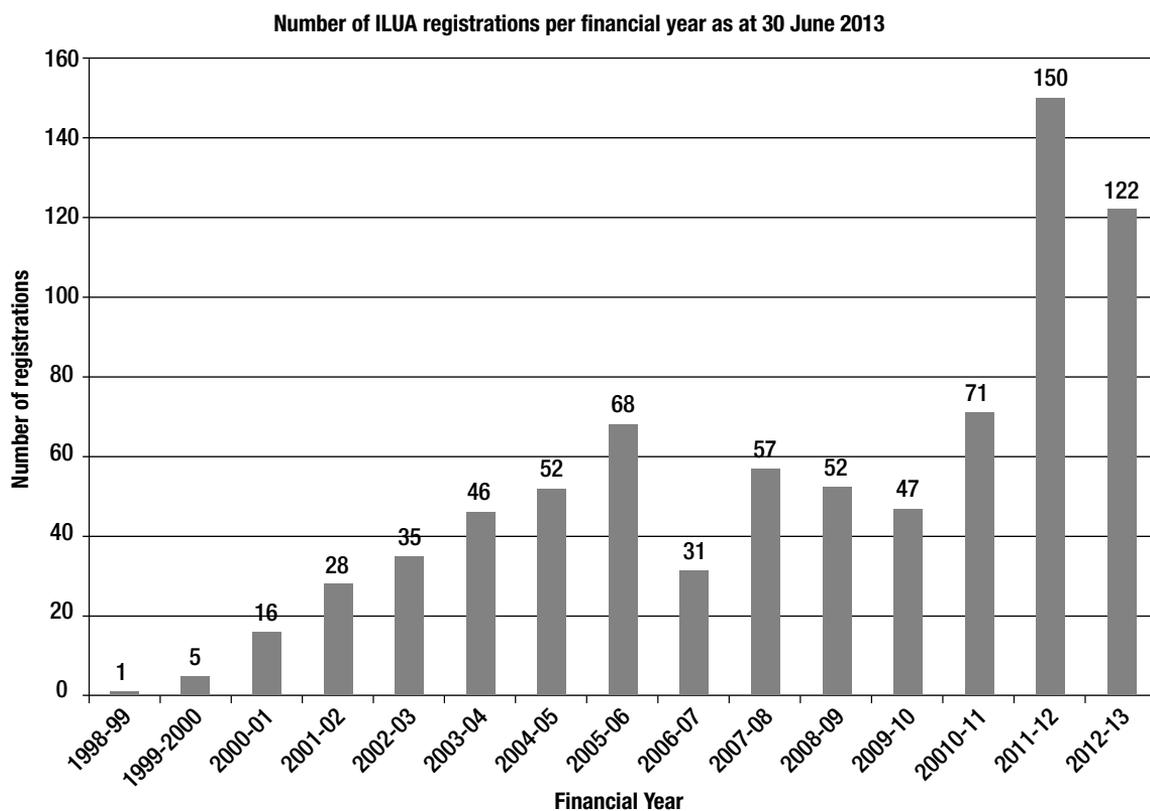


Diagram 2.2 illustrates an increasing trend towards agreement-making as a component of resolving native title matters.⁴⁶ This positive shift towards agreements was instigated by the 1998 amendments to the Native Title Act which introduced ILUAs as a mechanism for parties to negotiate about native title matters.

⁴⁵ Diagram provided by the National Native Title Tribunal.

⁴⁶ I discuss recent trends in native title determinations, ILUAs and future acts in Appendix 3.

Agreement-making has provided a welcome opportunity to build relationships between native title groups and external stakeholders. This has been critical given the early years of native title were filled with litigation that took time and consumed financial resources.

Litigation created an adversarial environment for negotiating native title rights and interests – with these disputes further depriving Aboriginal and Torres Strait Islander peoples of rights. And following the *Yorta Yorta* and *Ward* decisions in 2002, Aboriginal and Torres Strait Islanders raised obvious questions about whether common law decisions would protect and strengthen native title.

Native title outcomes for Aboriginal and Torres Strait Islander peoples have varied widely across the country. Some native title groups have successfully negotiated benefits with mining companies, other stakeholders and government bodies; while for other groups, the recognition of their native title has been largely symbolic.⁴⁷ And although there can be immense benefits from symbolic outcomes, this needs to be balanced with tangible outcomes for native title groups.

Native title has also created long processes and difficult systems that have contributed to stresses within and between our peoples and communities. Some of us have seen our old people die before their native title was recognised. And many of us have observed people in communities fight with each other during the process to have native title determined.

This observation was reported by Professor Dodson in 1994:

Native title has been the source of cohesion and dispute as the opportunity of gaining title has both opened up expectations of the return of country and tensions and wounds around connections to country, family histories and community relationships...⁴⁸

The period following the enactment of the NTA [Native Title Act] has given rise to a strong sense of frustration for native title claimants as the prospect of completing successful claims emerged as a distant reality. Instead of gaining recognition of native title, Indigenous claimants found themselves enmeshed in the intricacies of having their claims accepted.⁴⁹

These frustrations with the native title system are still being reported. In the *Native Title Report 2011*, I spoke about the concept of lateral violence and my concern that the native title process can affect the level of conflict and abuse within Aboriginal and Torres Strait Islander communities. In particular, I stated:

It is my view that the...Native Title Act, which codifies a process that can lead to the recognition of our lands, has the potential to generate positive outcomes for our communities. But too often this potential is not realised and lateral violence fragments our communities as we navigate the native title system.⁵⁰

All Social Justice Commissioners have argued that we need to ensure the native title system creates more positive outcomes and fewer stresses for our people. We acknowledge that native title provides tremendous opportunities for Aboriginal and Torres Strait Islander peoples. But the process of determining native title can be detrimental to our communities.

47 For example, see *Agreements, Treaties and Negotiated Settlements Project*. At <http://www.atns.net.au/> (viewed 26 July 2013).

48 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 4. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

49 M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1994), p 5. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 14 October 2013).

50 M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011), p 77. At <http://www.humanrights.gov.au/publications/native-title-report-2011> (viewed 13 September 2013).

(iv) The need for native title reform

The final theme throughout the *Native Title Reports* is repeated recommendations for Government to reform the native title system.

The focus of many of these recommendations has been the need to create a just and fair native title system that is consistent with international human rights standards. Such a process is articulated in Article 27 of the Declaration:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

All Social Justice Commissioners have questioned whether the Native Title Act provides a fair, independent, impartial, open and transparent process for Aboriginal and Torres Strait Islander peoples.

In the *Native Title Report 2009*, Dr Calma set out the way 'towards a just and equitable native title system',⁵¹ and strongly argued:

...the need to reform the native title system. Stakeholders from all sectors engaged in the native title system have also stressed the need for the Government to take significant steps to ensure that the system meets the original objectives set out in the preamble to the Native Title Act.⁵²

It is critical that we think long term about how we want to reform the native title system, especially because native title will be held by our future generations.

(e) Unfinished business: a Social Justice Package

In 1993, it was intended that the Native Title Act would be one of three complementary components to address the historical dispossession of Aboriginal and Torres Strait Islander peoples from their lands and waters.

The other two components were the establishment of a land fund and the creation of a social justice package to compensate Aboriginal and Torres Strait Islander peoples who would not be able to access native title.

The impact of dispossession and the absence of redress by the Australian Government was acknowledged in the Preamble to the Act:

[Aboriginal and Torres Strait Islander peoples] have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands. ...

It is...important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.⁵³

51 T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At <http://www.humanrights.gov.au/publications/native-title-report-2009-0> (viewed 13 September 2013).

52 T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2010), p 77. At <http://www.humanrights.gov.au/publications/native-title-report-2009-0> (viewed 13 September 2013).

53 *Native Title Act 1993* (Cth), preamble.

The commitment to a land fund has been realised through the Indigenous Land Corporation (ILC), which operates to 'acquire and manage land to achieve economic, environmental, social and cultural benefits'.⁵⁴ However, as reported by Dr Calma in the *Native Title Report 2008*, the ILC 'does not always provide an effective and accessible alternative form of land justice when native title is not available'.⁵⁵

The final component, a social justice package, has never been achieved. In 1995, Professor Dodson provided a report to Government that set out social justice measures that would support 'recognition, rights and reform' for Aboriginal and Torres Strait Islander peoples. The key themes of this report were:

- the rights of Aboriginal and Torres Strait Islander peoples as citizens
- recognition of their special status and rights as Indigenous Australians and the achievement of greater self-determination for Aboriginal and Torres Strait Islander peoples
- ensuring that Indigenous Australians are able to exercise their rights and share equitably in the provision of Government programs and services
- the protection of the cultural integrity and heritage of Indigenous Australians
- measures to increase Aboriginal and Torres Strait Islander participation in Australia's economic life.⁵⁶

Explaining the impact of never implementing a social justice package, Dr Calma commented in the *Native Title Report 2008* that 'this abyss is one of the underlying reasons why the native title system is under the strain it is under today'.⁵⁷

54 Indigenous Land Corporation, *About Us* (2013). At <http://www.ilc.gov.au/About-Us> (viewed 24 September 2013).

55 T Calma, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 46. At <http://www.humanrights.gov.au/publications/native-title-report-2008> (viewed 13 September 2013).

56 Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A report to government on native title social justice measures' (1995). Reproduced in [1996] *Australian Indigenous Law Reporter* 27. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 24 September 2013).

57 T Calma, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 46. At <http://www.humanrights.gov.au/publications/native-title-report-2008> (viewed 13 September 2013).

2.3 Conclusion

Twenty years after the *Mabo* decision and the Native Title Act, I am extremely concerned that the opportunities and promise of the early 1990s have not been realised. We need to view and understand native title in a holistic way that recognises native title is intrinsically linked to social justice and the enjoyment and exercise of our human rights as Aboriginal and Torres Strait Islander peoples.

Looking back on 20 years of native title and the Social Justice Commissioner role, there are still many outstanding recommendations for reform – I urge Government not to delay native title reforms and to act on the recommendations of Social Justice Commissioners. I talk about the way forward for native title in chapter 3.

Chapter 3:

How do we keep moving forward? A road map for our future

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- 3.3 Communities in control **108**
- 3.4 Conclusion **117**



3.1 Introduction

In chapters 1 and 2, I look back over the past 20 years that the Social Justice Commissioner position has been in place and think about the journey and our learning over this time. In this chapter, I want to explore how those lessons can take us forward to chart a confident course into the future and how the realisation of our rights can produce long term sustainable improvements in our life outcomes. Three themes are constants in every Commissioner's work over this 20 year period: rights, relationships and responsibilities. I want to see us build on these themes into the future.

This is an ideal time to think about the direction we want to take for the future, with the election of a new Federal Government on 7 September 2013. Like any new government, there will be opportunities and challenges. My hope is that this chapter can help inform the agenda for Aboriginal and Torres Strait Islander affairs.

In many ways we are already on the right track. Our progress in areas of health equality, Aboriginal and Torres Strait Islander representation through the National Congress of Australia's First Peoples (Congress) and the path to constitutional recognition set by the Federal Parliament are all examples of this. But we need to stay the course. This will require determination, patience and commitment to see these things through.

However, in other areas I think it is fair to say that we still have a long way to go. The results speak for themselves, with our people still lagging behind on many social indicators. Over the past 20 years, governments have taken various paths to try to address Aboriginal and Torres Strait Islander issues. Invariably, many have gone around in circles and ended up back where they started. This hasn't been for lack of goodwill or good intentions. It has been because they have failed, in the main, to adequately ask communities where they want to go and involve them in the decision-making.

Despite this mixed progress, I am cautious about proposing a radical new way. I think amongst some Aboriginal and Torres Strait Islander communities there is fatigue and real cynicism about all these 'new ways'. Every time the political landscape changes we get bombarded with another innovation that seldom results in measurable improvements because they fail to fundamentally engage with communities and coordinate their efforts.

What I am proposing is something that harks right back to the very first *Social Justice Report* in 1993¹ – our communities must decide the directions we take into the future. The only way we move forward is with communities meaningfully participating in the decisions that affect them and this means there needs to be fundamental changes to the way governments engage with us.

The way to achieve this is by improving relationships and realising rights.

Each Social Justice Commissioner has consistently advocated for a relationship between governments and Aboriginal and Torres Strait Islander communities built on mutual trust and respect, where our voices are heard, where we are treated as equals with government and where we are allowed to say both yes *and* no.

This relationship supports an understanding that sustainable improvements for Aboriginal and Torres Strait Islander peoples will only be attained with our participation in the design and delivery of policy, legislation and programs.

Professor Dodson advocated for this relationship 20 years ago and we still advocate for that relationship today.

¹ M Dodson, *Aboriginal and Torres Strait Islander Social Justice Commission First Report 1993*, Human Rights and Equal Opportunity Commission (1993). At <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/index.html> (viewed 14 October 2013).

Another aspect of relationships is the one between Aboriginal and Torres Strait Islander peoples and the rest of the Australian population. Again Social Justice Commissioners have consistently argued that reform of our constitution has the potential to reset this relationship. Once this reform occurs, this relationship will change forever for the better and will signal to the world that this nation has come to terms with its past.

Improving each of these relationships could be seen as practical manifestations of a human rights-based approach.

However, it worries me that in certain parts of the Australian body politic and community, rights are almost used as a pejorative. Advocates are often derided as somehow disconnected from the real lives of real people. Looking back at and knowing the people who have occupied this position, who have always advocated rights-based approaches, it is hard to sustain the view of them as somehow disconnected from their own communities.

In Australia, we generally have a proud history of advocating human rights. In 1948 we were represented on the committee tasked with drafting the *Universal Declaration of Human Rights*, we were one of the first countries to franchise women in our elections and we have committed to seven of the most important international human rights conventions and treaties.²

But somehow, a 'rights-based approach' is seen by some as an anathema in Aboriginal and Torres Strait Islander affairs; somehow for us, our situation is so dire that governments and others can justify the non-recognition and removal of our rights for the 'greater good' without discussion, without engagement and certainly without our agreement.

I believe we need a new narrative in which a rights-based approach is essential in providing sustainable improvements in our communities and families, an approach where rights and responsibilities stand side-by-side.

I want to reframe self-determination not only as a right but also as a call to our people to rise to this challenge and take responsibility and control over our internal and local affairs, and we measure its effectiveness by how the most vulnerable in the community are engaged and heard.

Rather than think of rights that we demand, I want to think of responsibilities and opportunities that we grasp.

If engagement is to be effective and if programs are going to deliver the optimum outcomes, these must be done in a way that fits our way of doing things. We must be able to engage with people who understand that. Put simply, this means dealing with people who are culturally competent and working within systems that are culturally secure. Cultural competence and cultural security emerges from the respect for and protection of our culture, one of the four principles guiding us in our efforts to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) here in Australia.

In this chapter, I will further outline some of the directions we need to follow for our communities to be in control. Some will be about staying the course but others will require a more fundamental shift encompassing governance, the interplay between rights and responsibilities, and the allocation of resources. All of this is underpinned by rights, relationships and responsibilities.

2 Attorney-General's Department, *National Human Rights Action Plan: Baseline Study* (2011), p 4. At <http://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlan/TheBaselineStudy.doc> (viewed 8 October 2013); M Sawyer, 'Women and Government in Australia' in Australian Bureau of Statistics, *1301.0 – Year Book Australia 2001* (2001). At <http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article52001?opendocument&tabname=Summary&prodno=1301.0&issue=2001&num=&view> (viewed 8 October 2013).

3.2 Staying the course

The last thing we need to do in Aboriginal and Torres Strait Islander affairs is start from scratch; there have been too many ‘first days’ of new strategies, programs and approaches. Too many people have worked too hard for us to throw away everything we have done over the last five years. I am hopeful the new Government builds on the work done over this period and I am encouraged to see that Prime Minister Abbott also shares a considered approach, stating:

I am reluctant to decree further upheaval in an area that’s been subject to one and a half generations of largely ineffectual ‘reform’.³

There are things we are doing which are working well. For instance, despite the hostility of the last Parliament, we have seen an unprecedented level of multi-party support for some aspects of Aboriginal and Torres Strait Islander policy. This tells me that politicians and indeed, Australia as a nation, is beginning to realise that the importance of these issues transcends politics.

I am also pleased to see that the status of Aboriginal and Torres Strait Islander affairs is being elevated in Cabinet. I have long held a view that it is too much to ask a ‘line agency’, such as the Department of Family, Housing, Community Services and Indigenous Affairs,⁴ to coordinate the Government’s effort with other line agencies, such as Health and Ageing and Education. I believe this is the proper role of a ‘central agency’ like the Department of Prime Minister and Cabinet. The inclusion of Aboriginal and Torres Strait Islander affairs in that Department with a dedicated Minister for Indigenous Affairs, whose sole responsibility is for that portfolio, shows a genuine commitment to achieving change.

The next challenge is to maintain this commitment into the future for the things that are working. I have often said that achieving real change is a nation building effort and will take at least a generation. After all, we are dealing with entrenched problems with long histories. Just as we are starting to see Aboriginal and Torres Strait Islander issues in a bipartisan way, we also need to recognise that they will not be resolved within a single funding or election cycle, and may not even be resolved within the careers of many working within the bureaucracy.

Dr Peter Shergold, a former head of the Department of Prime Minister and Cabinet with over 20 years’ experience as a senior public servant overseeing Aboriginal and Torres Strait Islander affairs, recently noted:

Most of the public servants I worked alongside did their best. Yet, after two decades, the scale of relative disadvantage suffered by indigenous Australians remained as intractable as ever. I can think of no failure in public policy that has had such profound consequences.⁵

This sort of honesty about the low baseline of previous government achievements and the significant commitment needed is welcome. I don’t raise this to be pessimistic, just realistic about the challenges ahead.

3 T Abbott, *Indigenous Affairs – A Coalition Approach* (Speech delivered at the Sydney Institute, Sydney, 15 March 2013). At <http://www.liberal.org.au/latest-news/2013/03/15/tony-abbott-address-sydney-institute-sydney> (viewed 12 September 2013).

4 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) is now the Department of Social Services. In accordance with the Commonwealth of Australia Administrative Arrangements Order signed on 18 September 2013 and amended on 3 October 2013, Commonwealth Aboriginal and Torres Strait Islander policy, programmes and service delivery, and the promotion of reconciliation are now matters dealt with by the Department of Prime Minister and Cabinet. At <http://www.dpmc.gov.au/parliamentary/> (viewed 15 October 2013).

5 P Karvelas, ‘Shergold brings PM and ATSIC nous to indigenous body’ in *The Australian*, 11 September 2013. At <http://www.theaustralian.com.au/national-affairs/election-2013/shergold-brings-pm-and-astic-nous-to-indigenous-body/story-fn9qr68y-1226716427267> (viewed 16 September 2013).

(a) The United Nations Declaration on the Rights of Indigenous Peoples⁶

If this chapter is about creating a road map for the future of our communities, the Declaration is our compass.

It is no coincidence that as we looked at the past 20 years of the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, the development of and advocacy for the Declaration was a common thread with each Commissioner. Professor Dodson's term was in the early days of the discussions around the development of the Declaration; Dr Jonas continued the advocacy; and Dr Calma's term saw the adoption of the Declaration by the United Nations General Assembly in 2007 and his advocacy saw its support by the Australian Government in 2009.

Since the beginning of my term I have seen the Declaration as that compass to guide me as I do what is asked of this office in 'reviewing the impact of policies and laws on, and monitoring the enjoyment and exercise of human rights by, Aboriginal and Torres Strait Islander peoples'.⁷

I have called for and worked at giving full effect to the Declaration by Government, Aboriginal and Torres Strait Islander communities, the business sector and non-government organisations (NGOs).

It is time to breathe life into the Declaration and make it more practical for our everyday lives. As I have said previously, this is important:

Because rights are not abstract concepts that exist in documents such as treaties, conventions and declarations alone. Rights are only rights when they are exercised. Therefore, the practical actions and outcomes needed to address disadvantage in real terms are the realisation of human rights.⁸

Similarly, Professor Dodson writing about the Declaration said: 'The value of human rights is not in their existence; it is in their implementation.'⁹

It is my hope that as we further consider what the Declaration means to us, it will become a more powerful tool for Aboriginal and Torres Strait Islander peoples to advocate for our rights and to guide Government policy.

The United Nations Permanent Forum on Indigenous Issues (UNPFII) in May 2013 marked a watershed moment when the Australian Government and the Commission, supported by the Congress, delivered a Joint Statement:

The Australian Government...committed to assisting Aboriginal and Torres Strait Islander peoples to achieve improved outcomes...[and] working with the Australian Human Rights Commission and the National Congress of Australia's First Peoples to increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done. ...

6 This section is based on M Gooda and K Kiss, *The United Nations Declaration on the Rights of Indigenous Peoples: Giving full effect to the Declaration – a National Strategy*, Australian Human Rights Commission Discussion Paper (undated). This paper forms part of a series of 'Dialogue Papers' which will inform dialogue as part of the National Declaration Strategy process. The Dialogue Papers will be disseminated as part of this process.

7 *Australian Human Rights Commission Act 1986* (Cth), s 46C(1).

8 M Gooda, *The Practical Power of Human Rights* (Speech delivered at Queensland University of Technology, Brisbane, 10 May 2010). At <http://www.humanrights.gov.au/news/speeches/practical-power-human-rights> (viewed 1 October 2013).

9 M Dodson, 'Foreword' in Amnesty International Australia, *United Nations Declaration on the Rights of Indigenous Peoples* (2001), p 3.

We will work together to raise awareness of the Declaration with Aboriginal and Torres Strait Islander peoples and all stakeholders, and facilitate discussion regarding the principles underpinning the Declaration and what they mean in a practical context.¹⁰

For me it was the moment when Government finally accepted it had at least a moral obligation, if not a legal one, to take action to give effect to the Declaration here in Australia. The challenge for us all now is to work out what that would look like.

There is no 'one' right way to give effect to the rights in the Declaration. The implementation of the Declaration will look different in different nations, depending on the needs, aspirations and situations of their Indigenous peoples.

The International Law Association has described the diversity of actions that nations may take to put the Declaration into practice:

States ought to restructure their domestic law in view of adopting all necessary measures – including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities – in order to make the full realization of indigenous peoples' human rights possible within their territories, consistent with the rules and standards established by the UNDRIP.¹¹

Some countries have adopted particular articles in the Declaration as national law. Others have developed participatory mechanisms or have prioritised education and promotion of the rights in the Declaration.

For example:

- The Pluri-national State of Bolivia passed a law which supports programmes relevant to the implementation of the Declaration in 2007.¹²
- In Norway, the legislation for the 'Procedures for Consultations between State Authorities and the Sami Parliament'¹³ ensures that new measures, legal provisions and consultation procedures are conducted in accordance with the Sami peoples' right to participate and have a tangible influence in the decision-making procedures that directly affect their interests.¹⁴
- In Peru, in designing a national plan for the implementation of bilingual education, Indigenous peoples will participate collaboratively with the Minister of Education in the formulation of these educational programs.¹⁵

10 Joint Statement by the Australian Government and the Australian Human Rights Commission on Agenda Item 7 (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013.)

11 International Law Association, Sofia Conference: *Rights of Indigenous Peoples Final Report* (2012), p 30.

12 Expert Mechanism on the Rights of Indigenous Peoples, *Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, fifth session, UN Doc A/HRC/EMRIP/2012/4 (2012), p 6. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session5.aspx> (viewed 7 September 2012).

13 Ministry of Government Administration, Reform and Church Affairs, *Procedures for Consultations between State Authorities and the Sami Parliament [Norway]* (2005). At <http://www.regjeringen.no/en/dep/fad/Selected-topics/Sami-policy/midtpaite/PROCEDURES-FOR-CONSULTATIONS-BETWEEN-STA.html?id=450743> (viewed 7 September 2012).

14 Expert Mechanism on the Rights of Indigenous Peoples, *Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, fifth session, UN Doc A/HRC/EMRIP/2012/4 (2012), p 10. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session5.aspx> (viewed 7 September 2012).

15 Expert Mechanism on the Rights of Indigenous Peoples, *Summary of responses from the questionnaire seeking the views of States on best practices regarding possible appropriate measures and implementation strategies in order to attain the goals of the United Nations Declaration on the Rights of Indigenous Peoples*, fifth session, UN Doc A/HRC/EMRIP/2012/4 (2012), p 8. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session5.aspx> (viewed 7 September 2012).

Similarly, different approaches will also be suited to specific contexts. Text Box 3.1 contains some of the approaches that are most relevant to the implementation of the Declaration.

Text Box 3.1:

Approaches to implementing the Declaration¹⁶

The ‘principled’ approach

This involves identifying the key principles underpinning the rights in the Declaration and then agreeing on ways in which these principles can give practical guidance on how each article can be operationalised.

Duties of States

Ensuring the Australian Government take the action required of them set out in the Declaration. There are at least 19 articles which impose duties on nation states or governments to undertake particular actions. These range from Article 12(2) which says that:

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned

to Article 38 which says:

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Referencing the Declaration

Promoting the referencing of the Declaration at every available opportunity. This could include using the Declaration as a point of reference in Australia’s Human Rights Framework and the Parliamentary Joint Committee on Human Rights.

It could also include Indigenous governance structures referencing the Declaration in their constitutions, their values and behaviours, in their advocacy and in their relationships.

Auditing compliance

This could mean auditing existing legislation, policies and programs to ensure compliance with the identified underpinning ‘principles’ of the Declaration, particularly the principle relating to non-discrimination and equality.

All of these approaches are reasonable and will have a place in certain circumstances. However, I believe the ‘principled’ approach presents the most opportunities in the Australian context. It is a broader framework that is not inconsistent to the other approaches but is more user-friendly and flexible.

I believe approaching the challenge of implementation through the principles rather than addressing each article individually will provide an analysis that is better understood by a broader cross section of Government and the community.

16 M Gooda and K Kiss, *The United Nations Declaration on the Rights of Indigenous Peoples: Giving full effect to the Declaration – a National Strategy*, Australian Human Rights Commission Discussion Paper (undated).

Over and over I have said that the Declaration is not a program of work, it is a way of doing things or a process based on principles. I believe the principled approach is the best way of translating this to action for Government.

(i) The principles

The Declaration covers all areas of human rights as they relate to Indigenous peoples. These can be categorised into four key principles:

- self-determination
- participation in decision-making, underpinned by free, prior and informed consent and good faith
- respect for and protection of culture
- equality and non-discrimination.¹⁷

These four principles provide guidance on how Aboriginal and Torres Strait Islander communities, governments, civil society and the private sector can apply the Declaration to fully realise the human rights of Aboriginal and Torres Strait Islander peoples. These principles will also provide benchmarks against which the effectiveness of the implementation can be measured.

(ii) A National Declaration Strategy

A National Declaration Strategy (National Strategy) is necessary because the adoption of the Declaration will not, in and of itself, guarantee the realisation of the rights it sets out. A National Strategy must be developed in partnership between the government and Aboriginal and Torres Strait Islander peoples. It should clearly articulate what needs to be done and ensure a coordinated effort to realise the rights in the Declaration.

In line with the commitment from the Australian Government given at the UNPFII, the Commission and Congress are working together on a National Strategy to give effect to the Declaration. Over the next 12 months, we will be conducting Declaration Dialogues with our communities and organisations, all levels of government, businesses and NGOs, to discuss what this means for us in the Australian context.

Through these Dialogues, we hope to reach a common understanding of the principles, how they might look in action and what we need to do to make them work. I encourage everyone to engage with these conversations, which will culminate in a National Declaration Summit focusing on the implementation of the Declaration in late 2014.

I will provide a detailed report on the Declaration Dialogues and the work undertaken on the National Declaration Strategy in next year's *Social Justice and Native Title Report*.

(iii) Government use of the Declaration

I welcome the scrutiny of the Parliamentary Joint Committee on Human Rights (JCHR) that oversees the requirement for new legislation to be accompanied by a statement setting out how the law complies with

17 I have written extensively about these principles in the *Social Justice and Native Title Reports* over the past two years. For example, see M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), ch 3; M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011), ch 3; M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2; M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 2. At <http://www.humanrights.gov.au/publications/aboriginal-and-torres-strait-islander-social-justice?source=our-work> (viewed 9 October 2013).

Australia's international human rights obligations. And I am pleased that Australian Government Departments are increasingly referencing the Declaration as a part of this process.

However, while this progress is pleasing, the requirement to reference the Declaration is not embedded in legislation and is dependent on the discretion of Committee members. The Declaration was not included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (Scrutiny Act)¹⁸ and I believe this is a missed opportunity to consider the unique context of the rights of Indigenous peoples. I reiterate my recommendation from the *Social Justice Report 2012* that the Declaration be included in the definition of human rights in the Scrutiny Act.¹⁹

I am also concerned that the *National Human Rights Action Plan* remains silent on the Declaration. Given the Government's commitment to reconciliation and its recognition that giving practical effect to the Declaration provides opportunities for positive engagement, this seems to me to be an inconsistent approach.

In chapters 4 and 5, I discuss ways that the principles in the Declaration can operate in practice; these include case studies on how we consult about and draft legislation, ways that we implement policies, and how business can engage with our communities.

(b) Reforming the Australian Constitution

Constitutional reform has been a key component of my agenda to reset and build relationships between Aboriginal and Torres Strait Islander peoples and all other Australians. A referendum to include Aboriginal and Torres Strait Islander peoples in the Constitution has the potential to do that; it is an opportunity to redefine our national identity based on recognition, respect and inclusion of Australia's First Peoples.

The campaign to reform the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples is being embraced by our communities and organisations, as well as the wider public and business groups. Importantly, this is one of few issues that brought parties together in what was considered the most volatile Parliament since Federation. There was no better example of this support from all parties for a referendum to change the Constitution than when the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) (Act of Recognition) was passed unanimously in both Houses of Parliament in March this year.

Speaking in support of the Act of Recognition, then Prime Minister Julia Gillard said:

...the government has advanced this bill for an act of recognition, to assure Indigenous people that our purpose of [constitutional] amendment remains unbroken...This bill is thus an act of preparation and anticipation. In this legislation, we – the nation's 226 legislators – will serve as proxies for Australia's 14 million voters, bridging the time between now and referendum day.²⁰

Following Julia Gillard to also support the bill, then Opposition Leader Tony Abbott said:

...our challenge is to do now in these times what should have been done 200 or 100 years ago to acknowledge Aboriginal people in our country's foundation document. In short, we need to atone for the omissions and for the hardness of heart of our forebears to enable us all to embrace the future as a united people.

18 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 3(1).

19 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p 14. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 10 October 2013). Also see Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* (7 July 2010), para 17. At http://www.humanrights.gov.au/legal/submissions/2010/20100707_human_rights.html (viewed 11 October 2012).

20 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2013, p 1120 (The Hon Julia Gillard MP, Prime Minister).

I believe that we are equal to this task of completing our Constitution rather than changing it. The next parliament will, I trust, finish the work that this one has begun.²¹

It is crucial that this bipartisanship is maintained in the new Parliament.

I therefore welcome Prime Minister Abbott's commitment to constitutional reform, promising that 'within 12 months we will publish a proposal for constitutional recognition and we will establish a bipartisan process to try and bring that about as soon as possible.'²²

In late 2010, then Prime Minister Gillard appointed an Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel). This Panel was given the responsibility of reporting to the Government on options for constitutional change surrounding Indigenous constitutional recognition and was to include advice as to the level of support from Indigenous people and the broader community for each option by December 2011.

The Expert Panel did their work over 14 months and held more than 250 consultations with experts and members of the Australian community. They undertook an incredibly robust and considered process, using four principles to guide the development of recommendations. Any proposal to be put forward had to:

- contribute to a more unified and reconciled nation
- be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples
- be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums
- be technically and legally sound.²³

Text Box 3.2 contains the Expert Panel's recommendations for constitutional reform.

21 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2013, p 1123 (The Hon Tony Abbott MP, Leader of the Opposition).

22 T Abbott, *Address to the Garma Festival* (Speech delivered at the Garma Festival, Gulkula, 10 August 2013). At <http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/9370/Address-to-the-Garma-Festival-Northern-Territory.aspx> (viewed 12 September 2013).

23 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012), p 4. At <http://www.recognise.org.au/final-report> (viewed 19 September 2012).

Text Box 3.2:

Expert Panel – recommendations for changes to the Constitution

The Panel recommends:

1. That section 25 be repealed.
2. That section 51(xxvi) be repealed.
3. That a new 'section 51A' be inserted, along the following lines:

Section 51A Recognition of Aboriginal and Torres Strait Islander peoples

Recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

Acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

Respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

Acknowledging the need to secure the advancement of Aboriginal and Torres Strait Islander peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

The Panel further recommends that the repeal of section 51(xxvi) and the insertion of the new 'section 51A' be proposed together.

4. That a new 'section 116A' be inserted, along the following lines:

Section 116A Prohibition of racial discrimination

- (1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.
- (2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

5. That a new 'section 127A' be inserted, along the following lines:

Section 127A Recognition of languages

- (1) The national language of the Commonwealth of Australia is English.
- (2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.²⁴

24 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012), p xvii. At <http://www.recognise.org.au/final-report> (viewed 19 September 2012).

A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established in late 2012 with a mandate to ‘work to build a secure strong multi-partisan Parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition.’²⁵ It was also asked to consider ‘the recommendations of the Expert Panel on Constitutional Recognition of Indigenous Australians on the process for the referendum.’²⁶

In developing the question that will be put to the people, I urge the Government to reconstitute the Joint Select Committee as a matter of urgency and require that it builds on the work of the Expert Panel to ensure that the progress for a referendum does not lose momentum.

As stated earlier, in March this year we witnessed a historic step toward a referendum when the Act of Recognition was passed unanimously through Federal Parliament. This Act provides acknowledgement of Aboriginal and Torres Strait Islander peoples’ unique place as Australia’s First Peoples.²⁷ It also prescribes that a review will be commenced considering proposals for constitutional change and their likely levels of support in the community.²⁸ A report on this review must be completed by 28 September 2014 and the Minister must table the report in Parliament within 15 sitting days of its receipt.²⁹

The Act of Recognition is a welcome development but it should be seen for what it is, an important early step on the pathway to the referendum where each and every Australian voter will get a say on this recognition question.

Getting the referendum question right is of the utmost importance to its ultimate success and as can be seen above, there have been several processes undertaken already that will guide this work.

However, this work should sit alongside a campaign to raise awareness of the need for recognition. As reported in the *Social Justice Report 2010*, George Williams and David Hume have identified some critical factors that are essential for a successful referendum. They include:

- bipartisan support
- popular ownership
- popular education.³⁰

Having achieved strong multi-party support for this recognition, we cannot ignore the other factors critical to a successful referendum – popular ownership and support.

The previous Government allocated funding to this task and engaged Reconciliation Australia, who in turn established *Recognise* as the national campaign for constitutional recognition. *Recognise* is literally taking this campaign all around Australia on a ‘Journey to Recognition’ to raise awareness of the need for constitutional reform.

It is essential that the new Government commit to adequately resourcing this campaign.

If constitutional change is about inclusiveness and is to be supported, the participation of Aboriginal and Torres Strait Islander peoples throughout the process, from the development of the question and throughout

25 Commonwealth, *Journals of the Senate: No 128, Senate*, 28 November 2012, p 3471. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/journals/20121128_SJ128/0000%22 (viewed 15 October 2013).

26 Commonwealth, *Journals of the Senate: No 128, Senate*, 28 November 2012, p 3471. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/journals/20121128_SJ128/0000%22 (viewed 15 October 2013).

27 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2012* (Cth), s 3.

28 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2012* (Cth), s 4.

29 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2012* (Cth), s 4.

30 G Williams and D Hume, *People Power: The History and Future of the Referendum in Australia* (2010), ch 7.

the campaign is non-negotiable. A key recommendation of the Expert Panel's report was that if changes other than those recommended in their report are to be put to a referendum, the Government 'should consult further with Aboriginal and Torres Strait Islander peoples and their representative organisations to ascertain their views in relation to any such alternative proposal.'³¹

Promising progress has been made in this nation building journey to make the Constitution a document inclusive of all Australians. It's a journey that will mark our maturity as a nation and one that has the potential to reset relationships between Aboriginal and Torres Strait Islander peoples, the Government and the broader population.

(c) A national body representing Aboriginal and Torres Strait Islanders

In 2010, the Congress was established as the national representative body for Aboriginal and Torres Strait Islander peoples.

While Congress is still a relatively new organisation, it is steadily growing its membership of Aboriginal and Torres Strait Islander peak bodies, organisations and individuals, and providing leadership on decisions that affect our peoples and communities. The work of Congress is underpinned by the Declaration and its constitution requires that it pursues the rights of Aboriginal and Torres Strait Islander peoples.³²

In the *Social Justice Report 2012*, I noted that Congress embodies the principles of legitimate Indigenous governance:

Its organisational governance is designed specifically to support community needs and aspirations... Underpinning its design and operation in all respects is community governance and ultimately self-determination.³³

I also said that the establishment of Congress provides an opportunity for Aboriginal and Torres Strait Islander peoples to develop a new relationship with government – a relationship based on partnership and genuine engagement with our peoples. This is an opportunity to put the Declaration into practice.

For this to happen, it is critical that all levels of governments support and engage with Congress in accordance with the principles and protocols set out in *A Framework for Engagement between Australian Government Agencies and The National Congress of Australia's First Peoples*.³⁴ Similarly, Aboriginal and Torres Strait Islander individuals and organisations also need to support and join Congress.

To truly represent the voices of Aboriginal and Torres Strait Islanders and participate in decision-making with governments on an equal footing, Congress must have access to a high level of engagement with governments through the Council of Australian Governments (COAG).

To put this into an historical context, the Aboriginal and Torres Strait Islander Commission (ATSIC) was an observer at COAG. It is therefore appropriate that Congress also be acknowledged as the national representative body of Aboriginal and Torres Strait Islander peoples to participate at this level of decision-making.

31 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012), p xix. At <http://www.recognise.org.au/final-report> (viewed 19 September 2012).

32 National Congress of Australia's First Peoples, *The Declaration*. At <http://nationalcongress.com.au/the-declaration/> (viewed 16 September 2013).

33 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p 198. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 15 October 2013).

34 National Congress of Australia's First Peoples and Australian Government Agencies, *A Framework for Engagement between Australian Government Agencies and The National Congress of Australia's First Peoples* (5 September 2012). At <http://nationalcongress.com.au/engagement-framework/> (viewed 16 October 2013).

Finally, I believe that Congress must be given time to fully establish itself. Reflecting back on the experience of ATSIIC, I believe it was never given this opportunity. Organisations evolve over time and I believe that Congress has the fundamentals for robust representation and good governance.

(d) Closing the Gap

Closing the Gap³⁵ is a commitment by all the Commonwealth and State/Territory governments, through COAG, to improve the lives of Aboriginal and Torres Strait Islander peoples. I welcome the progress made through the partnership by all Australian governments with Aboriginal and Torres Strait Islander communities and our representative organisations. It was particularly encouraging that COAG agreed to set specific timeframes for achieving six Closing the Gap targets relating to health, education and employment outcomes.³⁶ These targets are important because they enable us to measure progress over time and foster outcomes-focused policy.

The Close the Gap Campaign, discussed in chapter 1, was influential in getting governments to make these commitments. Indeed, the call for governments to commit to closing the life expectancy gap by 2030 lies at the heart of the Closing the Gap agenda. I believe that the Closing the Gap framework has been another watershed moment in Aboriginal and Torres Strait Islander affairs. It provides a firm non-partisan foundation upon which we can build.

I urge all Australian governments to continue along the path set in the Closing the Gap commitments. There is no need to radically change direction; long-term commitments require long-term policy continuity. We must remain aware that the magnitude of the problems facing our communities requires sustained effort. This point is also made in the Strategic Review of Indigenous Expenditure:

The deep-seated and complex nature of Indigenous disadvantage calls for policies and programs which are patient and supportive of enduring change (including in the attitudes, expectations and behaviours of Indigenous people themselves). A long-term investment approach is needed, accompanied by a sustained process of continuous engagement.³⁷

None of this is to say we cannot improve what we are doing and be more targeted in our efforts to close the gap, but I believe we are heading in the right direction.

(i) Progress in meeting Closing the Gap targets

Five years in, there is some good progress to celebrate. The COAG Reform Council *Indigenous Reform 2011–2012* report found positive outcomes in the targets around child deaths, early childhood education and Year 12 attainment:

Australia is on track to halve the gap in child death rates by 2018. From 1998 to 2011 the gap between the Indigenous and non-Indigenous child (0–4 years) death rates reduced from 139.0 to 109.9 deaths per 100 000...

In 2011, 91% of Indigenous children in remote communities were enrolled in a preschool program in the year before formal schooling. This result is close to COAG's target – only 4% improvement is needed to achieve 95% enrolment by 2013.

35 As explained in chapter 1, Closing the Gap is not to be confused with Close the Gap.

36 Targets contained in Council of Australian Governments, *National Indigenous Reform Agreement*. At http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf (viewed 25 September 2013).

37 Department of Finance and Deregulation, *Strategic Review of Indigenous Expenditure: Report to the Australian Government* (2010), p 15. At http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 8 October 2013).

From 2006 to 2011, the rate of Indigenous Year 12 or equivalent attainment rose from 47.4% to 53.9%.³⁸

However, at the same time we are seeing some worrying trends, particularly in education indicators, death rates and employment outcomes. Again, the COAG Reform Council found:

Between 2008 and 2012, for Years 3, 5 and 7, the national gap narrowed in reading but widened in numeracy. For Year 9 the gap widened in reading and narrowed in numeracy...

Only the Northern Territory is on track to close the gap in Indigenous death rates within a generation (by 2031)...

From 2006 to 2011, the employment gap widened on three measures – employment, unemployment and labour force participation.³⁹

In health, we are seeing reductions in child mortality rates and we are on track to meet that particular target by 2018.⁴⁰ Efforts to address child mortality rates are critical building blocks in efforts to close the life expectancy gap and in time will help drive improvements for Aboriginal and Torres Strait Islander people. Nevertheless, progress towards closing the life expectancy gap is proving to be more difficult.⁴¹

It is not enough to simply report on trends. More analysis needs to take place to find out why we are struggling to meet targets. This work needs to be done as early as possible in order to make sure resources are directed effectively.

Again, we must not lose sight of the fact that this is a long term, generational approach to address disadvantage. I am encouraged when I hear both sides of politics frankly recognising the enormity of the task. It shows that they are taking the challenges seriously but also acknowledging the nation-building potential of this program of work. Addressing disadvantage is not just an 'Aboriginal and Torres Strait Islander issue'; raising our life chances contributes to the overall well-being of our nation.

I am very supportive of the practice of the Prime Minister providing an annual report on Closing the Gap in Parliament. Not only does it keep the issues on the national agenda but it promotes transparency and accountability. Prime Minister Abbott has also laid out his commitment to this approach:

So often the statistics are a record of what government is doing, rather than a record of how people are living. It is excellent...that we are moving towards halving the gap in so many of these areas, but a gap which is halved is not a gap which has been closed and, in the end, it is not good enough to merely halve the gap – we need to close the gap.⁴²

As we make progress towards the targets, I would also like to see us aim higher as we achieve milestones. For example, given the strong progress in achieving enrolment in preschool, we should now set our sights higher and adjust the target to reflect actual attendance and achievement, not just enrolment. After all, what is important is for children to be actually participating in quality early childhood education programs, which will

38 COAG Reform Council, *Indigenous Reform 2011-2012: Comparing performance across Australia* (2013), p 6. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 12 September 2013).

39 COAG Reform Council, *Indigenous Reform 2011-2012: Comparing performance across Australia* (2013), p 7. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 12 September 2013).

40 COAG Reform Council, *Indigenous Reform 2011-2012: Comparing performance across Australia* (2013), p 21. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 12 September 2013).

41 COAG Reform Council, *Indigenous Reform 2011-2012: Comparing performance across Australia* (2013), p 7. At <http://www.coagreformcouncil.gov.au/reports/indigenous-reform/indigenous-reform-2011-12-comparing-performance-across-australia> (viewed 12 September 2013).

42 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 February 2013, p 162 (The Hon Tony Abbott MP).

equip them for the early years of school – not just increasing the names recorded on an enrolment list.

Of course targets must be matched by action. There are two current developments that are critical for enduring change in achieving health equality:

- The renewal with adequate funding of the expired *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes* (Indigenous Health NPA).
- The implementation of the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* (Health Plan).

If supported by necessary funding and effectively implemented, the Health Plan can drive real improvements to Aboriginal and Torres Strait Islander health and life expectancy. The Close the Gap Campaign Steering Committee, of which I am a Co-Chair, has called on the new Australian Government to take action in relation to the Indigenous Health NPA and the Health Plan in the first 100 days of Government.⁴³

(ii) Justice targets

I am pleased that there is bipartisan support for the inclusion of justice targets in the Closing the Gap agenda.⁴⁴

Social Justice Commissioners have been calling for justice targets since 2009⁴⁵ to reduce the imprisonment rate of Aboriginal and Torres Strait Islander people and enhance community safety. While we have neglected targets for justice issues, there has been a danger that this has undermined our efforts to meet the other targets set in the Closing the Gap agenda. This is because we know that imprisonment has such a profoundly destructive impact, not only on individuals, but on the entire community. It affects areas such as health, housing, education and employment – all the building blocks of creating stable and productive lives.

I welcome the announcement of an advisory group, led by Priscilla Collins, CEO of the North Australian Aboriginal Justice Agency (NAAJA) and hope to see this work continue without delay under the new government.⁴⁶

Justice targets need to include obvious indicators such as rates of imprisonment, recidivism and victimisation but to be really successful we need to look more holistically. We know a lot about the pathways that lead our people to involvement with the criminal justice system. I would like to see indicators such as involvement with the child protection system, use of diversionary programs, successful transition to school and employment also considered.

As we have learnt from the Closing the Gap experience so far, targets are just the start. Justice targets should be set as part of a fully funded Safe Communities National Partnership Agreement as part of the Closing the Gap strategy. Similarly, it would be disappointing to see justice targets set without adequately resourced services, particularly legal and advocacy services. Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Services have provided strong leadership on these issues and will do much of the

43 Close the Gap Campaign Steering Committee, *Building on the Close the Gap platform: Commitments for an incoming government* (2013), pp 6-7. At <https://www.humanrights.gov.au/close-gap-indigenous-health-campaign> (viewed 11 September 2013).

44 For example, see P Karvelas, 'Close gap targets "to include jail rate"', *The Australian*, 23 April 2013. At <http://www.theaustralian.com.au/national-affairs/policy/close-gap-targets-to-include-jail-rate/story-fn9hm1pm-1226626219538#> (viewed 18 October 2013).

45 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009). At <http://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 15 October 2013).

46 North Australian Aboriginal Justice Agency, *Macklin Sheds New Light on Justice Targets*. At <http://www.najja.org.au/index.php/82-news/156-macklin-sheds-new-light-on-justice-plan.html> (viewed 3 October 2013).

heavy lifting in actually achieving targets.

(e) Native title reform

Twenty years after the *Native Title Act 1993* (Cth) (Native Title Act) was enacted, it is now recognised by Australians that native title acknowledges the fundamental human rights of Aboriginal and Torres Strait Islander peoples to our lands, territories and resources. But while the recognition of native title has the potential to generate social, cultural and economic benefits for current and future generations, we need to reform the native title system if we are to fully realise these benefits.⁴⁷

Recent efforts to reform the Native Title Act have been disappointing. I am extremely concerned that the Native Title Amendment Bill 2012 (Cth) has not been passed by Parliament. This is despite recommendations to pass the Bill by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HSCATSIA) and – with minor changes – the Senate Legal and Constitutional Affairs Legislation Committee.⁴⁸ These amendments to the Native Title Act are on the right track and I strongly encourage the Government to reintroduce this Bill and support its passage through Parliament.

The Native Title Amendment Bill 2012:

- enables parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment such as parks and reserves
- clarifies the meaning of good faith under the right to negotiate regime, and the conduct and effort required of parties in seeking to reach agreement
- streamlines processes for Indigenous Land Use Agreements (ILUAs).⁴⁹

Importantly, these amendments are compatible with our human rights to enjoy and benefit from culture and to self-determination that are contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the Declaration.

In June, I welcomed the announcement by the Attorney-General for an inquiry by the Australian Law Reform Commission (ALRC) into two specific areas of the native title system.⁵⁰ This inquiry provides us with an opportunity to comprehensively examine what is working in native title and what needs to change.

As I said at the HSCATSIA Roundtable on the Native Title Amendment Bill 2012 in February this year, a constructive analysis of the native title system needs to start with the issues we can agree on. For example, we can agree that native title is not going away – it has been a consistent feature in our landscape over the past 20 years and it will continue forever.

We also agree that we want to see our native title determined in shorter timeframes and with less expense for all parties.

47 Australian Human Rights Commission, *Submission to the Minister for Families, Housing, Community Services and Indigenous Affairs on the Draft Indigenous Economic Development Strategy* (17 December 2010). At <http://www.humanrights.gov.au/our-work/legal/submissions-sort-date-subject-committee-submitted/submissions-made-aboriginal-and> (viewed 9 October 2013).

48 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Committee, Report Native Title Amendment Bill 2012 [Provisions]* (2013).

49 I discuss the details of the amendments in the Native Title Amendment Bill 2012 in Appendix 3.

50 M Dreyfus, *Terms of Reference – Review of the Native Title Act 1993* (3 August 2013). At <http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/ReviewoftheNativeTitleAct1993-finaltermsofreference-3August2013.PDF> (viewed 9 October 2013). I discuss the Australian Law Reform Commission inquiry in Appendix 3.

And we can agree that we need to change the status quo of the Native Title Act as it is currently drafted.⁵¹

It is my view that the key priorities for native title reform are to:

- Establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test.⁵²
- Enable native title holders to govern their lands, territories and resources through their Prescribed Bodies Corporate (PBCs).

We also need to ensure that outcomes from on-going reviews of the native title system address native title reform in a coordinated manner.

(i) Establish a presumption of continuity for native title

The process to prove our native title has been extensively criticised by international human rights mechanisms, prominent leaders within Australia and Social Justice Commissioners.⁵³ This criticism focuses on the high level of information that native title claim groups need to provide to demonstrate continuing connection to their lands and waters, in accordance with their traditional laws and customs, from the time of British colonisation.⁵⁴

This process is particularly unjust considering the history of government policies that removed many Aboriginal and Torres Strait Islanders from their country, thereby undermining their capacity to prove continuous connection to their lands and waters. Ironically, the burden to provide information proving continuous connection is then placed on Aboriginal and Torres Strait Islander peoples – despite governments often holding written information and records.

Establishing a presumption of continuous connection for native title would ease the burden of this onerous process on Aboriginal and Torres Strait Islander peoples by altering the balance of power in native title negotiations.

There have been a number of proposals over the past few years that seek to establish a presumption of continuity for native title.⁵⁵ These proposals, with minor variations, set out establishing a presumption of continuous connection to the land in relation to a native title claim once the claim meets the requirements of the registration test and is placed on the Register of Native Title Claims.

51 Commonwealth, *Standing Committee on Aboriginal and Torres Strait Islander Affairs*, House of Representatives, 8 February 2013, p 2 (Mr Mick Gooda Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission).

52 The registration test is a set of conditions in the *Native Title Act 1993* (Cth) that are applied to all new native title determination applications – see National Native Title Tribunal, *Native Title Claimant Applications: a guide to understanding the requirements of the registration test* (2008). At <http://www.nntt.gov.au/News-and-Communications/Publications/Documents/Booklets/Native%20title%20claimant%20applications%20April%202008.pdf> (viewed 5 July 2013).

53 For example, see J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Situation of indigenous peoples in Australia, Report to the United Nations General Assembly Human Rights Council*, fifteenth session UN Document A/HRC/15/37/Add. 4 (2010). At <http://unsr.jamesanaya.org/country-reports/report-on-the-situation-of-indigenous-peoples-in-australia-2010> (viewed 8 July 2013); R French, Chief Justice of the High Court, *Lifting the burden of native title: some modest proposals for improvement* (Speech presented to Native Title Users Group, Adelaide July 2008); P Keating, 'PM missed native title chance', *The Australian* 25 February 2013; *Native Title Reports 2002–2012*. At <http://www.humanrights.gov.au/publications/native-title-reports> (viewed 15 October 2013).

54 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

55 For example, T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2010). At <http://www.humanrights.gov.au/publications/native-title-report-2009-0> (viewed 5 July 2013); R French, Chief Justice of the High Court, *Lifting the burden of native title: some modest proposals for improvement* (Speech presented to Native Title Users Group, Adelaide July 2008); Native Title Amendment Bill 2011 (Cth); Amendments to the Native Title Amendment Bill 2012 (Cth); House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Advisory Report for the Inquiry into the Native Title Amendment Bill 2012* (2013).

The onus would then shift onto the respondent, usually State/Territory governments, to demonstrate that there is evidence of ‘substantial interruption’ in the acknowledgment of traditional laws or the observation of traditional customs that sets aside the presumption. This will clarify that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity.⁵⁶

(ii) Enable native title holders to govern their lands, territories and resources through their Prescribed Bodies Corporate

In the *Native Title Report 2012*, I discussed the critical role PBCs play in managing the rights and interests of native title holders following a determination of native title.⁵⁷ A recurring concern from around the country is that many PBCs do not have the support and resources they require to meet their administrative, legal and financial functions, but I note that this issue is currently being examined as part of the Government’s review of the roles and functions of native title organisations.⁵⁸

If we are to realise the benefits of our native title, then we need to invest in the governance of native title right now. This means that we need to build the capacity of PBCs to support native title holders to maximise opportunities from their native title.

(iii) Coordinate native title working groups, reviews and inquiries

A number of aspects of the native title system are being reviewed by the Government. This includes:

- the tax treatment of native title payments and how these payments can better benefit Indigenous communities⁵⁹
- a review of the roles and functions of native title organisations conducted by Deloitte Access Economics⁶⁰
- an inquiry into the native title system undertaken by the Australian Law Reform Commission.⁶¹

It is essential that these various working groups, reviews and inquiries work together. This will provide a consistent approach to ensuring that the native title system provides Aboriginal and Torres Strait Islander peoples with the opportunities to achieve our economic, social and cultural aspirations.

(f) Confronting racism

Racism has frequently been in the headlines over the past year; often it has affected Aboriginal and Torres

56 Australian Human Rights Commission, *Submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on the Native Title Amendment Bill 2012 and future reform of the native title system* (25 January 2013), paras 40–45.

57 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 3. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 10 July 2013).

58 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations: Discussion Paper* (2013), pp 14–20. At <http://www.deloitteaccessconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review> (viewed 16 September 2013).

59 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013). At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

60 Deloitte Access Economics has been contracted by the Australian Government to undertake this review – see Appendix 3.
61 I report on these reviews in Appendix 3.

Strait Islander people. We've seen online 'memes' featuring derogatory images of Aboriginal people,⁶² a group of prominent Aboriginal actors refused service by numerous taxis in the Melbourne CBD,⁶³ and a Western Australian university student union publication containing offensive stereotypes of Aboriginal people.⁶⁴ In the very week the Australian Human Rights Commission (the Commission) launched part of the *Racism. It Stops with Me* campaign, one of the key advocates, champion Sydney Swans player Adam Goodes was racially abused during a football match and again during the media commentary that followed.⁶⁵

Far from being isolated, I would argue that such incidents are a regular occurrence for many Aboriginal and Torres Strait Islander people in this country. In the words of the Victorian Aboriginal Child Care Agency, 'racism is a constant "background noise" in the lives of Aboriginal and Torres Strait Islander people.'⁶⁶

It is good that these incidents have been brought to light – they have served as a useful prompt for public reflection about what racism looks like and why it is not okay, particularly the 'casual racism' inflicted on many of us on a daily basis. But these discussions do not seem to have moved us much further towards a real understanding of the harm that racism causes and a genuine commitment, as a community, to do something about it.

And the focus on these high profile incidents does not reflect the silent, pervasive and systemic discrimination we see in complaints to the Commission under the *Racial Discrimination Act 1975* (Cth). In 2012-13, 35.5% of the complaints received by the Commission were made by Aboriginal and Torres Strait Islander people.⁶⁷ These are the experiences which lock us out of economic opportunities, damage our physical and mental health and undermine our trust in, and connection to, the broader community.

Ample evidence of these impacts is outlined in the submission to the National Anti-Racism Strategy made by Congress:

From the initial engagement between First Peoples and Europeans, through more than two centuries of government legislation and policies, Aboriginal and Torres Strait Islander peoples have been discriminated against, denied their human rights and deprived of the opportunity to participate in Australian society as equal citizens.

Dispossessed of their lands under the erroneous concept of Terra Nullius, denied recognition in the nation's founding document, subjected to decades of controlling and/or exclusionary legislation and policies and the forcible removal of children from their families and communities, Aboriginal and Torres Strait Islander peoples have a long and painful history of racism in this country.⁶⁸

So what do we do about it? I believe the National Anti-Racism Strategy is a good start. In its second year of implementation, the Strategy and its public awareness campaign *Racism. It Stops with Me* has gained strong support from many sectors of the Australian community and are serving as an important focal point for

62 A Moses and A Lowe, 'Contents removed from racist Facebook page', *The Sydney Morning Herald*, 8 August 2012. At <http://www.smh.com.au/technology/technology-news/contents-removed-from-racist-facebook--page-20120808-23tr1.html> (viewed 8 October 2013).

63 D Cooke and M Griffin, 'Taxi drivers bar Aboriginal actors', *The Sydney Morning Herald*, 2 May 2013. At <http://www.smh.com.au/entertainment/theatre/taxi-drivers-bar-aboriginal-actors-20130502-2iu42.html> (viewed 8 October 2013).

64 B Hiatt and D Emerson, 'UWA paper sparks racial row', *The West Australian*, 19 April 2013. At <http://au.news.yahoo.com/thewest/a/-/newshome/16795632/uwa-paper-sparks-racial-row/> (viewed 8 October 2013).

65 K Brooks, 'Racism, such as that shown towards Sydney Swans player Adam Goodes, is not a game', *The Courier-Mail*, 3 June 2013. At <http://www.couriermail.com.au/news/opinion/racism-such-as-that-shown-towards-sydney-swans-player-adam-goodes-is-not-a-game/story-fnihsr9v-1226655389955> (viewed 8 October 2013).

66 Victorian Aboriginal Child Care Agency, *Submission to the National Anti-Racism Strategy* (2012). At <http://itstopswithme.humanrights.gov.au/it-stops-with-me/consultations> (viewed 16 September 2013).

67 Australian Human Rights Commission, *Annual Report 2012-2013* (forthcoming).

68 National Congress of Australia's First Peoples, *Submission to the National Anti-Racism Strategy* (2012), pp 2-3. At <http://nationalcongress.com.au/racism-it-stops-with-me/> (viewed 16 September 2013).

individual and collective action to counter racism. At the very least I would recommend ongoing support for the Strategy by the Government.

But we also know that political leadership on these issues is vital. I would like to see a commitment from our leaders to set the bar higher in public discourse – to say, and to mean, that racism begins to stop with them.

3.3 Communities in control

While staying the course in areas that are already on the right track requires commitment and patience to see through some important issues, helping communities to be in control is where real vision and dedication comes in. If we can get this right, it is where I believe we will see the most profound changes over time.

What do I mean by our communities being in control?

One way of addressing this question is to look to the Declaration for guidance and to use the principles we have developed to give it effect across Australia. As I discussed earlier in this chapter, these principles are:

- self-determination
- participation in decision-making, underpinned by the concepts of free, prior and informed consent and good faith
- respect for and protection of culture
- equality and non-discrimination.

Governments must be prepared to ‘let go’ of many of the decisions that affect our lives and national policies and programs must be designed in a way that allows the greatest flexibility for implementation at the community level. Professor Megan Davis argues that we must ‘work in partnership with the state (the state as a junior partner)⁶⁹ to facilitate this.

In other words, governments must be prepared for our communities to participate in decisions that affect them. Again, Professor Davis notes that:

governments cannot truly tackle disadvantage or close the gap without allowing communities more responsibility in the decisions that affect their lives and this includes service delivery.⁷⁰

Our communities must step up and take control *and* responsibility for, as is said in Article 4 of the Declaration, ‘matters relating to their internal and local affairs’.

In other words, our communities must start exercising self-determination.

Over the years, the term ‘self-determination’ has fallen in and out of fashion. This is a shame because far from being a fad in Aboriginal and Torres Strait Islander affairs, it is a key human right that applies to all peoples. It is the first article in both the *International Covenant on Civil and Political Rights* and the *International Covenant of Economic, Social and Cultural Rights*, and in the Declaration⁷¹ it is framed in a way that refers to Indigenous peoples. I see it firstly, as a human right that accrues to all Australians and then secondly, my mind turns to what it means for us as Aboriginal and Torres Strait Islander peoples.

While there has been a lot of talk about self-determination over the years, I would argue that comprehensive self-determination has never really been given a chance to work for Aboriginal and Torres Strait Islander peoples in this country. I say this with immense appreciation and admiration for the individuals and organisations that work very hard to try and enable and exercise self-determination.

But these pockets of good practice are based mainly on the energy, goodwill and commitments of individuals rather than the systemic embedding of this right in our governance structures and in government institutions.

69 M Davis, ‘Community control and the work of the National Aboriginal Community Controlled Health Organisation: Putting meat on the bones of UNDRIP’, *Indigenous Law Bulletin* (2013) 8 (7), p 11.

70 M Davis, ‘Community control and the work of the National Aboriginal Community Controlled Health Organisation: Putting meat on the bones of UNDRIP’, *Indigenous Law Bulletin* (2013) 8 (7), p 13.

71 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 3, 4.

Professor Davis articulates another challenge of self-determination; it must reflect our experiences and needs:

Self-determination must become more specific and personalised in order to be capable of reflecting what self-determination means for Aboriginal peoples in their daily lives. And we cannot leave it to the state to do that for us. We must do that ourselves as Aboriginal people.⁷²

As I have noted earlier in this chapter, the Declaration Dialogues will inform this common understanding.

Ultimately, I want to see our communities organise themselves in ways that they choose, in accordance with the principles of good governance and in ways that ensure our most vulnerable, our elders, our women and our children, and not just the strong alone, are being heard in our communities and organisations. I want these structures to be recognised and respected by governments, built on relationships of mutual respect and good faith, and I want community and government engagement to take place at a more localised level.

Prime Minister Abbott has recognised the need to shift the focus from Canberra to the community, stating:

The real challenges are not just in this building; they are in the country, the communities, the suburbs and the regions of our nation. Real change does not happen in this building, although it may start here. Real change happens in places where Australians live.⁷³

Finally, I want to see our communities positioned to make this change happen through local decision-making so that they remain in control of decisions affecting them.

Once this is happening we will see empowered communities exercising real self-determination.

(a) Our governance is determined by us

Part of the failure of previous attempts to place our communities in control has been poor governance. In the *Social Justice Report 2012*, I said:

The exercise of self-determination can only be achieved if we have good community governance. This means the existence of 'effective, accountable and legitimate systems and processes' where Aboriginal and Torres Strait Islander peoples can 'articulate their interests, exercise their rights and responsibilities and reconcile their differences.'⁷⁴

In the *Social Justice* and *Native Title Reports 2012*, I also put forward a model of effective, culturally relevant and legitimate Indigenous governance.⁷⁵

This model acknowledged that the ways that our communities and organisations make decisions must be grounded in our right to self-determination. To reset the way in which we make decisions, we must take responsibility for our social problems and find ways to deal with these problems ourselves. We need to turn our rights into outcomes that reflect our aspirations as Aboriginal and Torres Strait Islander peoples.

Governments, NGOs and businesses that engage with our communities have a role to support – not to direct – our decisions and decision-making processes and to not create additional strains and stresses on our

72 M Davis, 'Community control and the work of the National Aboriginal Community Controlled Health Organisation: Putting meat on the bones of UNDRIP', *Indigenous Law Bulletin* (2013) 8 (7), p 13.

73 Commonwealth, *Parliamentary Debates*, House of Representatives, 6 February 2013, p 162 (The Hon Tony Abbott MP).

74 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p 105. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 24 September 2013).

75 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 15 October 2013); M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 2. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 15 October 2013).

communities.⁷⁶ And governments need to make it easier for us to tackle our problems and run services for our peoples by reducing the administrative ‘red-tape’ that our organisations have to navigate.

In turn, we must make sure that decision-making processes are open, transparent and embrace all members of our communities. We need to establish dispute resolution procedures that encompass our cultural values and we also must be accountable for our decisions, but this process should not be so onerous that it stifles our ability to achieve anything.

Examples of Aboriginal and Torres Strait Islander communities and organisations that are governing in a manner that is consistent with the principle of self-determination are described in Text Box 3.3.

Text Box 3.3:

Examples of self-determination in practice

In the *Native Title and Social Justice Reports 2012*, I case studied a number of Aboriginal communities and organisations whose governance was underpinned by the principle of self-determination. These included:

- The Kalkadoon Peoples in north-west Queensland who, following their determination of native title in 2011, have established a transparent governance framework in their Kalkadoon Constitution Indigenous Land Use Agreement.⁷⁶
- The Yawuru Peoples in Broome Western Australia who have developed the ‘Four Pillar Knowledge Vision’ strategy to inform and guide their community governance. This strategy is based on: knowing our people and community; knowing our country; knowing our story; and building our economic prosperity.⁷⁷
- The Warlpiri Youth Development Aboriginal Corporation that was started by members of the Yuendumu community in the Northern Territory in 1993 and continues to provide youth development, diversion and leadership programs, and community, rehabilitation and respite services to the community.⁷⁸
- The Torres Strait region of northern Queensland, which is working towards power-sharing governance arrangements between the Torres Strait Regional Authority and the Queensland and Australian Governments. These arrangements would reflect the ‘desire and capacity of Torres Strait Islander people for greater autonomy and the recognition by governments of the uniqueness of the region.’⁷⁹

76 For example, art 39 of the Declaration provides that ‘Indigenous peoples have the right to have access to financial and technical assistance from States’.

77 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 109–112. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 9 October 2013).

78 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 109–112. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 9 October 2013).

79 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 164–167. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 9 October 2013).

80 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 176–181. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 9 October 2013).

(b) Our rights are our responsibility too

The responsibility of governments to better engage with communities to realise our rights has been dealt with extensively. In fact, probably every *Social Justice* and *Native Title Report* has been concerned with this issue in some way over the past 20 years. I stand by these recommendations and continue to see that the fundamental responsibility of government is to meet all its human rights obligations to Aboriginal and Torres Strait Islander peoples.

But if we accept that putting communities in control is critical, we need to advance the conversation to talk about our responsibility as Aboriginal and Torres Strait Islander communities in achieving these rights as well. We have often been our own worst enemy when it comes to lateral violence and other conflicts in our communities. These conflicts have held us back from realising our rights, exercising self-determination and improving our life situations.⁸¹

I understand that these comments may provoke strong reactions from some parts of our communities. Suspicion is often expressed when people start talking about communities taking responsibility because it can be conceived as unfair when so many of the challenges facing us are related to a history of colonisation and lack of proper government engagement.

Let me be clear that governments have the responsibility for ensuring that our rights are realised through proper engagement, investment and respect for our cultures. But for real self-determination to be realised and to work we must accept responsibility to take an active leadership role, and in essence, take control.

So how do we do this? One of the first practical steps is that when we make decisions, we need to ensure, as I say above, that the most vulnerable in our communities – the women, children and elderly – are heard and protected and this may mean balancing different and competing rights. Finding this right balance is not new in human rights. Sometimes the process of getting the balance between competing rights is the best indicator of a functional self-determining community or society. It is how these discussions and debates are facilitated, conducted and agreed that will mark the strength of a community.

For example, I have spoken to the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council who considered the safety and security of women and children over-rode the ability of members of five communities to purchase take-away alcohol from a roadhouse near Uluru in the Northern Territory.

I was informed they undertook consultations within those five communities, and worked with government and in partnership with the roadhouse owners. The net result is the special licencing conditions for the roadhouse have been in place for about 14 years and an indication of their acceptance is that in that time, there has not been one formal complaint about them from any of those five communities.

This approach is not new. Every day I'm meeting with Aboriginal and Torres Strait Islander leaders and community members who are stepping up and confronting these challenges and making these hard decisions.

I have also been watching the *Empowered Communities* proposal, led by Noel Pearson, with interest. There are synergies between my ideas and this approach, particularly around the need to challenge communities to re-establish social norms through 'Indigenous-led responsibility'⁸² at the regional and local levels. I have been

81 See M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011). At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 16 September 2013); M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011). At <http://www.humanrights.gov.au/publications/native-title-report-2011> (viewed 16 September 2013).

82 Cape York Institute, *Empowered Communities* (2013). At <http://cyi.org.au/empowered-communities> (viewed 12 September 2013).

saying for a long time that we, as Aboriginal and Torres Strait Islander people, have to decide what is and isn't acceptable in our communities.

It is also good to see that *Empowered Communities* is based on communities choosing to opt-in to these proposals and there is no centralist approach with particular communities being 'anointed' by Government or people in Canberra. As the proposals develop it will be important to see how the consultation processes ensure that there has been real community consensus going forward.

The emphasis on measurable outcomes and accountability is crucial and fundamental to sustained outcomes. Again, I hope that the data, evaluations and general lessons on implementation will be freely shared to enable other communities to consider this model. While there are eight communities currently involved, we also need to have an eye to how other communities are faring. *Empowered Communities* is an exciting proposal but I would not want to see other positive community processes and work get left behind.

(c) Allocation of resources on the basis of need

Our Aboriginal and Torres Strait Islander communities are incredibly diverse. It worries me that one way the public discourse articulates this difference is through a remote/rural and urban divide. It is as if there is some magical imaginary line that once crossed, your situation either vastly improves or by the same magnitude, deteriorates.

For instance in chapter 1, I talk about the Family Violence Prevention Legal Services (FVPLS) being the main providers of services to the victims of domestic violence. Despite the critical work that these services do in supporting victims, there are only 14 FVPLS in Australia covering 31 regional and remote areas, but one of the funding guidelines limits the provision of services to non-urban areas. As noted in chapter 1, it is of grave concern that this policy fails to recognise many of the barriers that Aboriginal women who live in urban areas face when accessing mainstream service providers. This is particularly concerning given that 33% of Aboriginal and Torres Strait Islander people live in capital cities.⁸³

I think we can agree the magnitude of need in rural and remote communities is both undeniable and indisputable. Access to services including health care, education and housing as well as job opportunities lags behind the standards of the vast majority of Australians take for granted.⁸⁴ The ability to recruit the right people and the excessive costs of living compounds the already high level of disadvantage.

Similarly I think we can agree there is also social deprivation in our urban communities.⁸⁵ Some urban pockets have similar levels of poor health, lack of education, unemployment and imprisonment as some remote communities. We simply can't ignore these issues because they occur in urban, rather than remote, areas.

Noel Pearson, writing about his visit to Redfern earlier this year, said:

There is tremendous need in urban communities, and places like Redfern deserve proper government attention to their aspirations.

83 National Congress of Australia's First Peoples, *National Justice Policy* (2013), p 21. At <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (viewed 3 September 2013).

84 For a snapshot of socioeconomic data in relation to remote Aboriginal and Torres Strait Islander communities, see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Fact Sheet Remote Areas* (2011). At http://www.pc.gov.au/_data/assets/pdf_file/0012/111612/key-indicators-2011-factsheet-remote.pdf (viewed 8 October 2013).

85 For a snapshot of socioeconomic data in relation to urban or inner city Aboriginal and Torres Strait Islander communities, see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Fact Sheet Major Cities* (2011). At http://www.pc.gov.au/_data/assets/pdf_file/0016/111616/key-indicators-2011-factsheet-cities.pdf (viewed 8 October 2013).

...there are many communities who are as disadvantaged and as distressed as some of the most parlous remote communities. What is done in urban areas will often need to be different from remote and regional areas, but turning a blind eye to these communities as if they are prospering in the mainstream is wrong.⁸⁶

Despite the stereotypes that exist about all Aboriginal and Torres Strait Islander people living in the bush, the fact is that only around 20% live in remote areas, while almost 60% live in major cities and inner regional areas.⁸⁷

One way of looking at this issue is through the lens of availability and accessibility.

In remote communities, much of the disadvantage boils down to a lack of availability – whether we are talking about employment, education, housing, child protection, health or any number of services. We are playing catch up in our efforts to increase the availability of basic services to remote communities to ensure they have the same opportunities as other Australians.

It is promising to see increased investment through the Northern Territory Intervention, Stronger Futures and *National Partnership Agreement on Remote Service Delivery* across Australia.

In urban communities, there is generally a greater range of services and opportunities on offer; however, accessibility can also operate as a barrier. Indeed, evidence suggests that Aboriginal and Torres people in urban areas are less satisfied with their access to health care than those from remote communities.⁸⁸ Consistent with a human rights-based approach to health,⁸⁹ barriers to health care access can be described in terms of availability, affordability, acceptability and appropriateness.⁹⁰ For example, services might not be welcoming or adapted to the specific needs of our people. Or to put it another way, they might not be culturally secure. They may be offering fantastic programs or opportunities but unless there is a culturally secure environment, Aboriginal and Torres Strait Islander peoples are unlikely to access them and therefore they (the services) are unlikely to meet the needs of individuals and the community in those places.

There is a growing Aboriginal and Torres Strait Islander middle class in our urban communities. For the most part they have access to education, employment and all the services and opportunities to the same standard as what is available to mainstream Australia. We should be proud of these achievements born out of hard work.

But if we are to close the gap by 2030 effort must be directed at communities in all parts of the country, be it in Lajamanu in the Northern Territory or in Mt Druitt in Western Sydney. For this effort to be effective, we must understand the differences between these situations. In the second preambular paragraph of the Declaration, the right to be different is addressed. It says:

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,⁹¹

86 N Pearson, 'The Heroes of Redfern', *The Weekend Australian*, 13 April 2013, p 15. At <http://www.theaustralian.com.au/opinion/columnists/heroes-of-redfern-walk-the-walk/story-e6frg786-1226619445913> (viewed 9 October 2013).

87 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians – June 2011* (2013). At <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001> (viewed 12 September 2013).

88 M Scrimgeour and D Scrimgeour, *Health Care Access for Aboriginal and Torres Strait Islander People Living in Urban Areas, and Related Research Issues: A Review of Literature*, Cooperative Research Centre for Aboriginal Health, Discussion Paper No. 5 (2008), p 2.

89 See T Calma, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005), ch 2. At <http://www.humanrights.gov.au/publications/social-justice-reports-index> (viewed 24 September 2013).

90 M Scrimgeour and D Scrimgeour, *Health Care Access for Aboriginal and Torres Strait Islander People Living in Urban Areas, and Related Research Issues: A Review of Literature*, Cooperative Research Centre for Aboriginal Health, Discussion Paper No. 5 (2008), p 2.

91 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, preambular para 2.

When I engage with the government sector, I explain that my interpretation of this right places a duty on policy, program and systems developers to design and implement services that cater for difference. It should not be up to the people who are different to navigate their way through a system that is not designed for their particular situation.

The often repeated mantra of 'one size doesn't fit all' is the embodiment of this right and it means working with communities to determine their needs and to design with them, the programs that have the best chance of addressing that need.

It means national policies are designed in a way that allows for maximum flexibility for interpretation and implementation at the local level.

Finally, it means moving beyond this false urban/remote dichotomy to start designing and delivering programs to the places where and in ways they are needed.

(d) We must provide culturally secure services – building the Aboriginal and Torres Strait Islander capacity

All over Australia, governments are out-sourcing the provision of services.⁹² In my opinion the rationale for this ranges from ideological, fiscal, evidence-based, to pure pragmatism. It is a trend that is well advanced and unlikely to be reversed. The consequence of this devolution of responsibility has been the rise of NGOs that have successfully tendered to provide services.

My concern is that as I travel across Australia, I am hearing stories that some NGOs are edging out Aboriginal and Torres Strait Islander services. Many of our services do fantastic work, employing the right people in the right places to make change. However, it appears that some of our organisations struggle to compete with the large NGOs in terms of cost, capacity and evaluation.

Even more worrying, I am hearing that some non-Aboriginal and Torres Strait Islander organisations are not operating in a culturally secure way. Issues have been raised about these organisations not always having the requisite knowledge of local cultures, needs and relationships to make their service effective. This can make services less accessible and result in fewer Aboriginal and Torres Strait Islander people using them. This is not to say that these practices are reflective of all NGOs working with Aboriginal and Torres Strait Islander communities. Many NGOs are doing great work in our communities. However, we must always be mindful that services are delivered in a culturally secure way whilst building the capacity of the local community.

While we need to build the capacity of our organisations to be competitive in these processes, those mainstream organisations that work in and for our communities need to develop their cultural security and do their work in line with the principles of the Declaration.

Done well, this can facilitate a mutually beneficial relationship between the Aboriginal community controlled sector and the NGO sector. Aboriginal organisations can help NGOs increase their cultural security in delivering services to Aboriginal and Torres Strait Islander people. At the same time, NGOs have the experience to complement the capacity of the Aboriginal community controlled sector in areas like administration, best practice programs, evaluation and organisational governance. This is how genuine partnership works.

92 See Committee on Community Services, *Outsourcing Community Service Delivery: Interim Report*, Legislative Assembly of New South Wales (2013), p 4. At [http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/c4085d8b56552970ca257bc6001e2f70/\\$FILE/Interim%20Report.pdf](http://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/c4085d8b56552970ca257bc6001e2f70/$FILE/Interim%20Report.pdf) (viewed 8 October 2013).

Reflecting the importance of this issue, in February 2013 a Forum was held in Alice Springs, bringing together non-Aboriginal NGOs operating in the Northern Territory along with the Territory's Aboriginal peak bodies.⁹³ The Forum initiated the development of key principles to guide new ways of working between NGOs and Aboriginal organisations in the Northern Territory to ensure collaboration and partnership.⁹⁴ The primary objective of the NGO Principles' is to put 'Aboriginal people back into the driver's seat' in regards to service delivery and community development.⁹⁵ I believe that these principles, if widely adopted and implemented, could facilitate the much needed mutually beneficial relationships between the Aboriginal community controlled sector and the NGO sector. The NGO Principles have been sent to non-Indigenous NGOs for endorsement and it is encouraging to note that a number of these have already endorsed the principles.⁹⁶

I am also encouraged to see that this type of partnership is indeed already happening in some sectors. Text Box 3.4 discusses a partnership in out of home care in NSW.

Text Box 3.4:

Partnerships in Out of Home Care in NSW⁹⁶

In NSW, the Department of Families and Communities has encouraged larger mainstream NGOs to form partnerships with smaller Aboriginal and Torres Strait Islander controlled services to provide out of home care. Spearheaded by the Aboriginal Child, Family and Community Care Secretariat (ABSec), it has been described by Barry Lenihan at ABSec as a 'radically different partnership to the non-useful partnerships where the Aboriginal partner is only token, providing the community or cultural component but not the services.'⁹⁷

Ultimately, the goal is for all Aboriginal and Torres Strait Islander children in NSW to be supported by Aboriginal agencies. This is a long term aim but in the first 12 months of operation, the partnership has contributed to approximately an additional 350-600 placements.

93 The Forum was jointly hosted by the Aboriginal Peak Organisations Northern Territory (APO NT), Congress, Australian Council of Social Services, NT Council of Social Services and Strong Aboriginal Families, Together. See APO NT, *Non-Indigenous NGO Service Delivery in Remote NT Communities*. At <http://apont.org.au/index.php/ngo-forum-11-february-2013.html> (viewed 8 October 2013).

94 *Forum on the role of Non-Indigenous Organisations' engagement in Aboriginal communities in the Northern Territory* (Communiqué, 11 February 2013). At <http://apont.org.au/attachments/article/72/130211-Communique-NGO%20Forum%2011%20February%202013-meeting%20outcomes.pdf> (viewed 8 October 2013).

95 Aboriginal Peak Organisations Northern Territory, *Principles for a partnership-centred approach for NGOs working with Aboriginal organisations and communities in the Northern Territory* (2013). At <http://apont.org.au/attachments/article/72/210313%20-%20Principles%20for%20NGOs%20-%20Final.pdf> (viewed 8 October 2013).

96 Aboriginal Peak Organisations Northern Territory, *Non-Indigenous NGO Service Delivery in Remote NT Communities*. At <http://apont.org.au/index.php/ngo-forum-11-february-2013.html> (viewed 8 October 2013).

97 Secretariat of National Aboriginal and Islander Child Care and AbSec, *Developing Capacity through Partnerships* (2013). At http://www.snaicc.org.au/_uploads/rsfil/03192.pdf (viewed 12 September 2013).

98 Secretariat of National Aboriginal and Islander Child Care and AbSec, *Developing Capacity through Partnerships* (2013), p 4. At http://www.snaicc.org.au/_uploads/rsfil/03192.pdf (viewed 12 September 2013).

Of course, it is not just NGOs that must ensure culturally secure services. Governments also have an obligation to ensure cultural security in service delivery and the cultural competency of their staff to work with our communities. I have previously written about this in the context of addressing lateral violence.⁹⁹ In particular, governments can improve their cultural competence through a commitment to effectively engage,¹⁰⁰ increasing an Indigenous presence within government¹⁰¹ and building capacity through the sort of partnerships¹⁰² mentioned above.

Governments ultimately decide who receives funding for provision of services. I would also like to see cultural security recognised in the tender, funding and selection processes. Businesses can increase cultural competence by including it in industry standards. This will ensure the most skilled and accessible organisations provide services, which in turn leads to better outcomes for our people.

99 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011) p 120-164. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 15 October 2013).

100 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 154. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 15 October 2013).

101 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 158. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 15 October 2013).

102 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 162. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 15 October 2013).

3.4 Conclusion

This chapter reflects both the opportunities and challenges as we chart a road map for the future. The opportunities are great. Never before have we seen the level of bipartisanship and commitment around addressing Aboriginal and Torres Strait Islander disadvantage and constitutional recognition.

However, the challenge is to ensure that we as Aboriginal and Torres Strait Islander people are not just passengers for this journey but are sitting in the driving seat.

When people ask me how I will know whether I have made a difference in this job, I tell them that it is something I'll be able to measure when the kids born during my five years in this position turn 20 years of age. If we manage to stay the course with the things that are working and make the fundamental shift to putting our communities in control now, I am very optimistic that all of our children will be given the opportunity to grow up to be happy and healthy adults, proudly carrying our culture forward for generations to come. That is why it is so important we act now.

I make the following recommendations to Government:

(i) Support for existing policies and programs

Recommendation 3.1: The Australian Government continues the multi-party approach in Aboriginal and Torres Strait Islander affairs and any change to existing policies and programs is based on rigorous evidence and occurs in consultation with communities.

(ii) The United Nations Declaration on the Rights of Indigenous Peoples

Recommendation 3.2: The Australian Government agrees to engage with the National Implementation Strategy to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3.3: The Australian Government amends the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the *United Nations Declaration on the Rights of Indigenous Peoples* in the definition of human rights.

(iii) Constitutional recognition

Recommendation 3.4: The Australian Government commits to the conduct of the referendum within this Parliamentary term by:

- treating the development of the referendum question and date as a matter of urgency, including by reconstituting the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples as soon as possible to ensure that progress to a referendum can continue with limited interruption
- ensuring the campaign to raise popular awareness and support of this issue is properly resourced.

Recommendation 3.5: If constitutional amendments proposed are different to those recommended in the Expert Report, the Australian Government consults with Aboriginal and Torres Strait Islander peoples prior to going to Referendum.

(iv) National Congress of Australia's First Peoples

Recommendation 3.6: The Australian Government continues to engage with the National Congress

of Australia's First Peoples in accordance with the principles and protocols set out in *A Framework for Engagement between Australian Government Agencies and The National Congress of Australia's First Peoples* dated 5 September 2012.

Recommendation 3.7: The Australian Government invites the National Congress of Australia's First Peoples to participate in relevant COAG processes.

(v) Closing the Gap

Recommendation 3.8: The Australian Government commits to the Closing the Gap agenda and the annual Closing the Gap Reporting to Parliament.

Recommendation 3.9: The Australian Government negotiates through COAG a new *National Partnership Agreement on Closing the Gap in Indigenous Health Outcomes*, with a minimum Commonwealth investment of \$777 million over the next three years.

Recommendation 3.10: The Australian Government commits to supporting and implementing the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* in partnership with Aboriginal and Torres Strait Islander peoples and their representatives.

Recommendation 3.11: The Australian Government finalises targets as part of the Closing the Gap Strategy focused on increasing community safety, reducing imprisonment rates and improving outcomes in child protection for Aboriginal and Torres Strait Islander peoples.

(vi) Native title reform

Recommendation 3.12: The Australian Government reintroduces the Native Title Amendment Bill 2012 (Cth) and supports its passage through the Parliament.

Recommendation 3.13: The Australian Government considers the following outstanding recommendations in the *Native Title Report 2009*:

1. That the *Native Title Act 1993* (Cth) be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
2. That the *Native Title Act 1993* (Cth) provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.

(vii) Racism

Recommendation 3.14: The Australian Government continues to support the National Anti-Racism Strategy.

Chapter 4:

Human rights in practice – alcohol policy

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- 4.2 What works in addressing alcohol
misuse in discrete communities **124**
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4.1 Introduction

Alcohol consumption, misuse and related harm are some of the most challenging issues confronting communities across the length and breadth of Australia. These challenges are not limited to Aboriginal and Torres Strait Islander communities, but confront every demographic in Australian cities and towns. From Kings Cross to Halls Creek, St Kilda to Santa Teresa – communities grapple with alcohol related harm arising from over-consumption and the extent to which punitive or restrictive measures should or should not be applied.

Alcohol misuse is not unique to Aboriginal and Torres Strait Islander people. Compared to the broader population, a greater percentage of Aboriginal and Torres Strait Islander people do not drink alcohol at all. The 2010 National Drug Strategy Household Survey report noted that 24.5% of Aboriginal and Torres Strait Islander people surveyed abstained from drinking alcohol, compared to 19% of the general population.¹

However, Aboriginal and Torres Strait Islander people who do drink are more likely to do so at levels which are risky.²

Alcohol, therefore, is an issue of particular concern in many Aboriginal and Torres Strait Islander communities. It has repercussions across many areas, including health, education, community safety and children's rights. It is a major contributor to many different social and health problems, ranging from social disorder, family breakdown and violence, through to child neglect, loss and diversion of income and high levels of imprisonment.³

Worryingly, the emerging evidence tells us that the damage to children of Foetal Alcohol Syndrome Disorders (FASD) potentially represents one of the worst intergenerational impacts of alcohol misuse. Finally, alcohol misuse can be a major contributor to the dysfunction of whole communities.

There is no denying the harm alcohol can have in our communities, nor is there any denying the negative consequences of poorly conceived alcohol management policies. As I noted back in my first address at the Press Club in 2010 in relation to the Northern Territory Emergency Response (NTER), poorly conceived policy stigmatises our people:

Each of the Intervention communities had big blue signs erected outside them which, amongst other things, loudly proclaimed restrictions on alcohol and pornography – as if everyone living behind those signs are alcoholic, perverts and perpetrators!

I invite the residents of Yarralumla, Redhill, Woollara, Mosman and Toorak, to name just a few well-known, middle-class suburbs, to contemplate how they would feel with similar signs erected at the entrance to their communities.

These signs continue to diminish the people living behind them and they diminish us as a nation.⁴

While I am happy to say that these signs have been taken down, the tensions about alcohol management are still very real in the Northern Territory. Dissatisfaction and feelings of unfairness also continue in other parts of the country where policies and laws which are in place have not been consistent with human rights standards.

1 Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey report* (2011), p 60. At <http://www.aihw.gov.au/publication-detail?id=32212254712> (viewed 2 October 2013). Note that some reservations were held over the accuracy of this data given the small sample size.

2 Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey report* (2011), p 60. At <http://www.aihw.gov.au/publication-detail?id=32212254712> (viewed 2 October 2013).

3 M Wilson, A Stearne, D Gray and S Siggers, *The harmful use of alcohol amongst Indigenous Australians* (2010). At http://www.healthinfonet.ecu.edu.au/alcoholuse_review (viewed 25 September 2013).

4 M Gooda, *Towards a reconciled Australia: National Press Club speech* (Speech delivered at the National Press Club, Canberra, 3 November 2010). At <http://www.humanrights.gov.au/news/speeches/towards-reconciled-australia-national-press-club-speech-2010> (viewed 28 September 2013).

For example, as I say above, while alcohol misuse is an Australia-wide issue, it is only in Aboriginal and Torres Strait Islander communities where adults are criminalised for the consumption of alcohol across an entire community.

Dealing with alcohol is one of the most contested and intractable issues in our legal and policy sphere, however, I believe the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) is one of the most valuable tools we have available to us in solving complex social policy issues confronting Aboriginal and Torres Strait Islander peoples such as this.

In this chapter, I will discuss how human rights treaties under which Australia has obligations, and the Declaration can be used to guide the development of alcohol policy.

I will then look at case studies on alcohol management and related policies in Queensland and the Northern Territory. These case studies demonstrate how strategies that are consistent with human rights and the Declaration can provide opportunities to improve practice and outcomes.

4.2 What works in addressing alcohol misuse in discrete communities

As alcohol misuse is a multi-causal phenomenon any response must take a holistic approach. These responses should consider the particular circumstances of the community or location and include measures focussed on harm reduction, supply reduction and demand reduction.⁵

Policies must address the underlying social determinants of alcohol misuse, including the effects of social deprivation, poverty, lack of education and intergenerational and contemporary trauma.⁶ Remedial action should also include cultural healing.⁷

The effectiveness of any response is also highly influenced by the level of buy-in from the community. Interventions imposed without community control or culturally appropriate adaption can be counter-productive.⁸ The Closing the Gap Clearinghouse has found that ‘to be effective, such interventions need to be applied in a non-discriminatory manner, adapted so that they are appropriate to local cultures, and be subject to Indigenous community control’.⁹

Underpinning all effective interventions should be an understanding that first and foremost alcohol misuse is a health issue of which a primary consideration is the social and emotional wellbeing of the particular community and individuals.¹⁰

Text Box 4.1 provides a summary of features of effective interventions.

Text Box 4.1: Effective interventions¹¹

Evidence indicates that effective interventions to address alcohol abuse are:

- supported and controlled by affected communities
- designed and tailored to the specific needs of particular communities and subgroups within them
- culturally sensitive and appropriate

5 D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet No, 3 (2010). At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 September 2013).

6 W Loxley, J Toumbourou and T Stockwell, ‘Summary’, in A Kirsner (ed), *The Prevention of Substance Use, Risk and Harm in Australia: a review of the evidence* (2004), The National Drug Research Institute and the Centre for Adolescent Health, p 15.

7 Department of Health and Aging, *Alcohol treatment guidelines for Indigenous Australians* (2007) p 10. At <http://www.healthinfonet.ecu.edu.au/key-resources/promotion-resources?lid=967> (viewed 25 September 2013).

8 D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet No, 3 (2010), p 2. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 September 2013).

9 D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet No, 3 (2010), p 8. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 September 2013).

10 D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet No, 3 (2010). At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 September 2013).

11 In the Commission’s submission to the Parliamentary Committee inquiry into the Stronger Futures legislation we presented evidence, from a variety of sources including the Closing the Gap Clearinghouse, as to what makes an effective intervention. See Australian Human Rights Commission, Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and two related Bills (6 February 2012). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/submissions.htm (viewed 11 October 2013).

- adequately resourced and supported, including to cater for clients with complex needs
- provide a mix of broad-based and substance specific services
- planned and integrated as a suite of interventions.

(a) Alcohol restrictions

A common response to alcohol misuse is the imposition of restrictions, often in the form of complete bans, over specific geographic areas. This approach has been implemented predominately in discrete and remote communities with varying results.

There are several examples of communities deciding to be dry and implementing successful policies. For example the Groote Eylandt community of Umbakumba, which was featured in the *Social Justice Report 2007*, developed a plan to manage alcohol through an extended and in-depth process. The alcohol bans in Umbakumba and restrictions on the sale of takeaway in other parts of the island saw reduced consumption of alcohol along with a reduction in instances of violence and crime.¹²

There are also places where the community has chosen to restrict the availability of alcohol, as opposed to a complete ban. This approach has had success in areas such as Fitzroy Crossing, where restrictions have provided a circuit breaker to address dysfunction.¹³

On the other hand, bans imposed on communities without consultation or consent have been less effective and resulted in feelings of disempowerment and marginalisation in communities.¹⁴

The Northern Territory Intervention is an example of this. The Commission has consistently highlighted evidence which indicates that blanket alcohol bans, such as those imposed in the Northern Territory Intervention, are less effective than those driven by communities.¹⁵

Negative consequences of blanket alcohol bans include increased drinking in unsafe environments and displacement of people from communities into larger towns where alcohol is more readily available.¹⁶

Blanket bans also have the effect of criminalising behaviour that is not subject to criminalisation anywhere else. This is highly problematic given the disproportionate rate at which Aboriginal and Torres Strait Islander people are imprisoned in comparison to the non-Indigenous population.¹⁷

12 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008). At http://humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 11 September 2013).

13 M Gooda, *Social Justice Report 2010*, Australian Human Rights Commission (2011), p 28. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 18 October 2013).

14 Central Land Council, *The Central Land Council Community Development Framework* (2009), p 8.

15 See T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 9 January 2013).

16 Aboriginal and Torres Strait Islander Legal Services and Aboriginal Peak Organisations Northern Territory, *The Future of the Northern Territory 'Intervention': Issues Paper* (2010), p 7.

17 The rate of imprisonment for Indigenous persons is 2 268 per 100 000 compared the general population rate of 169 per 100 000 (based on average daily imprisonment rate): Australian Bureau of Statistics (ABS), 'Corrective Services Australia June Quarter 2012', 4512.0 (September 2012). At <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0?OpenDocument> (viewed 11 September 2013).

4.3 A human rights-based approach

A human rights-based approach to alcohol misuse advocates neither for the free flow of alcohol into every community nor the blanket application of alcohol bans.

This approach requires that communities are empowered to make decisions about the policies adopted to manage alcohol within their community. It also ensures that measures are reasonable, proportionate and necessary. The combination of these factors will, the evidence tells us,¹⁸ ensure policies have the greatest likelihood of success and will respect and protect the human rights of our communities.

The *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) is a crucial tool in guiding this process. As outlined in chapter 3, when developing any policy there must be consideration of the four Declaration principles of:

- self-determination
- free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

Any response delivered in line with these principles will result in the empowerment of communities to develop and implement responses, which, consistent with the evidence presented above, is most likely to have a positive impact.

I will consider the application of some aspects of the Declaration in more detail below.

(a) Protection from alcohol related harm

The protection of people from alcohol related harm is a legitimate goal which is consistent with the human rights contained in the Declaration. As well as the principles underpinning the Declaration, specific articles contain rights which are pertinent to alcohol policy. In particular, Article 7(1) includes the rights to life, physical and mental integrity, liberty and security of person.¹⁹ Article 22 of the Declaration is also important in any approach to this issue. It states:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

While we know the devastating harm that alcohol abuse can cause in some communities, a human rights-based approach mandates action to address and protect those most vulnerable to this harm.

18 D Gray and E Wilkes, *Reducing alcohol and other drug related harm*, Closing the Gap Clearinghouse Resource Sheet No. 3 (2010). At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs03.rtf (viewed 22 September 2013).

19 These Declaration rights are strongly supported by *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969, art 5(b); *International Covenant on Civil and Political Rights*, 1966, Art 9; *Convention on the Rights of the Child*, 1990.

(b) Non-discrimination and equality

A major human rights consideration in relation to the development of alcohol policies is the principle of non-discrimination and equality. Australia has obligations under both domestic and international law relating to discrimination on the basis of race.²⁰

Non-discrimination and equality is acutely relevant because many alcohol policies, particularly geographic bans, involve treating Aboriginal and Torres Strait Islander people differently to other Australians.

There are provisions in Australian and international law that allow States to justify differential treatment as 'special measures'. Special measures involve treating people differently on the basis of their race, where there is a requirement for the protection of a racial or ethnic group or individuals in order to ensure their equal enjoyment or exercise of human rights and fundamental freedoms. In fact, States are obliged to take special measures to ensure the full enjoyment of a particular group's human rights and fundamental freedoms.²¹

(c) Special measures in domestic Australian law

The *Racial Discrimination Act 1975* (Cth) (Racial Discrimination Act) s 8(1) provides an exception to the general prohibition against racial discrimination in s10 if a measure can be considered a special measure. The section makes reference to the *International Convention on the Elimination of All Forms of Racial Discrimination* Article 1(4) for an understanding as to what constitutes a special measure.²²

In the High Court case of *Gerhardy v Brown*²³ Justice Brennan identified the characteristics that must be satisfied in order for a measure to be considered a special measure within s 8(1).

- the measure must confer a benefit on some or all members of a class of people whose membership is based on race, colour, descent, or national or ethnic origin
- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others²⁴ and
- the measure must not have yet achieved its objectives (the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups).²⁵

The above elements of the test set out by Justice Brennan were confirmed in the recent case decided by the High Court, *Maloney v The Queen*.²⁶

Text Box 4.2 summarises the case and its findings.

20 *Racial Discrimination Act 1975* (Cth) and *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969.

21 *International Convention on the Elimination of All Forms of Racial Discrimination* 1969, art 2 (2).

22 *Racial Discrimination Act 1975* (Cth), s 8(1) reads 'This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).'

23 *Gerhardy v Brown* (1985) 159 CLR 70.

24 *Gerhardy v Brown* (1985) 159 CLR 70,133 (Brennan J).

25 *Gerhardy v Brown* (1985) 159 CLR 70, 139-140 (Brennan J).

26 [2013] HCA 28 (19 June 2013).

Text Box 4.2:

Maloney v The Queen²⁷

Mrs Maloney is an Aboriginal woman and resident of Palm Island in Queensland. She was convicted in the Magistrates Court in Townsville for breaching the island's alcohol restrictions.²⁸

Mrs Maloney's appeal against her conviction to the District Court of Queensland was dismissed.²⁹ Her application for leave to appeal to the Court of Appeal was also dismissed.³⁰

By special leave, she appealed to the High Court. The Commission was granted leave to appear as *amicus curiae* – a friend of the court.

The Palm Island community is composed almost entirely of Aboriginal and Torres Strait Islander peoples. Mrs Maloney claimed that the alcohol laws on Palm Island were in breach of the Racial Discrimination Act because those provisions affected her enjoyment of three rights: the right to equal treatment before courts and tribunals; the right to own property; and the right to access places and services intended for use by the general public. She also argued that they were not a 'special measure'.³¹

The Court found that the laws did involve differential treatment on the basis of race, however it confirmed the lower court's decision that the laws were a special measure. They found that the introduction of criminal penalties as part of the policy to ban alcohol did not preclude the laws from being a special measure.³² Therefore, Mrs Maloney's conviction was upheld.

The judgment adds to the understanding of what constitutes a special measure and how this is determined in a number of ways – but of particular note is its consideration of consultation and consent.

The Court found it is not necessary to show that there had been consultation or consent with those to whose benefit the measure is directed for the law to be a special measure. The majority did, however, find that the question as to whether there was genuine consultation may be relevant to the assessment of whether it is a special measure.³³

The Court also found that materials which were produced after the passing of the Racial Discrimination Act, such as general recommendations from treaty bodies and the Declaration, could not be considered to alter the understanding of the legislative provision. This was found despite the *Vienna Convention on the Law of Treaties* (1969) Article 31(3) which relates to the use of subsequent material in interpretation of treaty obligations.

27 [2013] HCA 28 (19 June 2013)

28 Mrs Maloney was charged with the offence of being in possession of more than a prescribed quantity of liquor in a restricted area on Palm Island contrary to s 168B of the *Liquor Act 1992* (Qld). Schedule 1R of the Liquor Regulation, made under the Act, has the effect of restricting the nature and quantity of liquor which people may have in their possession in public areas on Palm Island.

29 *Maloney v Queensland Police Service* [2011] QDC 139.

30 *R v Maloney* [2013] 1 Qd R 32.

31 *Liquor Act 1992* (Qld), s 168B in conjunction with Schedule 1R.

32 *Maloney v The Queen* [2013] HCA 28 (19 June 2013) 39–41 (French CJ).

33 *Maloney v The Queen* [2013] HCA 28 (19 June 2013) 46 (French CJ).

In its submissions to the High Court, the Commission argued, on the basis of the international law, that in order to determine whether the measures are special measures³⁴ a court should assess whether there is ‘free, prior and informed consent’ to the measures. We argued that if consent was not the standard accepted by the court then alternatively it should be considered whether the intended beneficiaries of the measures were consulted.

The test for what is required as a special measure under the Racial Discrimination Act does not accord with the requirements set out in the various international instruments, set out below. We would argue however, that if governments are to act in good faith, and in compliance with their obligations under the Declaration, CERD and other international instruments,³⁵ they must satisfy more than the narrower requirements of the Racial Discrimination Act. In my view, they must seek the free, prior and informed consent of the communities concerned, or as a bare minimum, undertake effective consultation.

(d) Special measures at international law

Special measures are a complex area of law where international law sets a higher benchmark than domestic Australian law. Text Box 4.3 sets out the international obligations which inform Australia’s responsibilities in relation to special measures.

Text Box 4.3: International Obligations

The Declaration

Article 21(2) of the Declaration places an obligation upon States regarding special measures:

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Convention on Elimination of all forms of Racial Discrimination

Article 1 (4) of CERD allows for differential treatment on the basis of race in certain circumstances.³⁶ For differential treatment to be deemed acceptable, and not racial discrimination, it must be a special measure.

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental

34 The particular questions it would address are whether the measures would confer a ‘real benefit’ on the members of a particular racial group and whether it is for the sole purpose of securing their advancement.

35 Such as the *International Convention on Civil and Political Rights*, 1966 and the *International Covenant on Economic, Social and Cultural Rights*, 1966.

36 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1969.

freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.³⁷

The Declaration's principle of non-discrimination and equality, informed by CERD and the guidance from the CERD Committee, provides authority as to what can be considered a special measure at international law.

The CERD Committee states that:

Special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary....States should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.³⁸

A way to apply this guidance, and ensure that special measures are legitimately characterised, is to ensure they:

- have a legitimate objective
- be a reasonable and proportionate measure to achieve that objective³⁹
- have a rational connection between the objective and the measures.⁴⁰

The legitimacy and proportionality of an objective will be harder to establish if the measures involve impeding the rights of or criminalises the purported beneficiaries. More restrictive measures are more likely to be considered reasonable if accompanied by a suite of measures which treat the problem in a holistic manner.

(e) Free, prior and informed consent

The best way to prove that the measures are reasonable and proportionate with a legitimate objective is to develop and implement them in close consultation with the community to gain their free, prior and informed consent.

I have said time and time again that a key element of free prior and informed consent is ensuring those most vulnerable in our communities have their say. If their voices are excluded then a community cannot be considered to have legitimately given their free, prior and informed consent. This is particularly important when considering alcohol policy, as those most vulnerable to alcohol related harm, such as women, children and the victims of abuse, are not necessarily those with the loudest voices.

37 *International Convention on the Elimination of All Forms of Racial Discrimination* 1969, art 1(4).

38 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009), paras 16, 18.

39 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009).

40 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (2009).

(f) Government to establish effectiveness

The Special Rapporteur on the rights of indigenous peoples, Professor James Anaya, says that:

discriminatory measures...cannot be found necessary to the legitimate objectives they are intended to serve, if the discriminatory treatment is not shown to actually be achieving the intended results.⁴¹

Too often we see governments' policies characterised as special measures without a clear demonstration for the basis of such a claim. If the Government implements measures which impact on our rights and are claimed to be special measures, governments should make clear to Aboriginal and Torres Strait Islander peoples how their actions are consistent with the Racial Discrimination Act.

41 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, fifteenth session, UN Doc A/HRC/15/37/Add.4 (2010), para 63. At http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/15/37/Add.4 (viewed 19 September 2013).

4.4 Alcohol policy in the Northern Territory and Queensland

In this reporting period substantial developments in alcohol policy have occurred in two jurisdictions – Queensland and the Northern Territory.

Both jurisdictions have implemented pathways for communities to develop their own Alcohol Management Plans (AMPs). I welcome these developments and their potential to return power to communities and effectively address alcohol misuse with community developed solutions. However, the way the Plans are implemented will ultimately determine their compatibility with human rights and their overall effectiveness.

If we are viewing alcohol policy holistically it is important to look at the suite of measures being proposed. Recent developments to address alcohol misuse in the Northern Territory raise serious human rights concerns that may undermine the overall efficacy of the return to community control in alcohol management plans in the Northern Territory.

(a) Queensland

In Queensland, 19 discrete Aboriginal and Torres Strait Islander communities have alcohol restrictions in place.⁴² These restrictions operate through AMPs. As was promised in the lead up to the State election in early 2012, the Minister for Aboriginal and Multicultural Affairs is currently coordinating a review of AMPs.

Each community has been given the opportunity to lead the review of their community's AMP.

The terms of reference, common to all reviews, requires the consideration of five issues:

1. Previous views and evidence base regarding alcohol misuse.
2. The strength of community leadership and the capacity to manage alcohol misuse and reduce alcohol related harm.
3. The effectiveness and impacts of the current AMP supply and demand strategies to reduce alcohol related harm.
4. The impact of AMPs on community members and regional centres.
5. Future strategies to manage alcohol misuse and reduce alcohol related harm, in each community, with a view to transitioning from AMPs if a community wishes to.⁴³

The review will operate in three phases.⁴⁴ Phase one involves communities conducting a review and submitting proposals to the State government. The community does not have to submit a proposal if it is happy with the current arrangements. Department officials are available to the community to assist with consultation and development of proposals if requested.

Phase two involves the development of alternative strategies and transition plans. At this stage, government officials will assist with the finalisation of the transition plan in order to move from the existing restrictions to a

42 Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Community alcohol limits*. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/alcohol-reforms/community-alcohol-limits> (viewed 19 September 2013).

43 Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Review of Alcohol Management Plans: Background and Terms of Reference*, pp 1-3. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/review-of-alcohol-management-plans-2012> (viewed 19 September 2013).

44 Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Review of Alcohol Management Plans: Review Process*. At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/review-of-alcohol-management-plans-2012> (viewed 19 September 2013).

new plan. However, the transition plan is restricted to existing budgets.

At Phase two, the transition plan will be sent to the Queensland Government for approval.

Phase three involves the implementation and monitoring of the new plans, with close interrogation of levels of alcohol related violence and harm.

I have had the opportunity to engage with the Woorabinda community about their AMP. Text Box 4.4 provides a history of Woorabinda, the context of alcohol policy and opportunities for the future.

Text Box 4.4: Woorabinda⁴⁵

Woorabinda is an Aboriginal community of just under 1000 people approximately two hours south-west of Rockhampton.

Woorabinda was established in 1927 when the Queensland Government moved the residents of the Aboriginal reserve at Taroom. The conditions on Woorabinda were harsh. A lack of water, a fatal outbreak of influenza and inadequate shelter from cold winters made life difficult.

Between 1927 and 1943, government policy under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) and subsequent protection Acts resulted in large numbers of people being forcibly moved to Woorabinda. In 1938, people from 47 different tribal groups, from as far away as NSW and the Northern Territory were living in Woorabinda.

During the Second World War, 271 Aboriginal people from the Cape Bedford mission (Hopevale) near Cooktown were moved to Woorabinda. It is estimated that at least 70 people from Cape Bedford including many children died within a year of arriving at Woorabinda because of inadequate facilities and disease. A further 630 people were forcibly moved to Woorabinda in the period after the end of the war until 1970.

In 1986, Woorabinda was transferred into the trusteeship of the newly formed Woorabinda Aboriginal Council.

The traumatic histories of many of the residents of Woorabinda, a lack of opportunities and generations of discrimination have created an environment highly susceptible to alcohol misuse.

Alcohol restrictions were put in place in Woorabinda in 2003. These restrictions involved limits on amounts of takeaway alcohol. A full ban on all alcohol and homebrew equipment was implemented in 1 July 2008.⁴⁶

45 Information about the history of Woorabinda has been sourced from D Craig, 'The Social Impact of the State on a Reserve in Queensland, Australia' Unpublished PhD Thesis, University of California, 1980. (John Oxley Library) and T Forde, *Confinement and Control: A History of Woorabinda Aboriginal Community 1927-1990*. At <http://espace.library.uq.edu.au/view/UQ:266148> (viewed 19 September 2013).

46 Queensland Government, Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, *Quarterly Bulletin for the period January to March 2012: Woorabinda*, (2012). At <http://www.datsima.qld.gov.au/atsis/government/programs-and-initiatives/reports/quarterly-bulletin-on-key-indicators-in-queenslands-discrete-indigenous-communities-january-march-2012> (viewed 3 October 2013).

In April 2013, on the invitation of the local community, I travelled to Woorabinda to help start a discussion about alcohol. I chaired a community meeting where a consensus was reached as to how the people of Woorabinda would engage with the AMP Review process.

The community acknowledged that the issue of alcohol was a contentious one and committed to developing a fair process to achieve a decision. Community members were anxious to ensure the voices of all members of the community were heard, especially those most vulnerable to alcohol related harm.

The community decided to form a Working Group, sitting independent from any existing organisational structure but accepting some logistical support from the Woorabinda Aboriginal Shire Council. The Working Group operate under terms of reference which ensure the review is undertaken in consultation with:

- the Woorabinda community including:
 - men, women and young people.
- service providers
 - government
 - non-government
- the Woorabinda Aboriginal Shire Council
- experts
- other communities
- other stakeholders in the community.

The Working Group will make minutes publically available and any community member is welcome to attend.

Although it is early days, the community of Woorabinda's approach to alcohol promises to be a process of empowerment for the community in exercising self-determination. There are many hurdles yet to overcome both within the community and navigating the review process. However, if the community is able to conduct the review and develop a plan with the same considered and inclusive approach which has characterised the early stages then the potential is great. This must be accompanied by the Queensland Government acting to facilitate and enable the community to develop, enact and implement their plan.

The Queensland Government also have a responsibility to ensure any plan respects the human rights of the people of Woorabinda. However, considering the above framework, any plan developed and supported by the community has a strong likelihood to be considered consistent with the human rights of the community.

I have welcomed this process because it places communities in control of the development of their responses to their own issues. Once developed by the community, any new measures should, by their nature, have the free, prior and informed consent of communities if all voices are heard, particularly the voices of the most vulnerable.

The development of AMPs stemming from the review and community involvement in the process can be seen as an exercise of self-determination, an essential principle and right of the Declaration. The community developed nature of AMPs and the guidance by the requirements of the terms of reference increases the likelihood that the measures can be considered special measures.

(b) Northern Territory

A lack of policy continuity has frustrated efforts to address the devastating impacts of alcohol misuse in some parts of the Northern Territory. Promising approaches, both at the community and government levels, have not been given an opportunity to prove themselves due to constant changes in policy. For instance, some of the community developed AMPs prior to the NTER achieved some positive results until they were abolished and replaced with blanket bans.⁴⁷ Also, as I will argue below, some good government programs have also been prematurely cut.

At different points alcohol policy has flared as a point of tension between state and federal governments and the people of the Northern Territory have suffered as a result of these tensions. For example, earlier this year both Commonwealth and Territory ministers strongly criticised each other's policies after the Northern Territory refused to conduct a premises assessment on two Alice Springs hotels after a request from the former Commonwealth Minister for Indigenous Affairs Jenny Macklin.⁴⁸

The partisan nature of alcohol policy in the Northern Territory has resulted in great fluctuations in government responses to alcohol. A lack of coordination, conflicting philosophies and a lack of evidence based policy has resulted in ineffective responses, often at odds with human rights.

(i) Australian Government – Stronger Futures measures

The recent history of alcohol restrictions in the Northern Territory are outlined in Text Box 4.5.

Text Box 4.5:

Background – alcohol restrictions in the Northern Territory

Before the Northern Territory Emergency Response (NTER) in 2007, some Aboriginal communities in the Northern Territory had successfully developed their own plans to respond to alcohol misuse. These responses varied from complete alcohol bans, to restrictions on carriage limits, bans on takeaway and restricted operating hours for licensed venues.

These community developed plans were replaced with blanket bans when the NTER was imposed.

The original 2007 NTER implemented a ban on drinking, possessing, supplying or transporting liquor in 73 Aboriginal communities (nominated as 'prescribed areas') in the Northern Territory.⁴⁹ The measures

47 For example see Unpublished, K Conigrave, E Proude and P d'Abbs, *Evaluation of the Groote Eylandt and Bickerton Island Alcohol Management System, A report produced for the Department of Justice*, Northern Territory Government (31 July 2007).

48 AAP, 'NT and Canberra clash over booze curbs', *The Adelaide Advertiser*, 7 February 2013.

49 *Northern Territory National Emergency Response Act 2007 (Cth)*, Parts I, II.

NOTE – communities included in the intervention were nominated as prescribed areas. The new measures allowed for the continued operation of licensed premises and individual permits issued under the *Liquor Act* (NT) and for some recreational, tourism and commercial fishing activities.

also established mechanisms to monitor takeaway sales across the whole of the Northern Territory.⁵⁰ Police were provided with powers to enter private residences in prescribed areas as if they were public places.⁵¹ At the time, the Australian Human Rights Commission (the Commission) expressed concerns about the discriminatory nature of the measures, most particularly the suspension of the Racial Discrimination Act and that these measures would be ineffective because they undermined community control in addressing alcohol-related harm.⁵²

The 2010 NTER redesign measures made a number of amendments to the operation of the alcohol measures.⁵³ The Commission welcomed aspects of the redesigned measures including:

- the provision of greater discretion in placing appropriate signage and publishing notices
- reinstatement of the Racial Discrimination Act
- provisions that enable communities to introduce voluntary alcohol management arrangements and apply to be exempted from blanket alcohol bans.⁵⁴

However, the Commission also expressed concerns regarding some features of the alcohol measures included in the 2010 NTER redesign, particularly that they were not developed with adequate community consultation.⁵⁵ At this point in time, no alternative plans were approved after these changes were made.

Federal government alcohol policy in the Northern Territory currently operates under the Stronger Futures suite of legislation and policies.⁵⁶

Stronger Futures continues the area-based restrictions created by the NTER but establishes a process through which the Commonwealth Minister for Indigenous Affairs can approve the AMPs proposed by communities. These plans are the first step in the process of communities seeking to adjust restrictions.

50 Department of Families, Housing, Community Services and Indigenous Affairs, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (2009), p 6. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Documents/landmark_reform_welfare_system.pdf (viewed 25 October 2013).

51 These powers were repealed in 2012 by *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*, s 1.

52 T Calma, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 285-289. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 25 October 2013).

53 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 3.

54 Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 123-124. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 25 October 2013).

55 Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (2010), 10 February 2010, paras 126-136. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 25 October 2013).

56 Stronger Futures is made up of three pieces of legislation:

- the *Stronger Futures in the Northern Territory Act 2011* (Cth)
- the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2011* (Cth)
- the *Social Security Legislation Amendment Act 2011* (Cth)

The legislation contains a requirement for community consultation⁵⁷ to precede the Minister making, revoking⁵⁸ or varying a rule restricting alcohol over a certain area. It also contains the requirement for the Minister to have regard to submissions received during consultations prior to making such a determination.

The legislation allows for the development of minimum standards for AMPs by legislative instrument. These minimum standards were made and registered in late 2012 and these standards must be met when the Minister makes a determination on whether to accept an AMP. Text Box 4.6 contains categories that make up the minimum standards.

Text Box 4.6:

AMP minimum standards overview

The minimum standards involve considerations in the following areas:

- Standard 1: Consultation and engagement
- Standard 2: Managing the Alcohol Management Plan
- Standard 3: Alcohol Management Plan strategies – supply, demand and harm reduction
- Standard 4: Monitoring, reporting and evaluation
- Standard 5: Clear geographical boundaries.⁵⁹

During the consultation on the AMP minimum standards, I raised concerns about the operation of the planning process. Expectations were raised during the development of Stronger Futures that the new process would allow each community to modify existing alcohol restrictions. However, this modification is not automatic as the revocation of existing restrictions requires further consideration by the Minister once an AMP has been approved.⁶⁰

The government considers the continued restrictions under Stronger Futures to be special measures. The Joint Committee on Human Rights (JCHR) criticised this characterisation and found that ‘the government has not provided a detailed explanation of why the Stronger Futures Measures can be legitimately viewed as special measures under international law.’⁶¹ The JCHR accepted the possibility that the measure may be

57 Before making, revoking or varying a rule the Minister must ensure that information about the proposal to make the rule, together with a short explanation of the consequences if such a rule is made, have been made available in the area in question. The Minister must also ensure people in the affected area have been given a ‘reasonable opportunity’ to make submissions to the Minister about the proposal to make the rule, the consequences if the rule is made and their circumstances, concerns and views: *Stronger Futures in the Northern Territory Act 2011* (Cth), s 27(6).

58 The community consultation requirement does not apply if the rule is in relation to the approval of an alcohol management plan: *Stronger Futures in the Northern Territory Act 2011* (Cth), s 27(7). The Explanatory Memorandum states that there should be sufficient community consultation prior to an alcohol management plan being approved: Explanatory Memorandum, *Stronger Futures in the Northern Territory Act 2011* (Cth), p 18.

59 Stronger Futures in the Northern Territory (Alcohol Management Plans) Rule 2013, pursuant to s 119, *Stronger Futures in the Northern Territory Act 2012* (Cth).

60 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27(3).

61 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Eleventh Report of 2013: Stronger Futures in the Northern Territory Act 2012 and related legislation* (2013), p 28. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/2013/112013/index (viewed 1 October 2013).

justified, however, it said that sufficient evidence had not been presented to accept the assertions that the continuing bans were special measures.

Given the chorus of concerns raised by myself and others, such as the JCHR, it is of particular importance that information is provided by Government to justify the characterisation as a special measure. On the other hand, these concerns could be alleviated if communities develop their own plans. But communities must be supported and assisted (including the provision of adequate resources) to transition to their own community developed plans. These AMPs should also be able to involve the lifting of blanket bans if that is what the community wants following a rigorous consultation process.

(ii) Northern Territory Government

The election of the Country Liberal Government in the Northern Territory in 2012 saw a dramatic change in approach to alcohol policy. I am concerned about many aspects of the new Northern Territory alcohol policy measures. I am particularly alarmed at the movement towards criminalisation of something that is a health problem that requires a preventative public health response.⁶²

The Banned Drinkers Register (BDR) and Substance Misuse and Referral Treatment (SMART) Court were abolished soon after the change of government and around the same time, the *Mandatory Alcohol Treatment Act 2013* (NT) was introduced in the NT Parliament.

The below section provides details and context of the key developments in alcohol policy.

Banned Drinkers Register

The BDR enforced identification checks for all takeaway alcohol purchases and allowed residents of the Northern Territory to be banned from purchasing alcohol. People were banned:

- if they were found guilty of an ‘alcohol related offence’
- were taken into protective custody three times in three months
- charged with high range drink driving offences.

The Substance Misuse and Referral Treatment (SMART) Court

The abolition of the SMART Court was announced in December 2012, after only eight months of operation, and it was repealed in Northern Territory legislation on 30 June 2013. Offenders with a ‘history of serious substance misuse’ who have criminal matters being heard before the Magistrates or Youth Justice Court may refer themselves, or be referred by a prosecutor or police officer, to the SMART court for the matter to be heard.⁶³

The SMART Court had the ability to make orders to address the substance misuse behaviours which had led to offending. Orders can include a ban on the consumption of alcohol or drugs, referral to treatment, and other conditions. Offenders are assessed by a Court Clinician prior to the making of an order and are monitored for at least six months after the order was made.

Non-compliance with the order could lead to consequences such as increased drug/alcohol testing, changes in orders and as a last resort, a short period of incarceration.⁶⁴

62 See for example United Nations Association of Australia, *Australia and the UN: Report Card* (2013), pp 21-23. At <http://www.unaa.org.au/release-of-australia-and-the-un-report-card-2013.html> (viewed 25 September 2013).

63 *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Act 2011* (NT) Part 3.

64 Northern Territory Magistrates Court, *Specialist Courts*. At http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml (viewed 28 September 2013).

Chief Magistrate Hilary Hannam bemoaned the scrapping of the SMART Court, stating:

We have now nothing in the court system, not a single program, not for drugs, not for illicit drugs, not for alcohol, not for mental health, not for Indigenous people.⁶⁵

Whilst the SMART Court was not in operation long enough to have produced strong results of its effectiveness, therapeutic drug and alcohol courts similar to the SMART Court are in operation in a number of other Australian jurisdictions and have been shown to be effective.⁶⁶

Mandatory Treatment

A key element of the Northern Territory Government's current alcohol policy is mandatory alcohol treatment. In May this year, I expressed my concerns about the human rights implications of the *Alcohol Mandatory Treatment Act 2013* (NT) (Alcohol Mandatory Treatment Act).⁶⁷ An outline of the Act is provided in Text Box 4.7.

Text Box 4.7:

Alcohol Mandatory Treatment Act

The Alcohol Mandatory Treatment Act requires that people who are taken into protective custody three times in two months must be taken into custody for assessment and forced to appear before an independent tribunal which will determine if and how the individual will be mandatorily treated.⁶⁸ The tribunal will have the option to force treatment:

- in a secure facility
- in a community residential facility
- in the community through measures such as income management.

If individuals abscond from a treatment facility more than twice they will be subject to criminal sanctions.⁶⁹ The criteria for making a mandatory treatment order is as follows:

- (a) the person is an adult;
- (b) the person is misusing alcohol;
- (c) as a result of the person's alcohol misuse, the person has lost the capacity to make appropriate decisions about his or her alcohol use or personal welfare;
- (d) the person's alcohol misuse is a risk to the health, safety or welfare of the person or others (including children and other dependants);

65 APONT, 'Maintain Court's discretion – Therapy not "throw away the key"' (Media release 3 July 2013).

66 D Weatherburn, C Jones, L Snowball and J Huw, *The NSW Drug Court: A re-evaluation of its effectiveness*, NSW Bureau of Crime Statistics and Research (2008). At http://www.bocsar.nsw.gov.au/bocsar/bocsar_pub_dtoh.html#drug_court (viewed 28 September 2012).

67 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.

68 *Alcohol Mandatory Treatment Act 2013* (NT), Part 2.

69 *Alcohol Mandatory Treatment Act 2013* (NT), s 72.

- (e) the person would benefit from a mandatory treatment order;
- (f) there are no less restrictive interventions reasonably available for dealing with the risk mentioned in paragraph (d).⁷⁰

I continue to have concerns that the involuntary detention under Mandatory Alcohol Treatment Act could be in breach of Australia's human rights obligations, in particular the right to freedom from arbitrary detention in Article 9 of the *International Covenant on Civil and Political Rights*.⁷¹ The draft General Comment on Article 9 states:

any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the person in question or preventing injury to others, must take into consideration less restrictive alternatives, and must be accompanied by adequate procedural and substantive safeguards established by law.⁷²

I outlined my concerns about deprivation of liberty in a letter to the Minister, elements of which are included in Text Box 4.8.

Text Box 4.8:

Deprivation of Liberty⁷³

Section 6 of the Alcohol Mandatory Treatment Act appears to recognise the need for such limitations on detention, stating:

The following general principles must be applied by a person when exercising a power or performing a function under this Act:

- (a) involuntary detention and involuntary treatment of a person are to be used only as a last resort when less restrictive interventions are not likely to be effective or sufficient to remediate the risks presented by the person
- (b) the least restrictive interventions are to be used when a person is being treated or dealt with under this Act
- (c) any interference with the rights and dignity of a person are to be kept to the minimum necessary.⁷⁴

However, in practice, if these principles were followed, there would be few if any occasions on which involuntary detention of the kind described in this Act would be permitted.

70 *Alcohol Mandatory Treatment Act 2013* (NT), s 10.

71 *International Covenant on Civil and Political Rights*, 1966, art 9.

72 Human Rights Committee, *Draft General Comment No. 35 – Article 9: Liberty and security of person*, UN Doc CCPR/C/107/R.3 (2013), para 19. At http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/107/R.3 (viewed 28 September 2013).

73 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commission, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.

74 *Alcohol Mandatory Treatment Act 2013* (NT), s 6.

As noted above, any infringement of the right to liberty must be necessary and proportionate to a legitimate aim. Proportionality typically has three aspects:

- the restrictive measure must be appropriate to achieve its protective function
- it must be the least intrusive instrument amongst those which might achieve the desired result
- it must be proportionate to the interest to be protected.⁷⁵

However, even before reaching this point, there must be some basis to the consideration that the deprivation of liberty is appropriate to achieve the protective aim. Given there is little evidence that involuntary drug and alcohol treatment is effective,⁷⁶ there is unlikely to be considered sufficient connection between the health promotion purpose of the Bill and the involuntary detention measures which the Bill provides.

Measures that disproportionately impact the ability for particular racial groups to enjoy their rights can be considered racial discrimination, inconsistent with the Racial Discrimination Act and Australia's international obligations. I hold fears that the laws will disproportionately affect Aboriginal and Torres Strait Islander people. In fact, comments by members of the Northern Territory Government suggest that the laws were developed with the intention of targeting Aboriginal and Torres Strait Islander people.⁷⁷ These comments give weight to predictions that the laws may have the practical effect of having an unfair and disproportional impact on Aboriginal and Torres Strait Islander people which could see them in breach of the Racial Discrimination Act.

The objection I raised about the Act's effect of criminalising health problems was reflected by the President of the Australian Medical Association Northern Territory branch, Dr Peter Beaumont:

The whole thing is meant to be a health pathway, and it's funny that the path leads to criminality if people don't abide by it. This is about illness and addiction; it's not about crimes, other than the fact that some people do commit crimes. But the ordinary courts of law can handle those; we already have laws for those.⁷⁸

The potential for the operation of this Act to add to the already drastic levels at which Aboriginal and Torres Strait Islander people are overrepresented in prisons in the Northern Territory is of particular concern. The Act provides yet another pathway for Aboriginal and Torres Strait Islander people to be incarcerated for behaviours which are not subject to criminal sanctions elsewhere in Australia.

In my communication to the Minister, I raised further human rights issues regarding:

- the ability of the Alcohol Mandatory Treatment Tribunal to make orders for the detention of a person cannot be considered an 'exceptional case' to justify the powers of administrative detention
- the extended periods of detention for assessment
- lack of safeguards for suitable representation before the tribunal

75 For example, see M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), p 275.

76 W Tan and M Johnson, *A Report into the effectiveness of civil commitment in the treatment of alcoholism, and its suitability for implementation in the Northern Territory*, AMSANT Research Issues Report (2013).

77 For example see A Aikman, 'Experts unite on "obscene" grog bill', *The Australian*, 28 May 2013. At <http://www.theaustralian.com.au/national-affairs/indigenous/experts-unite-on-obscene-brob-bill/story-fn9hmlpm-1226651729984> (viewed 30 September 2013).

78 A Betts, 'AMA attacks mandatory grog rehabilitation laws', *ABC News*, 12 June 2013. At <http://www.abc.net.au/news/2013-06-12/ama-attacks-nt-mandatory-alcohol-rehab-laws/4748382> (viewed 5 November 2013).

- adequate avenues of timely review
- criminalisation of health problems
- use of force
- charges for food and medication
- measures contrary to recommendations of the Royal Commission into Aboriginal Deaths in Custody.⁷⁹

Overlapping concerns about the Act were raised by a number of organisations and Peak organisations in the Northern Territory including Aboriginal Peak Organisations Northern Territory (APO NT), North Australian Aboriginal Justice Agency, Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission and Northern Territory Council of Social Services.

Whilst there were some welcome changes made after a consultation process,⁸⁰ I still harbour significant concerns about the human rights implications of this Act, including that the treatment facility in Darwin will soon be housed at the Darwin Correctional Centre, a jail.⁸¹ It is hard to see how the treatment can be characterised as anything but a punitive measure when participants are held in a jail. It is also unlikely that this facility will provide an appropriate therapeutic environment, undermining the likelihood that the treatment is successful.

While limited data is available about the impact of the Act so far, responsibility lies with the government to ensure its implementation is appropriately monitored and reported on transparently. This is particularly important because of the punitive nature of the provisions, especially the deprivation of liberty.

Alcohol Protection Orders

In October 2013 the Government introduced the Alcohol Protection Orders Bill 2013 (NT) to Parliament. Alcohol Protection Orders (APO) can be issued to people who are found guilty of an offence, including traffic offences, where alcohol was a factor which carries a minimum penalty of six months imprisonment or more. People who breach an APO by being in possession of alcohol, or found to have consumed alcohol will be liable to a \$7000 fine or six month jail term. Police will be given power to conduct breath tests on people who are thought to be under APOs.⁸²

I have grave concerns over the introduction of these measures. Where the previous Banned Drinkers Register restricted the purchase of alcohol, this measure goes further in effectively criminalizing the consumption of alcohol for those under APOs. My concerns relate to the fact that these APOs will further criminalise alcoholism, which, as I say above, is primarily an issue of health and social and emotional wellbeing. APOs may also lead to over policing of Aboriginal and Torres Strait Islander people, particularly those who are homeless.

79 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Correspondence to Robyn Lambley MLA, Minister for Health, Minister for Alcohol Rehabilitation, 31 May 2013.

80 R Lambley MLA, Minister of Alcohol Rehabilitation, *Alcohol Mandatory Treatment Bill: Proposed amendments as the result of consultations, 13 May to 12 June 2013*. At <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=10965&d=5> (viewed 28 September 2013).

81 J Elferink, Minister for Correctional Affairs and R Lambley, Minister for Alcohol Rehabilitation, 'New Location for Darwin's Alcohol Mandatory Treatment Facility' (Media release 21 August 2013). At <http://newsroom.nt.gov.au/index.cfm?fuseaction=viewRelease&id=11309&d=5> (viewed 3 October 2013).

82 105.7 ABC Darwin, 'Vicki Kerrigan asks Dave Tollner to explain the new Alcohol Protection Orders', *Drive with Vicki Kerrigan*, 13 May 2013 (D Tollner). At <http://www.abc.net.au/local/stories/2013/05/13/3757618.htm> (viewed 28 September 2013).

People placed on APOs are likely to be a similar cohort to those on the BDR. However, the abolition of the BDR removed barriers to the supply of alcohol. Consequently alcohol is easier to access for people previously restricted by the BDR. This access is of particular concern given the introduction of APOs would impose severe penalties for the consumption of alcohol. There is no evidence to suggest that the threat of punitive sanctions is effective against behaviours driven by addiction, such as alcoholism.⁸³ The associated penalties are likely to result in increased rates of incarceration.

Priscilla Collins, CEO of the North Australia Aboriginal Justice Agency, described the planned introduction of APOs as:

a major step backwards. The Government has learnt nothing from the Royal Commission into Aboriginal Deaths in Custody. That warned against criminalizing drunkenness and emphasised diversion from police custody. The Government is doing exactly the opposite.⁸⁴

83 W Tan and M Johnson, *A Report into the effectiveness of civil commitment in the treatment of alcoholism, and its suitability for implementation in the Northern Territory*, AMSANT Research Issues Report, (2013).

84 North Australian Aboriginal Justice Agency, 'New laws won't fix the Territory's drinking problem' (Media release 13 May 2013). At <http://www.naaaja.org.au/index.php/82-news/134-new-laws-won-t-fix-the-territory-s-drinking-problem.html> (viewed 3 October 2013).

4.5 Conclusion

This chapter has reviewed the complex human rights framework around alcohol policy in Australia. While I find the standards around consultation required under domestic legislation disappointing, I believe the Declaration nonetheless, provides the necessary guidance to develop sound alcohol management policies.

When people ask me what alcohol policy should look like in a particular community, quite simply I say that it is not up to me to tell them. A human rights approach doesn't dictate what alcohol policy should entail but it does set up a clear process to approach policy development based on the four principles that underpin the Declaration. If communities and governments can use these principles, they will have developed an alcohol management plan that demonstrates the Declaration in practice. Text Box 4.9 contains a summary of how these principles should guide practice.

Text Box 4.9:

Principles of the Declaration and alcohol management planning

Self-determination

If communities organise and respond to alcohol misuse, which may require varying levels of facilitation and enablement by government, then responses to alcohol misuse can be seen as an exercise in self-determination. June Oscar spoke about exercise of self-determination in the Fitzroy Valley response:

...I want to tell a different story. It is about how Aboriginal people can be the authors of our stories and not passive and powerless subjects in stories told and written by others.

... I want to talk about how the leaders of the Fitzroy Valley in the Kimberley are working together to create a pathway of hope and community vitality and resilience...⁸⁵

Self-determination can be exercised in these contexts by government's providing space for communities to take responsibility for responses to their own issues.

Free, prior and informed consent

Free, prior and informed consent is also key to developing responses to alcohol misuse in line with human rights. Without the consent of communities any response should not be legitimately considered a special measure, nor is it likely to be effective.

Respect for and protection of culture

Respect for and protection of culture is paramount through all stages of any alcohol management planning process and the implementation of any measures. It is key to ensure interventions have the greatest chance of being effective. Culturally appropriate rehabilitation services, demand reduction strategies and strong communities are all important to address alcohol misuse.

Alcohol abuse and related violence is not part of Aboriginal or Torres Strait Islander cultures. As outlined in the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*:

85 J Oscar, community member and CEO of Marninwarntikura, *Speech to the Western Australian Equal Opportunity Commission Forum* (Speech delivered at the Western Australian Equal Opportunity Commission Forum, Perth, 10 August 2009), pp 1-2.

Culture, in the Aboriginal and Torres Strait Islander context, needs to be differentiated from the excessive behaviours which can have a detrimental effect on the health and wellbeing of people, their families and communities. These excessive behaviours have no basis in Aboriginal and Torres Strait Islander cultures. Indeed it is the restoration and continuation of cultures which provide both the reason for change, and the pathway for securing it.⁸⁶

Non-discrimination and equality

The principle of non-discrimination and equality, incorporating considerations of special measures, is key to developing responses to alcohol in line with human rights. Any policy response to alcohol misuse must not be discriminatory, therefore when targeting discrete Aboriginal and/or Torres Strait Islander communities it must be implemented as a special measure.

In terms of the case studies in Queensland and the Northern Territory, control has been returned to some extent to communities to formulate their own AMPs. Both approaches are motivated by an aim to protect people from alcohol related harm. Both have the potential to lead to effective and empowering responses to alcohol misuse if the process proceeds in line with the rights and principles of the Declaration.

However, both also have the potential to frustrate community efforts and result in further disempowerment. Government departments involved in the planning process must respect and be guided by the four principles of the Declaration in facilitating communities involvement in the process. There also needs to be adequate support to enable communities to undertake this task.

Community developed AMPs may also have their effectiveness hindered if operating in parallel with punitive and problematic measures, such as those implemented and planned in the Northern Territory. I am highly concerned about the implications of Mandatory Alcohol Treatment and proposed Alcohol Protection Orders. I also have serious concerns about their compliance with human rights and will continue to monitor these developments.

86 *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*, Department of Health and Ageing (2013) p 9. At <http://www.health.gov.au/natsihp> (viewed 25 September 2013).

Chapter 5:

Business and our human rights in the Declaration

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5.1 Introduction

The significant role of business to respect and support our human rights is increasingly being recognised. Although the protection of human rights remains the responsibility of government, business is realising that human rights are both relevant and fundamental to their operations. In many of the conversations I have had with business and community leaders across the country, there is a firm view that business can – and does – play a fundamental role in the realisation of human rights by Aboriginal and Torres Strait Islander peoples.

‘Business’ is often described as multinational corporations operating in a global context.¹ Following a decade of unprecedented growth in mining in Australia, some of our communities have experienced global extractive corporations mining their lands, territories and resources.

But business also has a strong day-to-day presence in the lives of Aboriginal and Torres Strait Islander peoples. Whether we live in Tennant Creek or Adelaide, we have regular interactions with business in our everyday lives. This occurs in many circumstances. We engage with business when we visit the bank, put petrol in our cars and buy food for our families. When we go to work – as employers or employees – we interact with business and those interactions bring human rights into play.

The enjoyment of human rights by Aboriginal and Torres Strait Islander peoples can be impacted both positively and negatively in our engagement with business. This applies to our daily interactions when buying goods and accessing services, and in our dealings with large multinational corporations.

The growing number of businesses that are owned and managed by Aboriginal and Torres Strait Islander people also means that business is increasingly becoming integrated within our communities. As demonstrated by the case study on Supply Nation in section 5.4, the growth of Indigenous businesses is providing immense opportunities for the creation of employment and economic development in our communities. Experience has shown us that our interactions with business can be a very different proposition to our dealings with governments. I talk here about the responsiveness and effectiveness of business and its ability to quickly bring about change within our communities. This is shown by the case study on the Bourke Indigenous Housing Project in section 5.4, which describes the positive outcomes that the Bourke Aboriginal community has achieved working in partnership with Lend Lease.

In this chapter, I explain the benefits to business from taking a human rights-based approach to their operations. I set out the international framework that governs business and human rights, and then consider a human rights-based approach to business’ engagement with Indigenous peoples. I also highlight the role that business can play in implementing our human rights as articulated in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

Finally, the chapter presents five case studies in Australia that illustrate constructive outcomes for and improved relationships between Aboriginal and Torres Strait Islander peoples and business that are consistent with our human rights in the Declaration.

¹ For example, see Organisation for Economic Co-operation and Development, *Guidelines for Multi-National Enterprises* (2011). At <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (viewed 29 August 2013).

5.2 Why take a human rights-based approach to business?

We know that the fundamental objective of business is to drive economic growth. Business – particularly business involved in developing substantial infrastructure, industrial projects and/or extractive industries – can have a significant impact on Aboriginal and Torres Strait Islander peoples and their land. Whether this impact is positive or negative, however, depends on how businesses engage with the people affected by their activities.

We also know that economic development can provide immense opportunities for Aboriginal and Torres Strait Islander communities in terms of addressing social and economic disadvantage.² I believe that economic sustainability is critical to the future of our communities. But we need safe and healthy communities in order to create the best conditions for economic development. The underlying effects of colonisation and dispossession are still felt by many of our communities. So it is critical that economic development occurs in a way that supports and respects our culture and identity.³

And business' promotion of economic growth must be in a form that is sustainable and consistent with human rights if it is to enable our peoples to address this disadvantage. This means that when creating economic development opportunities, the application of a human rights approach will ensure that outcomes relating to health and well-being, employment, education and training are being addressed in order to overcome the distressing levels of disadvantage within our communities.⁴

I want to qualify my expectations of business. Businesses can contribute to the economic and social development of our communities and must ensure that their engagement with Aboriginal and Torres Strait Islander peoples occurs in a way that respects and supports our human rights. However, this cannot in any way detract from the responsibility of governments to protect our human rights, and to address and reconcile the historical situation of disadvantage facing our peoples.

(a) The benefits to business of adopting a human rights-based approach

Business adopting a policy of respecting and supporting human rights is not simply about complying with international and domestic law or 'doing the right thing'. While there are clear arguments for business to take a leading role in complying with human rights, there are also economic incentives for business to engage with human rights.

Evidence suggests that a commitment to human rights demonstrates good business practise. This includes:

- Enhancing a business' reputation and improving employee morale, leading to higher motivation, productivity and retention of excellent employees. It can also lead to a reduction in potential costs such as recruitment and insurance.

2 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission, Canberra (2011), ch 8. At http://www.pc.gov.au/__data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf (viewed 25 October 2013). Also see Australian Government, *Indigenous Economic Development Strategy 2011–2018*, Commonwealth of Australia, Canberra (2011), p 5. At <http://www.indigenous.gov.au/economic-participation/policy-programs/ieds/> (viewed 24 October 2013).

3 L Malezer, *Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 3: Discussion of the special theme for the year 'Indigenous Peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples'* (Delivered at the ninth session of the United Nations Permanent Forum on Indigenous Issues, New York, 19-30 April 2010).

4 The role of economic development to overcome disadvantage in our communities has been recently discussed by W Mundine, 'Shooting an Elephant: four giant steps' (Address to the Garma Festival Corporate Dinner, 10 August 2013). At <http://www.indigenouschamber.org.au/wp-content/uploads/2013/08/Speech-to-Garma-Festival.pdf> (viewed 18 October 2013).

- Operating as a point of difference for business. This can provide a competitive advantage as a business holds a stronger 'licence to operate' and has better access to new markets, consumers and investors.
- Developing a human rights policy can be an effective risk management tool for business. It provides an objective standard against which to assess social, economic and environmental impacts of business decisions, which can assist businesses to identify policy gaps and project-related risks.
- A human rights-based approach establishes a foundation for a more stable operating environment, which can contribute to sustainable development and outcomes.
- Human rights provide a framework to build relationships with communities, governments and other stakeholders resulting in fewer conflicts and disputes.⁵

I discuss the economic and social benefits for business further in relation to the case studies in section 5.4 below.

5 See Castan Centre for Human Rights Law, International Business Leaders Forum, and Office of the United Nations High Commissioner for Human Rights, *Human Rights Translated: A Business Reference Guide* (2008), p viii. At <http://www.law.monash.edu.au/castancentre/publications/human-rights-translated.html> (viewed 14 October 2013); United Nations Global Compact, *Second Exposure Draft – United Nations Declaration on the Rights of Indigenous Peoples: a Business Reference Guide* (2013), pp 15–16; CAER and Oxfam Australia, *The Right to Decide: company commitments and community consent* (2013), p 6. At <https://www.oxfam.org.au/media/2013/05/australian-mining-companies-fall-short-on-gaining-consent-from-the-worlds-indigenous-peoples-new-report/> (viewed 14 October 2013).

5.3 An international framework for human rights and business

International standards and guidelines prescribe the corporate responsibility to support and to respect human rights. The United Nations has taken a leading role in developing initiatives to guide business on human rights, and international organisations such as the International Labour Organisation (ILO)⁶ and the Organisation for Economic Co-operation and Development (OECD)⁷ have also established human rights standards for business.

(a) The corporate responsibility to support and respect human rights

(i) United Nations Global Compact

The corporate responsibility to support and respect human rights is outlined in the United Nations Global Compact (Global Compact).⁸ The Global Compact encourages businesses to align their operations and strategies with ten principles to develop and implement sustainable practices and policies.

The human rights principles in the Global Compact are:

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

Principle 2: make sure they are not complicit in human rights abuses.⁹

These principles are reinforced by a further eight principles that address the areas of labour, environment and anti-corruption.

(ii) Guiding Principles on Business and Human Rights

The *Guiding Principles on Business and Human Rights* (Guiding Principles) create a framework for implementing the United Nations' objective to protect and respect human rights, and to provide remedies in situations where human rights are violated.¹⁰ The Guiding Principles, as endorsed by the Human Rights Council in June 2011, are regarded as the 'authoritative global standard for addressing business-related human rights challenges.'¹¹

6 As set out in Text Box 5.2, the ILO has developed the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006). At http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (viewed 21 October 2013).

7 As set out in Text Box 5.2, the OECD has written the *Guidelines for Multi-National Enterprises* (2011). At <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (viewed 21 October 2013).

8 The United Nations Global Compact is a voluntary initiative currently comprising more than 10 000 corporations from over 130 countries: see United Nations Global Compact, *Overview of the UN Global Compact*. At <http://www.unglobalcompact.org/AboutTheGC/index.html> (viewed 14 October 2013).

9 United Nations Global Compact, *The Ten Principles*. At <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (viewed 14 October 2013).

10 The *Guiding Principles on Business and Human Rights* were developed by Professor John Ruggie, the United Nations Special Representative for Business and Human Rights.

11 Human Rights Council, *Follow up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, twenty first session, UN Doc A/HRC/21/55, para 21. At <http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx> (viewed 2 October 2013).

The Guiding Principles are founded on three ‘pillars’ of human rights that recognise:

- a. Governments’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms.¹²
- b. Business enterprises’ requirement to comply with all applicable laws and to respect human rights.
- c. The requirement for rights and obligations to be matched to appropriate and effective remedies when human rights are breached.¹³

This framework sets out the different but complementary responsibilities of governments and businesses:

Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.¹⁴

This means that the corporate responsibility to respect human rights ‘exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.’¹⁵

While the Guiding Principles do not create new international law obligations,¹⁶ they establish a regulatory system in which ‘public and private governance systems – corporate as well as civil – each come to add distinct value, compensate for one another’s weaknesses, and play mutually reinforcing roles...’¹⁷ In this way, the responsibility for business to respect human rights is supported by the government’s duty in the Guiding Principles to ‘protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises’ and to ‘set out clearly that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.’¹⁸

The Guiding Principles provide welcome clarity around the responsibilities of business and the duties of governments to work in partnership with Aboriginal and Torres Strait Islander peoples and communities.

12 I discussed the duty of governments to protect human rights as set out in the *Guiding Principles on Business and Human Rights* in M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 89–91. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 29 August 2013).

13 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, seventeenth session of the Human Rights Council, UN Doc A/HRC/17/31 (2011), p 1. At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 21 October 2013).

14 J Ruggie, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, eighth session of the Human Rights Council, UN Doc A/HRC/8/5 (2008), para 6. At http://ap.ohchr.org/documents/alldocs.aspx?doc_id=14100 (viewed 14 October 2013).

15 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, seventeenth session of the Human Rights Council, UN Doc A/HRC/17/31 (2011), p 13. At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 21 October 2013).

16 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, seventeenth session of the Human Rights Council, UN Doc A/HRC/17/31 (2011), p 6. At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 21 October 2013).

17 J Ruggie, ‘Progress in Corporate Accountability’, Institute for Human Rights and Business Advisory Board Commentary (2013). At <http://www.ihrb.org/commentary/board/progress-in-corporate-accountability.html> (viewed 21 October 2013).

18 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, seventeenth session of the Human Rights Council, UN Doc A/HRC/17/31 (2011), p 3. At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 29 August 2013).

I have spoken extensively in this Report about the interplay between rights, relationships and responsibilities. I believe that the Guiding Principles, when underpinned by full and proper consultation with our communities, will provide tremendous rewards for business, governments and our communities by establishing the processes that create sustainable development outcomes. I discuss the application of the Guiding Principles to business' engagement with Indigenous peoples in section 5.3(c) below.

The foundational principles underpinning the corporate responsibility to respect human rights are outlined in Text Box 5.1. As noted above, operational principles guiding the corporate responsibility to respect human rights, and foundational and operational principles directing government's duty to protect human rights and access to remedy comprise the remaining Guiding Principles.¹⁹

19 For the complete Guiding Principles, see J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, United Nations Human Rights, Office of the High Commissioner, New York and Geneva (2011), is available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (viewed 18 October 2013).

Text Box 5.1:

Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework

The corporate responsibility to respect human rights

A. Foundational principles

Principle 11: Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Principle 12: The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

Principle 13: The responsibility to respect human rights requires that business enterprises:

- a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
- b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Principle 14: The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.

Principle 15: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- a. A policy commitment to meet their responsibility to respect human rights;
- b. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.²⁰

²⁰ J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, seventeenth session of the Human Rights Council, UN Doc A/HRC/17/31 (2011). At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 29 August 2013).

These Guiding Principles highlight the far-reaching implications of business activities on human rights. In the introduction to this chapter, I talk about the daily presence of business in the lives of Aboriginal and Torres Strait Islander peoples – the Guiding Principles encourage *all* these diverse businesses to consider and address the impact of their activities on our human rights. As I have mentioned often in this Report, meaningful and effective consultation with Indigenous peoples is essential to respecting and supporting our human rights.

Practical initiatives that businesses can undertake to act consistently with the Guiding Principles in relation to Indigenous peoples and our lands are discussed in section 5.3(c) below.

(iii) Other international standards on business and human rights

A snapshot of international standards that support the requirement for business to respect and support human rights is set out in Text Box 5.2. Many of these standards have recently been updated to be consistent with the Guiding Principles. This demonstrates the global authority of the Guiding Principles.

Text Box 5.2:

International standards on business and human rights

The Equator Principles (2013)

The *Equator Principles* provide a benchmark for financial institutions to assess and manage environmental and social risk in projects, particularly major infrastructure and industrial projects.²¹

Global Reporting Initiative: G4 Sustainability Reporting Guidelines (2013)

The Global Reporting Initiative (GRI) is a non-profit organisation that provides businesses with a sustainability reporting framework to monitor and report on economic, environmental and social sustainability.

The GRI contains specific indicators on human rights which are consistent with the foundational principles underpinning the corporate responsibility to respect human rights in the *Guiding Principles on Business and Human Rights*.²²

Performance Standards on Environmental and Social Sustainability (2012)

The *Performance Standards on Environmental and Social Sustainability* (Performance Standards) have been developed by the International Finance Corporation (IFC) to provide guidance on how to identify risks and manage risks and impacts so as to undertake business/investment in a sustainable way. There are eight Performance Standards that are underpinned by the corporate responsibility to respect human rights set out in the *Guiding Principles on Business and Human Rights*.²³

21 *The Equator Principles* (2013). At <http://www.equator-principles.com/> (viewed 29 August 2013).

22 Global Reporting Initiative, *G4 Sustainability Reporting Guidelines* (2013), p 76. At <https://www.globalreporting.org/reporting/g4/Pages/default.aspx> (viewed 29 August 2013).

23 International Finance Corporation (World Bank Group), *Performance Standards on Environmental and Social Sustainability* (2012), p 3. At http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps (viewed 29 August 2013).

Guidelines for Multi-National Corporations (2011)

The OECD's *Guidelines for Multi-National Enterprises* provide non-binding principles and standards for responsible business conduct in a global context that is consistent with applicable laws and internationally recognised standards.²⁴

The Guidelines contain a human rights chapter that is consistent with the foundational principles underpinning the corporate responsibility to respect human rights in the *Guiding Principles on Business and Human Rights*.²⁵

Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006)

The ILO developed the principles contained in the *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (MNE Declaration) in 1977. Most recently updated in 2006, the MNE Declaration provides universal guidelines to MNEs, governments, and employers' and workers' organisations in areas such as employment, training, conditions of work and life, and industrial relations.

The objective of the MNE Declaration is 'to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimize the difficulties to which their various operations may give rise...'²⁶

Voluntary Principles on Security and Human Rights

Established in 2000, the *Voluntary Principles on Security and Human Rights* (Voluntary Principles) is a multi-stakeholder initiative involving governments, companies and non-governmental organisations promoting the implementation of a set of principles that guide oil, gas and mining companies on providing security for their operations in a manner that respects human rights.

Specifically, the Voluntary Principles guide companies in conducting a comprehensive human rights risk assessment in their engagement with public and private security providers to ensure human rights are respected in the protection of company facilities and premises.²⁷

Dow Jones Sustainability Index

These indices track the performance of international companies in terms of economic, environmental and social criteria in order to provide benchmarks for human rights and sustainable practices.²⁸

24 Organisation for Economic Co-operation and Development, *Guidelines for Multi-National Enterprises* (2011), pp 2-3. At <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (viewed 29 August 2013).

25 Organisation for Economic Co-operation and Development, *Guidelines for Multi-National Enterprises* (2011), ch 4. At <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> (viewed 29 August 2013).

26 International Labour Organisation, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (2006), p 2. At http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm (viewed 29 August 2013).

27 *Voluntary Principles on Security and Human Rights*. At <http://www.voluntaryprinciples.org/> (viewed 29 August 2013). Dow Jones Sustainability Indices. At <http://www.sustainability-indices.com/> (viewed 29 August 2013).

28 *Dow Jones Sustainability Indices*. At <http://www.sustainability-indices.com/> (viewed 29 August 2013).

(b) International human rights – business and Indigenous peoples

I have talked about how business provides opportunities for Indigenous peoples in terms of economic and social development, employment and the protection of culture. In section 5.4 below, I present case studies that highlight some of the positive outcomes that can occur when businesses undertake activities in a way that supports and respects the human rights of Aboriginal and Torres Strait Islander peoples in Australia.

Nonetheless, we know that there are still instances where Indigenous peoples remain vulnerable to negative human rights impacts from business activities. For example, the International Finance Corporation (IFC) recently observed that:

Indigenous peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. In many cases, their economic, social, and legal status limits their capacity to defend their rights to, and interests in, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development.²⁹

The Human Rights Council established a *Working Group on the issue of human rights and transnational corporations and other business enterprises* (Working Group on Human Rights and Business) in 2011 to, amongst other matters, promote the implementation of the Guiding Principles.³⁰

A report released by the Working Group in August 2013 confirmed that Indigenous peoples are ‘among the groups most severely affected by the activities of the extractive sector, the agro-industrial and the energy sectors.’³¹ The nature of these adverse effects on Indigenous peoples’ human rights:

...range from impacts on indigenous peoples’ right to maintain their chosen traditional way of life, with their distinct cultural identity; to discrimination in employment and accessing goods and services (including financial services); access to land and security of land tenure; to displacement through forced or economic resettlement and associated serious abuses of civil and political rights, including impacts on human rights defenders, right to life and bodily integrity.³²

The report also highlighted specific groups of Indigenous peoples that are especially ‘vulnerable to human rights abuses connected to business activities and...excluded from agreement processes and other consultations that irrevocably influence their lives.’³³ These groups include Indigenous women, children, older persons, young people, people with disabilities, and lesbian, gay, bisexual and transgender people.³⁴

29 International Finance Corporation (World Bank Group), *Performance Standards on Environmental and Social Sustainability* (2012), p 47. At http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps (viewed 29 August 2013).

30 *Human rights and transnational corporations and other business enterprises*, Human Rights Council Resolution 17/4, UN Doc A/HRC/RES/17/4 (2011). At http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4 (viewed 2 October 2013).

31 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixty eighth session, UN Doc A/68/279 (2013), para 1. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

32 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixty eighth session, UN Doc A/68/279 (2013), para 1. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

33 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixty eighth session, UN Doc A/68/279 (2013), para 2. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

34 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixty eighth session, UN Doc A/68/279 (2013), para 2. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

This report is extremely worrying and further confirms the need for business to actively support and respect our human rights. Businesses can promote and advance the human rights of Indigenous peoples through their core operations, strategic social investments and philanthropy, advocacy and public policy engagement, and partnership and collective action.³⁵ These actions enable businesses to:

...create opportunities for Indigenous peoples to participate in, and benefit from project related activities that may help them fulfil their aspiration for economic and social development. Furthermore, Indigenous peoples may play a role in sustainable development by promoting and managing activities and enterprises as partners in development.³⁶

Effective engagement is critical to supporting and respecting the human rights of Aboriginal and Torres Strait Islander peoples. This is particularly the case when our communities have to navigate their way through complex processes with an unequal power dynamic. In the *Social Justice Report 2011*, I said that 'the way our communities operate will always be shaped and informed by external influences. These influences can either empower and support our communities or undermine them.'³⁷

A key principle of the Declaration is participation in decision-making, underpinned by free, prior and informed consent and good faith. The right to participate in decision-making is critical to our communities determining our priorities for development, owning the solutions to the challenges we face and improving our quality of life.³⁸ Our communities also need to be able to talk to business on an equal footing in order to minimise power imbalances. As I said in the *Social Justice Report 2011*:

The principle of free, prior and informed consent should guide both the internal and external culture of decision-making. It should be used by Aboriginal and Torres Strait Islander peoples to improve their own internal decision-making processes so that they are representative [and] inclusive.

Free, prior and informed consent should also be used by governments and other parties to guide their engagements with our communities and to inform subsequent monitoring and evaluation of these processes.³⁹

The following section explains how the Guiding Principles provide a human rights framework for business' engagement with Indigenous peoples.

(c) Applying the Guiding Principles to business' engagement with Indigenous peoples

The Special Rapporteur on the rights of indigenous peoples (Special Rapporteur), Professor James Anaya, has affirmed that the Guiding Principles should be applied to Indigenous peoples with due regard to the relevant international laws and standards, and that to do otherwise would:

35 United Nations Global Compact, *Exposure Draft – United Nations Declaration on the Rights of Indigenous Peoples: a Business Reference Guide* (2012), p 5.

36 International Finance Corporation (World Bank Group), *Performance Standards on Environmental and Social Sustainability* (2012), p 47. At http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability/publications/publications_handbook_pps (viewed 29 August 2013).

37 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 9. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 15 October 2013).

38 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p 111. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 16 October 2013).

39 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 116. At <http://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 16 October 2013).

be contrary to the injunction, found among the Guiding Principles' introductory paragraphs, that they should be applied in a 'non-discriminatory manner', with particular attention to the rights and needs of groups that are vulnerable or marginalised.⁴⁰

This approach has also been proposed by the Expert Mechanism on the Rights of Indigenous Peoples.⁴¹

The mandate to apply the Guiding Principles in a non-discriminatory manner requires businesses to respect the human rights of Indigenous peoples as set out in the Declaration.⁴² This is affirmed in the report by the Working Group on Human Rights and Business, which notes that:

...business enterprises may need to consider additional standards, such as UNDRIP [United Nations Declaration on the Rights of Indigenous Peoples] and ILO Convention 169 [Convention Concerning Indigenous and Tribal Peoples in Independent Countries], where they may have an adverse impact on the rights of individuals, both men and women, belonging to specific groups or populations that require particular attention, such as indigenous peoples.⁴³

It is important to remember that equality requires an acknowledgement of cultural difference and recognition that historical discrimination has continuing negative impacts. Accommodating and accounting for this difference can create true equality. In chapter 3, I refer to the second preambular paragraph of the Declaration, which states:

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.⁴⁴

I discuss extensively what this paragraph means for governments in chapter 3. But many of the points I make about governments are also relevant to business. I believe that if we are to achieve circumstances of equality, structures must be reoriented to account for Aboriginal and Torres Strait Islander peoples' difference. In line with the Guiding Principles, business should acknowledge these differences in policies to accommodate the priorities and incorporate the internal decision-making processes of Aboriginal and Torres Strait Islander peoples.

In the *Social Justice Report 2012*, I referred to the Declaration as 'a remedial instrument that offers a blueprint to improving the human rights of Aboriginal and Torres Strait Islander peoples.'⁴⁵ As such, the Declaration guides how business should engage with Indigenous peoples.

40 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council*, twenty first session, UN Doc A/HRC/21/47 (2012), paras 55–56. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/AnnualReports.aspx> (viewed 29 August 2013).

41 Human Rights Council, *Follow up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, twenty first session, UN Doc A/HRC/21/55 (2012), paras 21–28. At <http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx> (viewed 2 October 2013).

42 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council*, twenty first session, UN Doc A/HRC/21/47 (2012), para 59. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/AnnualReports.aspx> (viewed 29 August 2013).

43 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixty eighth session, UN Doc A/68/279 (2013), para 19. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

44 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, preambular para 2.

45 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p 109. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 18 October 2013).

Because the Declaration sets out the rights of Indigenous peoples and the responsibilities of governments, but does not specifically articulate the obligations of business to respect the human rights of Indigenous peoples, the Global Compact is currently drafting a Business Reference Guide on the Declaration: see Text Box 5.3. I have previously outlined the elements of Guiding Principle 15 which state that business should address a number of issues when their activities impact on Indigenous peoples and their lands and territories. I discuss these requirements in greater detail below.

Text Box 5.3:

*United Nations Declaration on the Rights of Indigenous Peoples – Business Reference Guide*⁴⁶

The United Nations Global Compact is in the process of drafting a *Business Reference Guide to the United Nations Declaration on the Rights of Indigenous Peoples* (Business Reference Guide) that provides practical guidance to businesses seeking to respect and support the human rights of Indigenous peoples. Exposure drafts of the Business Reference Guide were released for comment in December 2012 and September 2013, and the final Guide will be issued at the United Nations Forum on Business and Human Rights in December 2013.

The Business Reference Guide examines the role of business to respect and support the human rights of Indigenous peoples. The Guide illustrates how the rights of Indigenous peoples are relevant in a business context, provides a guide for business on the articles in the Declaration and offers practical examples for business to support the rights in the Declaration.

The Business Reference Guide suggests the following key policy actions for business to respect and support the human rights of Indigenous peoples:

- Adopt and implement an Indigenous peoples' rights policy, addressing Indigenous peoples' rights and committing the business to respect and support Indigenous peoples' rights.
- Conduct human rights due diligence to identify actual or potential impacts on Indigenous peoples' rights, integrate findings and take action, track and communicate findings.
- Consult with Indigenous peoples in relation to matters that may affect their rights.
- Obtain (and maintain) free, prior and informed consent from Indigenous peoples where appropriate.
- Establish or cooperate with legitimate processes to remediate any adverse impacts on Indigenous peoples' rights.
- Establish or cooperate with an effective and culturally appropriate grievance mechanism.

⁴⁶ United Nations Global Compact, *Second Exposure Draft – United Nations Declaration on the Rights of Indigenous Peoples: a Business Reference Guide* (2013), pp 15–35.

(i) Policy commitment to respect human rights (Guiding Principle 15(a))

When business enterprises undertake operations on or near the lands and territories of Indigenous peoples, the Special Rapporteur states that the corporate responsibility to respect human rights must recognise the 'basic rights' of Indigenous peoples, including:

...the existence of indigenous peoples and...their own social and political structures; indigenous possession and use of land, territory and natural resources; exercise by the State of its duty to consult indigenous peoples in relation to activities that might affect them, and the related responsibility of business; impact studies and mitigation measures; and benefit sharing with indigenous peoples.⁴⁷

The report by the Working Group on Human Rights and Business provides practical suggestions that set out how businesses can embed its policy commitment to respect human rights into its business policies and procedures: see Text Box 5.4.

Text Box 5.4:

Good business practices to implement the policy commitment to respect human rights

Cultural awareness

Businesses need to build a work environment that is culturally aware, gender sensitive and inclusive. They must also ensure employees and contractors have an understanding of Indigenous peoples, and respect the rights, cultures and customs of Indigenous peoples within the communities in which projects are located. In this regard, business enterprises should organise specific training as an obligatory part of the contracting procedure.⁴⁸

Recognition of land rights and tenure

Business enterprises should recognise that land rights and tenure based on customary laws, traditions and practices, can create disputes between companies and Indigenous peoples. Therefore, they should identify mechanisms to prevent such disputes and if they occur, resolve them through culturally appropriate mediation.⁴⁹

Consultation

Businesses need to ensure that information is conveyed in a manner that can be understood and is accessible by both men and women. Business enterprises need to be aware of the imbalance of power and take specific measures to ensure that 'they and the community meet on an equal footing.'⁵⁰

47 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the Human Rights Council*, fifteenth session, UN Doc A/HRC/15/37 (2010), para 46. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-15-37-19-july-2010> (viewed 29 August 2013).

48 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 27. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

49 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 28. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

50 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 29. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

Communication

The policy commitment to respect human rights needs to be easily understood and available to Indigenous peoples. Therefore, businesses should translate their human rights policy commitment in a way that accounts for ‘differences in language, literacy levels (in particular among women and vulnerable groups), and cultural preferences for the way in which information is transmitted and received.’⁵¹

The case studies in section 5.4 also describe how businesses in Australia are using Reconciliation Action Plans (RAPs) to commit to targets that promote cultural awareness, employment and reconciliation with Aboriginal and Torres Strait Islander peoples – policies and practices that support and respect our human rights.

(ii) Human rights due-diligence process (Guiding Principle 15(b))

Guiding Principles 15(b) and 17–21 provide for businesses to implement a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.⁵²

The Special Rapporteur notes that the exercise of human rights due-diligence for activities on Indigenous land means that businesses need to consider the context of their business activities and whether the activities are likely to adversely impact on the human rights of Indigenous peoples.⁵³

This approach requires businesses to recognise that generic social, environmental and/or economic impact assessments may not identify the potential human rights impacts of their activities on Indigenous peoples. Consequently, businesses need to ensure that impact assessment processes are evidence-based and study the effects of their activities on all members of the Indigenous community.⁵⁴ Businesses must also ensure that the vulnerable members of our communities – our women, children and elders – are supported to participate in these processes.

(iii) Grievance mechanisms (Guiding Principle 15(c))

Guiding Principle 15(c) articulates that businesses should develop processes that will enable the remediation of any adverse human rights impacts. This means that where a business identifies that they have ‘caused or contributed to adverse impacts on Indigenous peoples, they should provide for or cooperate in the

51 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 23.

At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

52 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/31 (2011). At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 29 August 2013).

53 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the Human Rights Council*, fifteenth session, UN Doc A/HRC/15/37 (2010), para 37. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-15-37-19-july-2010> (viewed 29 August 2013).

54 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 31. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

remediation of those impacts through legitimate processes.¹⁵⁵

The history of dispossession that Indigenous people have faced has often been exacerbated by business projects and activities.⁵⁶ This historical situation has an on-going impact on Indigenous peoples, who continue to suffer from power imbalances in their interactions with business.⁵⁷

Consequently, business must understand that there is a need to 'address the legacy of past wrongs inflicted on indigenous communities as a result of business activities.'⁵⁸ While past grievances can create 'additional challenges in seeking to address potential adverse impacts going forward', addressing these issues and 'developing an understanding of any continued impacts can be an important aspect of building a relationship with indigenous communities.'⁵⁹

The report by the Working Group on Human Rights and Business notes that, consistent with the recognition of Indigenous peoples' laws and customs in the Declaration, 'business enterprises should consider identifying adequate and culturally and gender appropriate remedy mechanisms, as an integral part of any contractual relationship with indigenous peoples.'⁶⁰

The report also identifies good business practices to address the grievances of Indigenous peoples: see Text Box 5.5.

55 Human Rights Council, *Follow up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, twenty first session, UN Doc A/HRC/21/55 (2012), para 27(f). At <http://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx> (viewed 2 October 2013)

56 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), paras 1-2, 20. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

57 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 44. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

58 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 20. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

59 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 20. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

60 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 42. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

Text Box 5.5:

Good business practices to address grievances of Indigenous peoples

Consultation

Businesses should develop grievance mechanisms in consultation with affected Indigenous peoples and communities. Businesses should pay specific attention to the accessibility, responsiveness and local ownership of a grievance mechanism to ensure:

- it meets Indigenous peoples' needs
- it will be used in practice
- there is a shared interest in ensuring its success.

Capacity building

Businesses need to build the capacity of affected Indigenous peoples and communities to develop their relevant knowledge and skills.

Transparency

Businesses need to ensure grievance mechanisms are accessible, transparent, and protect victims in situations where reprisals or pressures may occur.

Review

Grievance mechanisms need to be periodically reviewed. To ensure grievance mechanisms are independent and legitimate, reviews should incorporate feedback from Indigenous peoples and communities.⁶¹

These practices reflect the importance of building real relationships between business and Indigenous peoples – relationships that acknowledge past grievances and recognise that transparent and consultative processes are necessary to ensure that future engagement is consistent with our human rights.

(d) Extractive industries and the rights of Indigenous peoples

The Special Rapporteur on the rights of indigenous peoples has observed that the extraction and development of natural resources on or near the lands and territories of Indigenous peoples is 'one of the foremost concerns of indigenous peoples worldwide, and possibly also the most pervasive source of challenges to the full exercise of their [human] rights.'⁶²

61 United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, sixth eighth session, UN Doc A/68/279 (2013), para 44. At <http://www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx> (viewed 1 October 2013).

62 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples to the General Assembly*, sixth sixth session, UN Doc A/66/288 (2011), para 97. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-general-assembly-a-66-288-10-august-2011> (viewed 29 August 2013).

He has also noted that a lack of awareness of the rights of Indigenous peoples by extractive business causes 'serious situations of dispossession, environmental contamination, forced displacement and permanent damage to the culture, spirituality and traditional knowledge of indigenous people.'⁶³

Because of these concerns, the Special Rapporteur has studied the rights of Indigenous peoples in relation to extractive industries. As part of this study, the Special Rapporteur attended a Roundtable on Indigenous Peoples and Extractive Industries in Australia in August 2012: see Text Box 5.6.

Text Box 5.6:

Roundtable on Indigenous Peoples and Extractive Industries⁶⁴

In August 2012, National Congress of Australia's First Peoples (Congress) hosted a Roundtable on Indigenous Peoples and Extractive Industries in Melbourne.

The Special Rapporteur on the rights of indigenous peoples, James Anaya, was invited to Australia by Congress as part of his study and report on the impact of extractive industries operating within or near Indigenous peoples' territories.

The Roundtable brought together Aboriginal and Torres Strait Islander peoples and representatives from government and mining companies to discuss their perspectives on the impacts and opportunities from the operations of extractive industries.

Discussion at the Roundtable focused on:

- the rights that Aboriginal and Torres Strait Islander peoples derive from the Declaration and from relevant state and federal laws including the Native Title Act
- the options for Aboriginal and Torres Strait Islander peoples to use these rights when negotiating with extractive industries about projects occurring on their lands.

63 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples to the Human Rights Council*, fifteenth session, UN Doc A/HRC/15/37 (2010), para 28. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-15-37-19-july-2010> (viewed 29 August 2013).

64 National Congress of Australia's First Peoples, *First Peoples and Extractive Industries: Report of Roundtable (2012)*.

In his latest and final report to the Human Rights Council, the Special Rapporteur asserts that the interests of extractive industries and Indigenous peoples are not necessarily opposed and that the extraction of natural resources from Indigenous territories can occur in ways that are beneficial to Indigenous peoples and respectful of their rights.⁶⁵ In particular, he suggests that opportunities for Indigenous peoples to develop and extract natural resources themselves enables Indigenous peoples to exercise their self-determination.⁶⁶

Given the extensive resources required to develop and extract natural resources, however, it is a more usual occurrence for businesses – often large multinational corporations – to undertake extractive projects on Indigenous lands and territories. Recognising this, the Special Rapporteur sets out the following conditions for business enterprises to obtain and sustain the agreement of Indigenous peoples for extractive projects to operate on their lands:

- extractive businesses should undertake due diligence to identify Indigenous groups that may be affected by the project, their rights in and around the project area, and potential/actual impacts on those rights⁶⁷
- extractive businesses should ensure fair and adequate consultation and negotiation procedures with Indigenous peoples in relation to a project⁶⁸
- agreements with Indigenous peoples that permit extractive projects on their lands must occur with the full respect of their 'rights in relation to the affected lands and resources, and provide for equitable distribution of the benefits of the projects within a framework of genuine partnership.'⁶⁹

These conditions are consistent with the practices set out in section 5.3(c) above in relation to businesses acting in accordance with the Guiding Principles when their projects affect Indigenous peoples and their lands.

In line with the Special Rapporteur's study on extractive industries and the rights of Indigenous peoples, Professor Megan Davis, a member of the United Nations Permanent Forum on Indigenous Issues (UNPFII), submitted a study to the UNPFII in May 2013.⁷⁰ This study examined the impact of the recent mining boom on Indigenous communities in Australia. Key outcomes from the study are summarised in Text Box 5.7.

65 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013), para 2. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013> (viewed 29 August 2013).

66 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013), para 8. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013> (viewed 29 August 2013).

67 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013), paras 53–54. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013> (viewed 29 August 2013).

68 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013), paras 61–67, 70. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013> (viewed 29 August 2013).

69 J Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples: extractive industries and indigenous peoples*, UN Doc A/HRC/24/41 (2013), para 72. At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-24-41-2013> (viewed 29 August 2013).

70 M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013). At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).

Text Box 5.7:

Study on the impact of the mining boom on Indigenous communities in Australia

Noting the significant effect of the recent mining boom on Indigenous peoples and acknowledging the relevant provisions in the Declaration, the study observes that there have been positive and negative impacts from mining on Indigenous communities in Australia.

These impacts are:

Agreement-making between mining companies and Indigenous peoples

Agreement-making provides opportunities for economic development and capacity-building within Indigenous communities and often involves consideration 'of the well-being and socioeconomic disadvantage of indigenous peoples. This means that agreements cover not only distribution of revenue but also poverty, education, training, health and culture.'⁷¹

However, the study notes the disparate outcomes from agreement-making across Australia. While Indigenous communities in the Northern Territory and in the Cape York, Pilbara and Kimberley regions are negotiating significant revenues from mining on their traditional lands, many other Indigenous groups in Australia still have limited capacity to negotiate substantial payments.⁷²

Employment opportunities for Indigenous peoples

The study notes that employment opportunities have benefited Indigenous communities whose land is affected by mining. Although there have been good practices in relation to mining companies recruiting and retaining Indigenous peoples, these practices have been hampered by low education levels and skills.⁷³

Improved infrastructure

Some mining companies and Indigenous communities have developed a partnership approach that involves the investment by mining companies in community development and infrastructure. The study observes:

The underlying motivation is to ensure that communities reap sustainable benefits from the boom, achieved through a partnership approach that emphasizes indigenous self-determination. Indeed, in many indigenous communities in mining regions, mining companies are providing the infrastructure and services that the state governments, and the federal Government, are failing to deliver.⁷⁴

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- 71 M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013), para 6. At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).
- 72 M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013), para 8. At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).
- 73 M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013), paras 14 and 16. At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).
- 74 M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013), para 12. At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).

Social and cultural impacts

Despite positive outcomes from agreement-making, increased opportunities for employment and improved infrastructure, the study notes the negative social and cultural impacts that mining can have on Indigenous peoples. These impacts include:

- reduced cultural and community well-being including the diminution of leadership
- damage to sacred sites and environmental damage
- increased cost of living in mining areas, including reduced access by Indigenous peoples to affordable housing and health services.⁷⁵

Historically, where Indigenous peoples have had concerns about the activities of businesses – particularly extractive businesses – impacting on their lands, there have been few mechanisms for redress following adverse impacts on their human rights. This situation has begun to change over the past few years. There seems to be gathering momentum from the articulation of our rights in the Declaration, the work of the Special Rapporteur and the implementation of the Guiding Principles – all of which highlight the beneficial outcomes and improved relationships that occur when businesses ensure their operations support and respect the human rights of Indigenous peoples. As shown in this section, this growing awareness at the international level is being translated into practical guidance on what business needs to do to support and respect human rights.

I discuss the application of these practices in Australia in the following section.

⁷⁵ M Davis, *Study on the impact of the mining boom on indigenous communities in Australia*, twelfth session of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2013/20 (2013), paras 2, 18–22.
At <http://undesadspd.org/IndigenousPeoples/UNPFIIISessions/Twelfth/Documents.aspx> (viewed 3 October 2013).

5.4 Business and the Declaration in practice in Australia

I have spoken extensively in previous chapters about the work that my office and the National Congress of Australia's First Peoples (Congress) is currently undertaking on the National Declaration Strategy. Over the next 12 months, we will be conducting Declaration Dialogues with our communities and organisations, all levels of government, businesses and NGOs to discuss the key principles in the Declaration. It is my hope that we will reach common understandings of the principles, how they may look in action and what we need to do to make them work. Business will be a key player in those discussions and in the development of the National Declaration Strategy.

The international framework for business to support and respect the human rights of Indigenous peoples is increasingly becoming embedded in the activities of businesses in Australia. Indeed, as shown in the case studies below, there are a growing number of businesses who are engaging actively with Aboriginal and Torres Strait Islander peoples in ways that support and respect the key principles in the Declaration:

- self-determination
- participation in decision-making, good faith, and free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

The following five case studies illustrate business activities that support and respect our rights in the Declaration. In some cases, the link between business operations and our rights in the Declaration is clear; businesses such as Rio Tinto and KPMG Australia set out in their policies and procedures how their operations support and respect the human rights of Aboriginal and Torres Strait Islander peoples.

Other organisations – while not explicitly linking their activities to our human rights in the Declaration – are nonetheless creating outcomes that support and respect the human rights of Aboriginal and Torres Strait Islander peoples.

For example, by supporting the growth of Indigenous businesses, Supply Nation is also building our capacity for self-determination and our pursuit of economic, social and cultural development as established in Article 3 of the Declaration. And businesses such as Lend Lease and Westpac are actively working in partnership with Aboriginal and Torres Strait Islander peoples and communities in a manner that is consistent with Article 18 of the Declaration.

(a) Supply Nation – promoting self-determination through economic development

Supply Nation is a model that promotes our right to self-determination, to develop our economic and social development priorities, and to have them administered by our own institutions consistent with Articles 3 and 23 of the Declaration. Economic and social development does not necessarily mean profit as an outcome; in some instances, outcomes will come in the form of sustainability, community and cultural development or entrepreneurial activity.

The vision of Supply Nation is to create a vibrant and prosperous Indigenous business sector in Australia by embedding Indigenous businesses into the supply chain of Australian companies and government agencies. Supply Nation provides a direct business-to-business purchasing link between large corporations, government agencies and Indigenous owned businesses. This enables the integration of Indigenous businesses into the

supply chain of private sector corporations and government agencies.⁷⁶

Supplier diversity is a proactive procurement approach taken by government bodies and large companies that are genuinely committed to providing a level playing field for minority suppliers. In the Australian context, the aim of supplier diversity is to increase opportunities for Indigenous owned businesses to supply their goods and services to large public and private sector organisations. Supplier diversity offers under represented businesses the same opportunities to compete for the supply of quality goods and services as other qualified suppliers.⁷⁷

Supplier diversity not only provides the opportunities for contracts and projects to benefit the Indigenous businesses involved; it also creates an environment to develop role models for current and future generations in the business sector. I am encouraged that this approach will inspire Aboriginal and Torres Strait Islander peoples to go into business, which in turn will provide employment opportunities in our communities.⁷⁸

Supply Nation provides an essential link between purchasers and sellers by:

- Engaging Australia's largest government, non-government enterprises, universities and not-for-profit organisations as members to buy goods and services from certified Indigenous businesses.
- Providing members with access to Supply Nation Certified Indigenous businesses when making buying decisions.
- Assisting members to adapt their procurement processes to include Indigenous suppliers.
- Acting as a thought leader and driver for supplier diversity in Australia.⁷⁹

(i) Background – Supply Nation

Supply Nation (formally known as the Australian Indigenous Minority Supplier Council) is a not-for-profit company that launched a three year pilot phase in September 2009 through a funding agreement with then Department of Education, Employment and Workplace Relations (DEEWR).⁸⁰

In 2012 Supply Nation successfully completed its pilot phase, which proved that the idea of an Indigenous supply council could work in Australia.

The formal DEEWR review of Supply Nation outlined the significant success of the pilot phase and recognised Supply Nation as a well governed organisation with strong leadership.⁸¹ This demonstrated that, with practical support from Supply Nation, Aboriginal and Torres Strait Islander peoples can establish sustainable and profitable businesses that are part of the supply chain providing goods and services to private sector corporations and government agencies.

76 Supply Nation, *Supply Nation Brochure: Connecting Australia with Indigenous Business*.

At http://supplynation.org.au/resources/SNBrochures_Videos (viewed 20 September 2013).

77 Supply Nation, *Supplier Diversity*. At http://www.supplynation.org.au/about_us/Supplier_Diversity (viewed 19 September 2013).

78 Australian Indigenous Minority Supplier Council, *Annual Report 2009–2010* (2010), p 4.

At http://www.supplynation.org.au/resources/Annual_Report_2009_2010 (viewed 16 September 2013).

79 Supply Nation, *Brochure Connecting Australia with Indigenous Business*, p 2.

At http://supplynation.org.au/resources/SNBrochures_Videos (viewed 20 September 2013).

80 Department of Education, Employment and Workplace Relations, *Post-implementation review of the Australian Indigenous Minority Supplier Council* (2011), p 2. The Department of Education, Employment and Workplace Relations is now the Department of Employment and the Department of Education.

81 Department of Education, Employment and Workplace Relations, *Post-implementation review of the Australian Indigenous Minority Supplier Council* (2011), p 2.

This growth should continue as the implementation of the Indigenous Opportunities Policy (IOP) and changes to the Commonwealth Procurement guidelines create incentives for Australian companies to engage with Indigenous people and companies. The IOP aims to increase Aboriginal and Torres Strait Islander employment opportunities and the engagement of Indigenous businesses through Australian Government procurement processes.⁸² Additionally, changes to the Commonwealth Procurement Rules (CPR) provide increased opportunities for Indigenous businesses to become part of the supply chain of major suppliers to the Australian Government.⁸³

I am encouraged by progress of the IOP and CPR changes in supporting Indigenous business. To ensure that these opportunities are maximized it is important that the implementation of these programs includes targets to determine the amount of Government obligated funds for contracts made with Indigenous businesses. This requirement for targets is supported by outcomes in the United States of America (USA), where the US Small Business Administration negotiates annual procurement goals for small, minority and woman owned firms. In the 2011 fiscal year, the USA federal government obligated over \$36 billion to small, minority owned businesses.⁸⁴

(ii) Certified Indigenous Suppliers and Membership

Supply Nation membership and certification are the important elements for bringing large corporations, government agencies and Indigenous businesses together. Supply Nation certifies Indigenous business suppliers as majority Indigenous owned, managed and controlled. Australian companies and government agencies that are members of Supply Nation are able to access a database of Indigenous suppliers for procurement opportunities.⁸⁵

Certified Indigenous Suppliers

Indigenous businesses that are majority owned, controlled and managed by Aboriginal and Torres Strait Islander people can become a Supply Nation Certified Indigenous Supplier.

In doing so, Indigenous businesses must meet the following criteria to become certified through Supply Nation:

- 51% ownership of the company must be by an Aboriginal or Torres Strait Islander person/s.
- The company is led or managed by a Principal Executive Officer who is Aboriginal or Torres Strait Islander.
- The key business decisions regarding the company's finances, operations, personnel and strategy are made by an Aboriginal or Torres Strait Islander person.
- The company is able to distribute its equity to members or others trading as a business, for example it has goods, services and/or products to sell.

The business is located in Australia.⁸⁶

82 Australian Indigenous Minority Supplier Council, *Annual Report 2011-2012* (2012), p 4.

At http://www.supplynation.org.au/resources/Annual_Report_2011_2012 (viewed 20 September 2013).

83 Department of Education Employment and Workplace Relations, *An Introduction to the Indigenous Opportunities Policy (IOP)*, pp 5, 7. At http://supplynation.org.au/resources/The_Indigenous_Opportunities_Policy (viewed 20 September 2013).

84 United States Government Accountability Office, *Government Contracting: Federal Efforts to Assist Small Minority Owned Businesses* (2011), p 29. At <http://www.fas.org/sgp/crs/misc/R42390.pdf> (viewed 20 September 2012).

85 Supply Nation, *About Us*. At http://www.supplynation.org.au/about_us (viewed 26 September 2013).

86 Supply Nation, *Certification Overview*. At http://www.supplynation.org.au/indigenous_businesses/Certification (viewed 19 September 2013).

Members

Members of Supply Nation are represented by some of Australia's largest government, non-government enterprises, universities and not-for-profit organisations. To become a member of Supply Nation, organisations must make a three year commitment to their membership to allow supplier diversity to get traction within the organisation.

The benefits of becoming a Member of Supply Nation helps organisations increase the diversity of their supply chain by providing:

- Access to the country's database of Certified Indigenous owned and controlled suppliers that are business ready.
- Access to a national and international network of supplier diversity experts and procurement professionals.
- Support from a Supply Nation Account Manager to assist with the implementation of the company's commitments.
- Learning opportunities to develop the organisations knowledge and practice in supplier diversity.
- Quarterly reports on the organisation's engagement with Indigenous business.⁸⁷

Supply Nation is working on a transition program to become financially independent while continuing to provide streamlined services to its membership. As part of this process, in 2013, Supply Nation commenced charging membership fees and introduced a nominal fee for Indigenous businesses to obtain and renew certification. Supply Nation will also continue to generate income from its annual Connect event and some of its supplier diversity training programs.⁸⁸

(iii) Outcomes – growth in Indigenous businesses

Supply Nation demonstrates how business can enable our people to fully realise their social, cultural and economic development aspirations. To date, the achievements of Supply Nation are:

- Membership growth is on the rise and currently includes 115 Members.
- Certified Indigenous Suppliers numbers are above identified targets and are now at 208.
- Interest from new Indigenous businesses is on the rise which demonstrates that outreach activities are working.
- Supply Nation's Member expenditure on Certified Indigenous business Suppliers has exceeded targets in every year of operation and now stands at \$64.6 million.
- Certified Indigenous Suppliers are rapidly increasing Indigenous employment opportunities.
- Certified Indigenous Suppliers are winning contracts in a wide range of industries across Australia.⁸⁹

87 Supply Nation, *Become a Member*. At http://www.supplynation.org.au/membership/Become_a_member (viewed 19 September 2013).

88 Supply Nation, *Membership Fee FAQs*. At http://www.supplynation.org.au/membership/Membership_Fee_FAQs (viewed 19 September 2013).

89 Australian Indigenous Minority Supplier Council, *Annual Report 2011-2012* (2012), p 8. At http://www.supplynation.org.au/resources/Annual_Report_2011_2012 (viewed 20 September 2013).

The story of Indigenous business, Yaru Water and their partnership with Qantas is an example of positive cultural, social and economic outcomes: see Text Box 5.8.

Text Box 5.8:

Yaru Water and Qantas

Yaru Water is a Supply Nation Certified Indigenous owned bottled water company. The water is sourced from the foothills of the Wollumbin (also known as Mount Warning), an ancient volcano in the heart of Bundjalung country in northern NSW.

Yaru Water is a business driven by a strong community development focus and a commitment to making an ongoing contribution to 'closing the gap' on disadvantage in Indigenous communities. Income generated from the sale of Yaru Water is used to facilitate Indigenous leadership and cultural teaching programs within Bundjalung country, while utilising Mount Warning Spring Water facilities and resources.⁹⁰

Yaru Water and Qantas have formed a sustainable and long-term partnership through Supply Nation. Qantas have introduced Yaru Water into their executive meetings, boardrooms and events.⁹¹ And working with Qantas team has also assisted Yaru Water with referrals and introductions to other Supply Nation Members.⁹² The Business Development Officer at Yaru Water, Brendan Meddings observes:

The support from the corporate world has amazed us and Supply Nation connections have clearly been a major part of our success. We understand it is important for us to maintain the highest level of professionalism to continue to meet our customers' needs and grow our business.⁹³

The success of Yaru Water has had a positive impact on the Bundjalung community. Kyle Slabb, the Director of Yaru Water says:

Our success has inspired a lot of young Indigenous leaders and business people. To say that an Indigenous product and business can be well accepted in the corporate world is really important to us. It has really been an inspiration for those young guys that have dreams of their own, and hopes for the future.⁹⁴

90 Yaru Water, *True Partnership*. At <http://yaruwater.com/true-partnership/> (viewed 20 September 2013).

91 Australian Indigenous Minority Supplier Council, *Annual Report 2011-2012* (2012), p 19. At http://www.supplynation.org.au/resources/Annual_Report_2011_2012 (viewed 20 September 2013).

92 Australian Indigenous Minority Supplier Council, *Annual Report 2011-2012* (2012), p 19. At http://www.supplynation.org.au/resources/Annual_Report_2011_2012 (viewed 20 September 2013).

93 B Meddings, *Case Study: Qantas and Yaru Water*. At http://www.supplynation.org.au/resources/Qantas_Yaru_Water (viewed 27 September 2013).

94 L Berry, *Case Study: Qantas and Yaru Water*. At http://www.supplynation.org.au/resources/Qantas_Yaru_Water (viewed 27 September 2013).

(b) KPMG – ‘good business and creating better lives’⁹⁵

KPMG is a global network of professional firms providing audit, tax and advisory services which operate in 156 countries and have more than 152 000 people working in member firms around the world. In Australia, KPMG has around 5 200 employees who operate out of 13 offices around the country.⁹⁶

KPMG Australia recognises that the rights of Aboriginal and Torres Strait Islander peoples are one of the most pressing social issues in Australia, and that there is a direct connection between ‘good business and creating better lives.’⁹⁷ Consequently, KPMG is working with Aboriginal and Torres Strait Islander peoples to promote economic and social development, and to close the gap between Indigenous and non-Indigenous Australia.

(i) KPMG’s reconciliation journey 2006–13

KPMG began its journey of reconciliation and engagement with Aboriginal and Torres Strait Islander communities in 2006 when Doug Jukes, then Chairman of KPMG Australia travelled to Cape York, Queensland. His own journey proved to be a catalyst which prompted KPMG to empower its employees to utilise their skills and expertise to increase the capacity and build the sustainability of Indigenous organisations and businesses.⁹⁸

In 2007, KPMG commenced a relationship with Jawun Indigenous Corporate Partnerships (Jawun), which enabled KPMG to expand its work with Aboriginal and Torres Strait Islander communities.⁹⁹

KPMG launched its first RAP in 2009 as part of its commitment to improving the wellbeing of our communities through building mutual respect and creating opportunities for Aboriginal and Torres Strait Islander people.¹⁰⁰

Since then, KPMG has used its skills and resources to work with Aboriginal and Torres Strait Islander people to promote economic and social development. This has involved ‘tackling Indigenous economic disadvantage through business leadership, cultural awareness and respect within their own organisation, building capacity by providing business advice and services, and employing Indigenous Australians directly.’¹⁰¹ Key initiatives by the company have focused on:

- an ongoing collaboration with Jawun
- building the capacity of, and procuring goods and services from, Indigenous businesses
- developing Indigenous cultural awareness amongst KPMG staff
- encouraging KPMG staff to become leaders for reconciliation
- supporting the pathway into education and employment for young Aboriginal and Torres Strait Islander people

95 KPMG, *Corporate Citizenship Report 2011* (2011). At http://epublishbyus.com/corporate_citizenship_2011/10020914# (viewed 21 October 2013).

96 KPMG, *KPMG at a Glance*. At <http://www.kpmg.com/AU/en/about/About/Pages/default.aspx> (viewed 27 September 2013).

97 KPMG, *Corporate Citizenship Report 2011* (2011). At http://epublishbyus.com/corporate_citizenship_2011/10020914# (viewed 21 October 2013).

98 KPMG, *Our Reconciliation Journey* (2012). At <http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/our-reconciliation-journey-2012.aspx> (viewed 24 October 2013).

99 KPMG, *Reconciliation Action Plan 2010-11* (2009), p 4. At <http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/our-reconciliation-journey-2012.aspx> (viewed 1 October 2013).

100 KPMG, *Reconciliation Action Plan 2010-2011* (2009), pp 1–2. At <http://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/our-reconciliation-journey-2012.aspx> (viewed 1 September 2013).

101 P Nash, ‘Defining Shepparton’ (Speech delivered at the Dungala Kaiela Oration, Shepparton, Thursday 20 June 2013).

- committing to support Indigenous not-for-profit organisations through KPMG's honorary work program
- supporting the campaign for constitutional recognition.¹⁰²

The commitment of KPMG to these initiatives was explained by Peter Nash, Chairman of KPMG Australia earlier this year:

Put most simply, a new generation of business leaders has emerged who take human rights seriously. They pursue reconciliation because it's the right thing to do...

But of course, as we have discovered, reconciliation is good for business. How could it not be? Progressive opinion is no longer to be found only on campus, but increasingly in commerce. The smart young employees we need to help run our companies rightly find any racism totally unacceptable. Our clients demand we share their social as well as their business values. Our accountants tell us that ethical procurement actually saves us money. Our business developers tell us that connecting with Indigenous communities drives innovation.¹⁰³

This approach to reconciliation has led to the following outcomes for KPMG:

Economic and social development

KPMG provides an example of a business that supports the economic and social development of Aboriginal and Torres Strait Islander peoples in a way that is consistent with Article 20 in the Declaration.¹⁰⁴ This is demonstrated by KPMG supporting the economic and social development of Aboriginal and Torres Strait Islander peoples by:

- Purchasing goods and services from Indigenous owned businesses. In the past financial year, KPMG sourced almost half a million Australian dollars in goods and services from Indigenous-owned businesses certified by Supply Nation, reflecting the firm's commitment to embedding Indigenous business into their supply chain and procurement processes.¹⁰⁵
- Providing professional services on an honorary basis to support and build these Indigenous owned businesses and Indigenous controlled community organisations.¹⁰⁶ In the 2012-13 financial year, KPMG provided more than 250 days worth of professional services to Indigenous organisations through its honorary work program.

KPMG remains committed to Jawun as it also provides employees with an understanding of Aboriginal and Torres Straits Islander culture, and contributes to transforming both the workplace and communities. Since 2007, more than 150 KPMG people have participated in Jawun secondments, equalling more than 3 300 days of skills transfer and capacity building. A KPMG secondee to Jawun reflected:

Working with Jawun is one of the most impressionable experiences of our careers and will have a lasting impact on both our personal and professional lives. Without doubt, it is definitely an experience we would all do again and something everyone should try.¹⁰⁷

102 KPMG, *Reconciliation Action Plan 2013* (2013), p 9.

103 P Nash, 'Defining Shepparton' (Speech delivered at the Dungala Kaiela Oration, Shepparton, Thursday 20 June 2013).

104 Art 20(1) of the *United Nations Declaration on the Rights of Indigenous Peoples* articulates that Indigenous peoples have the right 'to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.'

105 KPMG, *Reconciliation Action Plan 2013* (2013), p 6.

106 KPMG, *Reconciliation Action Plan 2013* (2013), p 7.

107 KPMG, *Reconciliation Action Plan Report and Refresh 2011* (2011), p 8. At <http://www.kpmg.com/au/en/about/corporate-citizenship/social-inclusion/pages/reconciliation-action-plan.aspx> (1 October 2013).

In its most recent RAP, KPMG is seeking to further develop ways to increase its involvement and impact on Aboriginal and Torres Strait Islander communities by refining its commitment to build capacity in Indigenous owned and controlled organisations.¹⁰⁸

Education to employment

Economic participation requires access to a quality education as a pathway to employment. In 2011, KPMG built on its relationship with the Australian Indigenous Education Foundation to provide mentoring and tutoring to Aboriginal and Torres Strait Islander high school students.

To increase Aboriginal and Torres Strait Islander employment, KPMG in Australia will implement the following strategies into the workforce:

- dedicated recruitment resources
- a clear strategy to inspire Aboriginal and Torres Strait Islander people to consider employment opportunities at KPMG
- renewed focus on existing high school and tertiary scholarships
- expand current mentoring and work experience programs
- increase collaboration with community partners
- expand current cultural awareness training
- support for Aboriginal and Torres Strait Islander staff in the organisation.¹⁰⁹

Recognising and promoting the rights of Indigenous Australians

KPMG International is a signatory to the United Nations Global Compact; and the rights of Aboriginal and Torres Strait Islander peoples have been a priority for KPMG Australia in implementing their response to the Global Compact.¹¹⁰

KPMG Australia has participated in the Global Compact LEAD taskforce, which is tasked with developing the *Business Reference Guide on the United Nations Declaration on the Rights of Indigenous Peoples* (see Text Box 5.3). KPMG has remained committed to working with the business community to raise awareness of the Declaration and to promote the drafting and use of the Business Reference Guide.

A key step towards reconciliation is the formal recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. KPMG is one of the first businesses to support the campaign for constitutional recognition and is also actively encouraging the wider business sector to engage in the discussion of constitutional recognition because:

The business community has a special role to play as a partner of Indigenous Australia – because it has the means and the scale to convert changes in public attitudes into a fairer go and rising living standards for Australia’s first peoples... And it can help immediately by adding its voice to the growing numbers of Australians calling for constitutional recognition.¹¹¹

Corporate citizenship extends beyond compliance with our human rights; it requires businesses to be involved in and take leadership of the issues that shape our nation’s identity and prosperity. Through its work to

108 KPMG, *Reconciliation Action Plan 2013* (2013), p 7.

109 KPMG, *Reconciliation Action Plan 2013* (2013), p 12.

110 KPMG, *Reconciliation Action Plan 2013* (2013), p 8.

111 P Nash, ‘Defining Shepparton’ (Speech delivered at the Dungala Kaiela Oration, Shepparton, Thursday 20 June 2013).

promote and protect the rights of Aboriginal and Torres Strait Islander people, KPMG is demonstrating the meaning of true corporate citizenship.¹¹²

(c) Rio Tinto – a case study of the extractive industry engaging with the human rights of Aboriginal and Torres Strait Islanders

Rio Tinto is a global mining company operating in different social, political, economic and cultural contexts.

Rio Tinto's extensive Australian operations include the production of iron ore, coal, bauxite, alumina, aluminium, uranium, copper, gold, diamonds and salt from more than 30 sites and processing plants.¹¹³ Many of these operations are in remote areas in Australia where there is a significant Aboriginal population and on or near native title claims or Aboriginal land, leading to a high degree of engagement between Aboriginal peoples and the company.

As noted earlier in the chapter, the Special Rapporteur, James Anaya, has reported on the potentially detrimental impacts of extractive industries on Indigenous peoples and their lands, and highlighted the need for extractive companies to understand, prevent and address their potential and adverse impacts on the rights of Indigenous peoples.¹¹⁴

Rio Tinto manages its Australian operations in a way that aims to respect and support the human rights of Aboriginal and Torres Strait Islander peoples. One of the catalysts was a landmark public address by then CEO Leon Davis in 1995 in which he stated his wish to see Rio Tinto's operations work in active partnership with Aboriginal people and create 'innovative ways of sharing with and compensating Indigenous Australians.'¹¹⁵

This address deliberately set Rio Tinto apart from other mining companies during the highly acrimonious period following the High Court's decision in *Mabo* and the negotiation of the Native Title Act.¹¹⁶ It also established Rio Tinto's future direction and approach to engaging and negotiating with Aboriginal and Torres Strait Islanders in relation to mining operations occurring on or near their traditional country.¹¹⁷

First drafted in 1996, Rio Tinto outlines the company approach in its Aboriginal and Torres Strait Islander Policy: see Text Box 5.9.¹¹⁸

112 KPMG, *Reconciliation Action Plan 2013* (2013), p 10.

113 Rio Tinto, *About Us* (2013). At http://www.riotinto.com.au/index_aboutus.asp (viewed 27 September 2013).

114 For example, see Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: extractive industries and indigenous peoples*, 24th session United Nations General Assembly, UN Doc A/HRC/24/41 (2013). At <http://unsr.jamesanaya.org/notes/special-rapporteur-issues-report-on-extractive-industries-and-indigenous-peoples> (viewed 4 October 2013).

115 Rio Tinto, *Reconciliation Action Plan* (2010), p 2. At http://www.riotinto.com.au/ENG/communities/33_indigenous_australians.asp (viewed 27 September 2013).

116 B Harvey and P Wand, 'The sky did not fall in! Rio Tinto after Mabo' in T Bauman and L Glick (eds) *The Limits of Change: Mabo and native title 20 years on*, AIATSIS Research Publications, Canberra (2012).

117 E Bradshaw, Principal Advisor, Communities and Cultural Heritage, Communities and Social Performance Global Practice, Rio Tinto, Telephone conversation with L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

118 Rio Tinto, *Indigenous Australians* (2013). At http://www.riotinto.com.au/ENG/communities/33_indigenous_australians.asp (viewed 10 September 2013).

Text Box 5.9:

Rio Tinto's Aboriginal and Torres Strait Islander Policy¹¹⁹

In all exploration and development in Australia, Rio Tinto will consider Aboriginal and Torres Strait Islander people issues.

Where there are traditional or historical connections to particular land and waters, Rio Tinto will engage with Aboriginal and Torres Strait Islander stakeholders and their representatives to find mutually advantageous outcomes.

Outcomes for Aboriginal and Torres Strait Islander people will result from listening to them.

Economic independence through direct employment, business development and training are among advantages that Rio Tinto will offer. Strong support will be given to activities that are sustainable after Rio Tinto has left the area.

This policy is based upon recognition and respect. Rio Tinto recognises that Aboriginal and Torres Strait Islander people in Australia:

- have been disadvantaged and dispossessed
- have a special connection to land and waters
- have native title rights recognised by law.

Rio Tinto respects Aboriginal and Torres Strait Islander peoples'

- cultural diversity
- aspirations for self sufficiency
- interest in land management.

(i) Rio Tinto's human rights framework

Since the late 1990s, Rio Tinto has sought to incorporate human rights into its policies and processes. The company has been a participant in the Global Compact since 2000 and is a signatory to a range of international human rights initiatives.¹²⁰ Rio Tinto was one of the first transnational companies to adopt a stand-alone human rights policy, which has recently been revised,¹²¹ and the company's code of business conduct, *The way we work* contains a specific section on human rights.¹²²

Most recently, Rio Tinto has set out the human rights framework that helps guide its' work with communities

119 Rio Tinto, *Aboriginal Policy and Programs in Australia*. At http://www.riotinto.com/documents/ReportsPublications/RT_PolicyandProg.pdf (viewed 18 October 2013).

120 Rio Tinto, *The way we work: our global code of business conduct* (2009), appendix. At <http://www.riotinto.com/aboutus/corporate-publications-3147.aspx> (viewed 27 September 2013)

121 Rio Tinto, *Human Rights Policy* (2012). At http://www.riotinto.com/documents/ReportsPublications/Human_rights_policy.pdf (viewed 18 October 2013); V Zimmerman, Group Human Rights Advisor, External Affairs, Rio Tinto, Telephone conversation with L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

122 Rio Tinto, *The way we work: our global code of business conduct* (2009). At <http://www.riotinto.com/aboutus/corporate-publications-3147.aspx> (viewed 27 September 2013)

in the publication, *Why human rights matter*, which states that ‘respecting human rights helps to underpin our business success.’¹²³ This recognises that operating within a human rights framework is ‘good business sense’ as well as the ‘right thing to do.’¹²⁴

Explaining the reasons for compliance with human rights, Rio Tinto:

...understands that not doing so [respecting human rights] poses very real risks to the company such as operational delays, legal disputes, reputational harm, investor challenges, loss of social license to operate and employee dissatisfaction. On the other hand, the actions [Rio Tinto] takes in support of human rights help us to build enduring and positive relationships across the community and the world.¹²⁵

Specifically acknowledging the impact of extractive industries on Indigenous peoples, Rio Tinto’s human rights policy states that it:

respect[s] the diversity of indigenous peoples, acknowledging the unique and important interests that they have in the land, waters and environment as well as their history, culture and traditional ways.¹²⁶

The company seeks to embed support of human rights including the rights of Indigenous peoples through comprehensive written procedures and policies – including voluntary commitments, policies, standards and guidance notes. These procedures and policies are interrelated. For example, Rio Tinto’s *Communities standard* contains principles that support human rights and engagement with Indigenous peoples; and this is consistent with and supported by the *Cultural Heritage management standard* that sets out how operations manage and respect cultural heritage for Aboriginal and Torres Strait Islander peoples in Australia.¹²⁷

Rio Tinto’s *Community Agreements Guidance*, written in 2012, outlines the company’s position on Indigenous communities and the Declaration: see Text Box 5.10.¹²⁸

123 Rio Tinto, *Why human rights matter* (2013), p 11. At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

124 V Zimmerman, Group Human Rights Advisor, External Affairs, Rio Tinto, Telephone conversation with L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

125 Rio Tinto, *Why human rights matter* (2013), p 11. At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

126 Rio Tinto, *Human rights policy* (2012). At http://www.riotinto.com/documents/ReportsPublications/Human_rights_policy.pdf (viewed 27 September 2013).

127 Rio Tinto, *Cultural heritage management standard for Australian businesses* (2011).

128 Rio Tinto, *Community agreements guidance* (2012), pp 14–15. At http://www.riotinto.com/documents/Community_agreements_guidance_2012_2014.pdf (viewed 27 September 2013).

Text Box 5.10:

Rio Tinto's position on Indigenous communities and the United Nations Declaration on the Rights of Indigenous Peoples¹²⁹

Rio Tinto acknowledges and respects Indigenous and local communities' connections to lands and waters. We will work in a spirit of reciprocity, transparency and recognition of rights and cultures. We recognise that every Indigenous community is unique. Accordingly, we seek to reach a specific agreement with each community on how it wants to engage with us in the development and performance of our operations, including how each community may express its support and concerns regarding our activities.

We seek broad-based community support based on the following principles:

- mutually informed understanding of interests and activities
- deep respect for social values and cultural property
- good faith, mutual respect and long term commitment
- access to reliable independent advice
- comprehensive information on proposed activities, including potential negative impacts and positive opportunities
- community participation in social and environmental assessments
- community participation in any resettlement planning and in elements of project design that may affect communities
- active support for local economic opportunity and participation.

The Declaration primarily concerns the relationship between Indigenous peoples and sovereign governments. Rio Tinto seeks to operate in a manner that is consistent with the Declaration.

In particular, Rio Tinto strives to achieve the Free, Prior, and Informed Consent (FPIC) of affected Indigenous communities as defined in the 2012 International Finance Corporation (IFC) Performance Standard 7 (PS7) and supporting guidance. Rio Tinto is obliged to respect the law of the countries in which it operates, hence it also seeks consent as defined in relevant jurisdictions and ensure agreement-making processes are consistent with such definitions.

Neither Rio Tinto policy nor IFC PS7 intends that the implementation of FPIC contradicts the right of sovereign governments to make decisions on resource exploitation.

129 Rio Tinto, *Community agreements guidance* (2012), pp 14–15. At http://www.riotinto.com/documents/Community_agreements_guidance_2012_2014.pdf (viewed 27 September 2013).

Reflecting that Rio Tinto's operations involve a high level of engagement with communities, *Why human rights matter* provides a practical guide for personnel to integrate human rights into the company's communities and social performance processes.

This process has four phases that are consistent with the Guiding Principles:

1. Know and understand

This involves knowing and understanding the human rights context, undertaking risk analysis and impact assessment, and collecting data.¹³⁰

2. Plan and implement

This phase involves working to implement the knowledge collected (from the first phase) into multi-year communities and social performance plans. Human rights considerations may be integrated into these plans through steps such as developing human rights training programmes, assessing procurement processes for human rights risks and working with civil society to empower at risk and vulnerable groups.¹³¹

3. Monitor and implement

Developing robust monitoring and evaluation is viewed as essential for the learning processes for integrating human rights into communities and social performance processes including addressing complaints, disputes and grievances from the community.¹³²

4. Report and communicate

This phase involves working towards effective internal reporting, external reporting and communication with communities.¹³³

Each of these four phases relies on inclusive engagement, including recognition of the human rights of Indigenous peoples.¹³⁴

(ii) Outcomes – Rio Tinto and Aboriginal and Torres Strait Islander communities

Rio Tinto seeks to reach agreements with Indigenous communities to gain access for exploration (land access agreements) and to develop mining operations (mine and regional development agreements).

The company's approach to agreement-making is underpinned by recognition and respect of mutual interests; a process in which Rio Tinto ensures community groups entering into agreements have access to independent advice and expertise during negotiations. Rio Tinto applies a 'participatory process' so that local community members understand the operations, what is proposed in the agreements and that the negotiations to get to agreement occur at a pace and scope that local communities can sustain.¹³⁵

130 Rio Tinto, *Why human rights matter* (2013), pp 16 and 34–52.
At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

131 Rio Tinto, *Why human rights matter* (2013), pp 16 and 53–70.
At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

132 Rio Tinto, *Why human rights matter* (2013), pp 17 and 71–83.
At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

133 Rio Tinto, *Why human rights matter* (2013), pp 17 and 84–86.
At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

134 Rio Tinto, *Why human rights matter* (2013), pp 23–24.
At <http://www.riotinto.com/ourcommitment/human-rights-4800.aspx> (viewed 10 September 2013).

135 Rio Tinto, *Sustainable Development Report* (2012), p 1.
At http://www.riotinto.com/documents/rio_tinto_2012_sustainable_development_report.pdf (viewed 19 October 2013).

Details about Rio Tinto's agreements are available on the 'Agreements, treaties and negotiated settlements project' website¹³⁶ and in Rio Tinto's RAP, which draws together existing agreements and reports on current and long-term targets for each agreement.¹³⁷ More broadly, Rio Tinto is the largest private sector employer of Aboriginal and Torres Strait Islander people in Australia, with Indigenous people comprising around 7% of the company's total workforce in Australia.¹³⁸ In the Pilbara region of Western Australia, the company's Indigenous supplier base has grown from six businesses in 2009 to 104 businesses in 2012 – the largest Indigenous supply network in Australia.¹³⁹

These outcomes – both the process of agreement-making and the terms of the agreements – aim to be consistent with many of our human rights including self-determination, respect for culture and participation in decision-making underpinned by good faith. For Rio Tinto, these outcomes ensure that the company continues to strengthen its 'social license to operate.'¹⁴⁰

(d) Bourke Aboriginal Community Working Party and Lend Lease – the Bourke Indigenous Housing Project

In November 2010, Lend Lease was approached by Aboriginal community leaders from the Murdi Paaki region to provide advice on project management and capacity building for the development of a new, innovative and cost efficient concept for community housing.¹⁴¹

There was recognition by the Murdi Paaki community leadership of deficiencies in the design and construction of Aboriginal housing in remote locations in NSW. The project's vision is to:

- Develop an environmentally efficient and scalable Indigenous housing model for remote and regional areas that is designed, owned and maintained by the community and provides sustainable training, skilling, and employment opportunities.
- Work towards identifying how this new model will contribute to improved social and economic development outcomes, including aspirations for people to transition from social and community housing to home ownership.¹⁴²

This initiated what is now called the Bourke Indigenous Housing Project (the project).

While this project has primarily been a partnership between the Bourke Aboriginal Community Working Party, Murdi Paaki Building and Lend Lease, other organisations have also been involved. A complete list of participants in the project is set out in Text Box 5.11.

136 See *Agreements, Treaties and Negotiated Settlements Project*. At <http://www.atns.net.au/> (viewed 19 October 2013).

137 Rio Tinto, *Reconciliation Action Plan 2011–2012 Report*, (2013), pp 6–35. At http://www.riotinto.com.au/ENG/communities/33_indigenous_australians.asp (viewed 10 September 2013).

138 V Zimmerman, Group Human Rights Advisor, External Affairs, Rio Tinto, Email to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

139 V Zimmerman, Group Human Rights Advisor, External Affairs, Rio Tinto, Email to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

140 E Bradshaw, Principal Advisor, Communities and cultural heritage, Communities and Social Performance Global Practice, Rio Tinto, Telephone conversation with L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 16 September 2013.

141 L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013, p 1.

142 L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013, p 1.

Text Box 5.11:

Participants in the Bourke Indigenous Housing Project¹⁴³

Bourke Aboriginal Community Working Party

The Bourke Aboriginal Community Working Party is one of 16 Aboriginal Community Working Parties represented on the Murdi Paaki Regional Assembly.

Murdi Paaki Regional Enterprise Corporation

Murdi Paaki Regional Enterprise Corporation (MPREC) is the parent company of Murdi Paaki Building. MPREC supported the Bourke Aboriginal Community Working Party by coordinating project meetings and providing training to young Aboriginal people who signed up to participate in building the houses.

Lend Lease

Lend Lease is a leading international property and infrastructure group.

Lend Lease's RAP sets out its vision for reconciliation to promote opportunities for career development, sustainable business growth and economic participation of Aboriginal and Torres Strait Islander peoples within the property and infrastructure sector.¹⁴⁴

Lend Lease initially became involved in the project because one of its RAP objectives was to develop a 'pipeline' of job ready Aboriginal and Torres Strait Islander people to meet Indigenous participation commitments on a range of projects across Australia.

The Commonwealth Bank

The Commonwealth Bank's Indigenous Banking Team was invited into the Bourke Housing Project to provide advice on community education for financial literacy and the pathway to home ownership.

Commonwealth Government

The Department of Families, Housing, Community Services and Indigenous Affairs (now the Department of Social Services) provided funding for the first two pilot houses and was a member of the project team.

World Vision

World Vision provided consultancy services to develop a participatory monitoring and evaluation process of Community Development Employment Program (CDEP) providers in the region. This consultancy extended to the design and implementation of a community survey that would inform the community engagement and education elements of the Housing Project.

Birrang Enterprise Development Co Ltd

Birrang Enterprise Development Co Ltd is the CDEP provider that worked with World Vision to implement the community survey.

Indigenous Business Australia

Indigenous Business Australia has worked with the project team to provide home loans to families in Bourke to purchase the two pilot houses.

143 L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013, p 1.

144 Lend Lease, *Australia Reconciliation Action Plan: Case Study*, p 2. At http://www.lendlease.com/australia/sustainability/~/~/~media/Group/Lend%20Lease%20Website/Australia/Documents/Sustainability/RAP_Case_Study.ashx (viewed 1 October 2013).

(i) Outcomes from the project¹⁴⁵

The Bourke Indigenous Housing Project aimed to develop a process of community-led housing design and capacity building in project development.

This involved the construction of two houses at Bourke which reflect the identified tenant's / owner's lifestyle needs, and are suitable to the environment, climate and conditions. The project also identified the need to improve housing quality and durability, and to reduce maintenance demands and costs.

The project aims to identify and support the levels of skills in the local area required for the ongoing construction, delivery and other employment and training outcomes in the community to contribute to a sustainable local housing industry.

The project has been in existence for over 12 months. Between June and November 2012, Lend Lease's Principal Architect Rob Brennan and Murdi Paaki Building Manager Steve Parish held consultations with members of the Aboriginal Community in Bourke to inform the design brief for the houses. Following agreement on the final design by the community, the Bourke Shire Council identified a site for the construction of the two houses and then approved the development application.

The project developed a procurement strategy, which focused on local trades and suppliers. Lend Lease provided advice on procurement and project staging and secured the bulk of materials at cost or no cost.

In February 2013, Murdi Paaki Building began the construction of the two houses which were completed in late May 2013.

The two houses have now been sold to members of the Aboriginal community in Bourke. The intent of the project is that proceeds from the sale of the houses will fund future construction of community-designed housing.

The project's approach to community ownership created the following outcomes:

- 30 young Aboriginal people signed up for the training courses to be part of the project build.
- About 15 community members were involved in the development and delivery of the community survey which informed the community education program.
- Several applications were received from potential buyers of the new homes who are interested in the long-term aspiration of home ownership.
- Primary school children at the three schools in Bourke participated in a competition to draw their vision for the perfect house.

Community engagement and participation

This project provides an example of effective community engagement in line with the standards of consultation and participation in decision-making outlined in Articles 18 and 19 of the Declaration.

The genuine partnership that has been built between the Bourke Aboriginal Community and Lend Lease is working to realise the community's aspirations.

At a presentation of the project in February 2013, Alistair Ferguson, the Chair of the Bourke Aboriginal Community Working Party, highlighted that the difference between the Bourke Indigenous Housing Project and

¹⁴⁵ These outcomes from the project are set out in L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013.

previous attempts to address housing issues:

Planning around housing in the past has been done *for* Aboriginal people, not *with* Aboriginal people. The Aboriginal people of Bourke have ownership of the project, through the design consultations to the capacity building of individuals and community groups throughout the design of the community education program (via design and delivery of a survey); true engagement with the community on this project has been driven by the community.

The house is a vehicle for closing the gaps in health, training and employment, and economic opportunity in Bourke. It's not about the house but about the process – because we know a one-size-fits-all solution doesn't work. All communities are different so we don't need a technical fix, we need solid partnerships and processes that will deliver what's right for the Bourke community.¹⁴⁶

At the same presentation, Cath Brokenborough, Chair Reconciliation and Indigenous Engagement at Lend Lease observed that, while Lend Lease initially became involved to meet its RAP objectives, the company subsequently came to realise the project:

...allows us to better understand the issues working with remote, regional and Indigenous communities on the development and delivery of hard and social infrastructure projects, particularly in meeting the real needs of communities.¹⁴⁷

Both the Bourke Aboriginal Community Working Party and Lend Lease recognise the following factors were important in making the project work:

- Time – it took two years to build the relationships between the Bourke community and the Lend Lease project team.
- Effective community engagement through maintaining consistency of project team members and personal commitment from the same people turning up at every meeting to see the project through.¹⁴⁸

I am encouraged that Bourke's community leaders, both Indigenous and non-Indigenous, are backing this project;¹⁴⁹ it is an example of genuine partnership between our communities and corporate Australia.

(e) Westpac – supporting Indigenous leadership

Formed in 1817, Westpac has played an integral role within the Australian community as the first bank operating in Australia.

Today Westpac Group employs approximately 36 000 people and operates throughout Australia, New Zealand and the Pacific region, with offices located in Asia, the USA and the United Kingdom. Westpac Group's portfolio of financial services brands includes Westpac, St George, Bank SA, Bank of Melbourne, BT Financial Group, RAMS, Westpac Institutional Bank and Westpac New Zealand.¹⁵⁰

Westpac works across the saving and investment needs of retail customers to service the needs of corporate,

146 A Ferguson, Presentation at Reconciliation Australia's RAP Showcase, Parliament House, Canberra, 6 February 2013.

147 L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013, p 3.

148 C Brokenborough, Presentation at Reconciliation Australia's RAP Showcase, Parliament House, Canberra, 6 February 2013.

149 L Potter, Community Partnerships Australia, Lend Lease, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 19 September 2013, p 3.

150 Westpac Group, *Working Together: Reconciliation Action Plan 2012-2014* (2012), p 4.

At <http://www.westpac.com.au/about-westpac/sustainability-and-community/our-community/community-focus-areas/indigenous/reconciliation-action-plan/> (viewed 25 September 2013).

institutional and government clients. As part of this, Westpac works with Aboriginal and Torres Strait Islander customers to understand their financial and non-financial needs.¹⁵¹

(i) Background – Westpac’s engagement with Aboriginal and Torres Strait Islander peoples

Westpac has launched two RAPs, which outline the companies’ commitment to reconciliation and closing the gap through supporting:

- Aboriginal and Torres Strait Islander leadership
- initiatives leading to empowerment and social and financial inclusion of Aboriginal and Torres Strait Islander peoples.¹⁵²

The Westpac Group believes that empowerment and social and financial inclusion are the most tangible ways that staff can make a positive contribution to support all of Australia’s First Peoples. Gail Kelly, CEO of Westpac, recently stated:

We need to ensure indigenous Australians are economically empowered, not just dependent on government support...And this is where the business community needs to continue to do more as the engine of sustainable employment and thus higher living standards. And when businesses support indigenous enterprises, the effect is even more powerful and immediate.¹⁵³

Seeking to reflect this approach, Westpac is increasing employment of Aboriginal and Torres Strait Islander peoples, sourcing products from Indigenous suppliers, and aiming to provide appropriate banking services to Indigenous businesses and communities.

(ii) Outcomes

Since the launch of Westpac Group’s inaugural RAP in 2010, Westpac has provided a best practice example of progress against their commitments to supporting reconciliation between Aboriginal and Torres Strait Islander people and non-Indigenous Australians.¹⁵⁴ Some of the major structural achievements include:

- Establishing an Indigenous Employee Action Group representing Aboriginal and Torres Strait Islander employees called ‘Brothers and Sisters’.
- Establishing a RAP Steering Committee to focus on the strategic agenda and inform the Indigenous Working Group.
- Becoming a member of Supply Nation and engaging accredited suppliers as part of sustainable supply chain procurement. This includes signing with Indigenous supplier MessageStick to provide teleconference facilities to a number of Westpac Group locations.
- Launching an Internet Kiosk pilot in two remote communities during late 2011 to explore option of accessing account balance information without cost for remote customers as an alternative to ATMs.

151 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, p 1.

152 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, p 1.

153 G Kelly, CEO Westpac, ‘Business must lift its game for First Peoples’, *The Australian*, 29 August 2013, p 12.

154 Westpac Group, *Working Together: Reconciliation Action Plan 2012-2014* (2012), p 3.
At <http://www.westpac.com.au/about-westpac/sustainability-and-community/our-community/community-focus-areas/indigenous/reconciliation-action-plan/> (viewed 25 September 2013).

- Appointing a Senior Manager Indigenous Engagement for the Westpac Group.¹⁵⁵

Economic and social inclusion

Westpac provides an example of a business prioritising the economic and social inclusion of Aboriginal and Torres Strait Islander people to achieve culturally safe environments. Westpac acknowledges that education and employment are often the two best pathways for inclusion to occur. Westpac Group currently employs 221 Aboriginal and Torres Strait Islander people across all states – this includes 43 school based trainees.¹⁵⁶

To support Aboriginal and Torres Strait Islander employees, Westpac Group has set up an action group named ‘Brothers and Sisters’ under the direction of the Diversity team at Westpac Group. By 2013, ‘Brothers and Sisters’ has grown to nearly 100 members including both Indigenous and non-Indigenous employees to ensure Westpac Group is an inclusive workplace where Aboriginal and Torres Strait Islander peoples and cultures are understood, respected and celebrated.¹⁵⁷

Westpac Group believes that empowerment and social and financial inclusion are the most tangible ways they can make a positive contribution to support Aboriginal and Torres Strait Islander peoples. Westpac’s relationship with Jawun provides a strong example of their commitment to empowering Aboriginal and Torres Strait Islanders: see Text Box 5.12.

155 Westpac Group, *Working Together: Reconciliation Action Plan 2012-2014* (2012), p 6-7. At <http://www.westpac.com.au/about-westpac/sustainability-and-community/our-community/community-focus-areas/indigenous/reconciliation-action-plan/> (viewed 25 September 2013).

156 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, p 2.

157 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, p 2.

Text Box 5.12:

Westpac Group and Jawun¹⁵⁸

In 2001, Westpac took a lead role in forming Indigenous Enterprise Partnerships, now known as Jawun. Jawun is a not-for-profit organisation that second corporate and government employees into Indigenous organisations to build local capacity and strengthen the capability of Indigenous communities.

More recently, Westpac supported the first phase of the collaboration work associated with the *Empowered Communities Group*. Led by Noel Pearson, this initiative brings together 25 Indigenous leaders across Australia to collaborate, share their policy insights and best practice, and to develop a proposal for structural reform to the structural interface between government and communities.

In addition to regular secondment placements, Westpac introduced extended secondments of three months to specifically support the *Empowered Communities* reform agenda. These secondments are a significant part of Westpac Group's reconciliation journey bringing together all Australians to learn from and work alongside each other.¹⁵⁹

Westpac's continuing partnership with Jawun has seen nearly 600 Westpac Group employees seconded into Indigenous communities, contributing over 76 work years to Indigenous organisations, families, individuals and local businesses.¹⁶⁰

Westpac's participation in these secondments not only aligns with corporate responsibility but also offers a unique professional development opportunity for employees. The following quote explains the experience from the perspective of a Westpac employee:

I found my secondment to be an invaluable experience where I gained a lot, both personally and professionally. I believe I contributed to the organisation I worked with in a positive way and the secondment enabled me to use my current skills in different ways and learn new skills. My experience helped me to continue my development when I returned to Westpac by bringing different perspectives to my work and my people management.

Westpac's Family of Giving, made up of Westpac Foundation, St. George Foundation, Bank SA and Staff Charitable Fund and Bank of Melbourne Neighbourhood Fund, also aims to empower Indigenous communities and has provided over \$2.5 million of funding to around 40 Indigenous-focused community organisations since 2006.

158 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, pp 1–2.

159 S Yazbeck, Indigenous Engagement Manager, Westpac, Correspondence to L Bygrave, Senior Policy Officer, Australian Human Rights Commission, 17 September 2013, p 1.

160 G Kelly, CEO Westpac, 'Business must lift its game for First Peoples', *The Australian*, 29 August 2013, p 12.

One of these organisations is Tjanpi Desert Weavers, a long-time partner of Westpac Foundation, who provide meaningful and culturally appropriate employment to women in Central and Western Australia. The Manager of Tjanpi Desert Weavers, Michelle Young, has stated:

It has been wonderful to secure funding from the Westpac Foundation as we have a greater capacity to ensure we are a sustainable social enterprise activity of NPY Women's Council, share with the wider Australian community the activities and achievements of Tjanpi and extend our benefits deeper and wider across the NPY Lands.

(f) What can we learn from these case studies?

Each of these case studies illustrate how business is developing relationships with Aboriginal and Torres Strait Islander peoples that are enabling us to achieve tangible social, economic and cultural outcomes. Fundamental to each of these case studies is the relationship between business and Aboriginal and Torres Strait Islander peoples being underpinned by support and respect for our human rights.

Business' engagement with the Declaration is still in its early days. This is in part due to the adoption of the Declaration by the Australian Government occurring relatively recently in 2009. In addition, the wording of the articles in the Declaration focuses on the rights of Indigenous peoples and the responsibilities of governments, rather than specific obligations of business to respect the human rights of Indigenous peoples. As I set out above in Text Box 5.3, the Global Compact is assisting businesses to incorporate our rights in the Declaration into their human rights policies through the development of a Business Reference Guide to the Declaration.

Despite the relatively recent adoption of the Declaration, many businesses are leading the way in considering how their operations can respect and support Aboriginal and Torres Strait Islander peoples' human rights. And not only are businesses respecting and supporting these rights, they are also playing a key role in the realisation of our human rights. This is demonstrated in each of the case studies above, which show specific outcomes for business and Aboriginal and Torres Strait Islander peoples in terms of economic development, employment, self-determination and cultural awareness.

There are also broader social and economic benefits that occur when business engages with Indigenous Australians in ways that support and respect our human rights. The *Reconciliation Action Plan Impact Measurement Report* (RAP Impact Report) undertaken by Reconciliation Australia in 2012 analysed the impact of RAPs in enabling organisations to make 'a difference to the lives of Aboriginal and Torres Strait Islander peoples and the nation as a whole.'¹⁶¹ The key outcomes of the RAP Impact Report are enlightening and shown in Text Box 5.13.

161 Reconciliation Australia, *Reconciliation Action Plan Impact Measurement Report 2012* (2013), p 6.
At <http://www.reconciliation.org.au/home/reconciliation-action-plans/rap-impact-measurement-report> (viewed 7 October 2013).

Text Box 5.13:

Reconciliation Action Plan Impact Measurement Report 2012 – key outcomes¹⁶²

The Reconciliation Action Plan Impact Measurement Report found that, compared to the general community, peoples in organisations that had a RAP:

- have more frequent contact with Aboriginal and Torres Strait Islander peoples
- are more likely to agree that Aboriginal and Torres Strait Islander peoples hold a special place as the First Australians
- are more likely to be proud of Aboriginal and Torres Strait Islander cultures
- are more likely to trust Aboriginal and Torres Strait Islander peoples
- are less prejudiced
- take more action to support reconciliation.

RAPs have been used to outline the policy commitment of businesses in Australia. Westpac, Rio Tinto Australia, KPMG Australia and Lend Lease all set out how they seek to engage with Aboriginal and Torres Strait Islander peoples in their RAPs.

These outcomes demonstrated in the RAP Impact Report show that if business and our communities can continue and expand this positive engagement, then there is immense hope for the future. This engagement will only become stronger as business and Aboriginal and Torres Strait Islander peoples establish relationships that are based on our rights in the Declaration.

¹⁶² Reconciliation Australia, *Reconciliation Action Plan Impact Measurement Report 2012* (2013), p 4.
At <http://www.reconciliation.org.au/home/reconciliation-action-plans/rap-impact-measurement-report> (viewed 7 October 2013).

5.5 Conclusion

I am heartened by the work of business that is leading the way in illustrating the positive outcomes that can occur when engagement with Aboriginal and Torres Strait Islander peoples is based on our rights in the Declaration.

Time and again, we see the benefits from acting in a way that is consistent with our human rights – real outcomes that reflect our social, economic and cultural aspirations, and demonstrate improved relationships between non-Indigenous and Indigenous Australians. And we see real opportunities for Aboriginal and Torres Strait Islander peoples to stand on an equal footing and become true partners with business and government based on rights, relationships and responsibilities.

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Appendix 1

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Bourke Aboriginal Community Working Party

Tim Gartrell

Campaign Director
Recognise

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Woorabinda Shire Council

Rosalind Hanf

Manager, Registrar Directorate
National Native Title Tribunal

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Recognise

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KPMG

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Manager Corporate Citizenship
KPMG

Ian Irving

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Federal Court of Australia Registry

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Marketing Manager
Supply Nation

Lachlan McDaniel

Public Awareness Project Officer
Recognise

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Supply Nation

Annette Sands

Manager
National Centre for Crime and Justice Statistics
Australian Bureau of Statistics

Andrew Sheldrick

Senior Project Manager
Lend Lease

Mathew Storey

Chief Executive Officer
Native Title Services Victoria

Emma Sydenham

Deputy Chief Executive Officer
Secretariat of National Aboriginal and
Islander Child Care

Sioban Toohill

Head of Sustainability and Community
Corporate Affairs and Sustainability
Westpac

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President
National Native Title Tribunal

Janelle Whitehead

Chief Executive Officer
Murdi Paaki Regional Enterprise Corporation

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Indigenous Engagement Manager
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Appendix 2

International mechanisms addressing Indigenous peoples' human rights 2012-13

Overview

There have been a number of developments at the international level during the reporting period from 1 July 2012 to 30 June 2013 (Reporting Period). Some of these developments have included specific engagement by Aboriginal and Torres Strait Islander peoples, while others have addressed issues that affect the lives of Aboriginal and Torres Strait Islander peoples.

These include:

- the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
- the twelfth session of the United Nations Permanent Forum on Indigenous Issues (UNPFII)
- preparatory meetings for the World Conference on Indigenous Peoples 2014 (WCIP 14)
- the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

International Engagement

During the Reporting Period, the above fora were prioritised by the Indigenous Peoples Organisations Network of Australia (IPO Network)¹ for the attendance of Aboriginal and Torres Strait Islander peoples by financially supporting the attendance of IPO Network members at these meetings.² Individuals and organisations participating in the IPO Network also provided input into the fifty seventh session on the Commission on the Status of Women.

In my role as the Aboriginal and Torres Strait Islander Social Justice Commissioner, I attended the preparatory meetings for the WCIP 14 and my office contributed to the Commission's work at the EMRIP and the UNPFII.

The following is an update on the level of engagement by Aboriginal and Torres Strait Islander people at some of these international fora.

Expert Mechanism on the Rights of Indigenous Peoples

The fifth session of EMRIP was held in Geneva in July 2012. The EMRIP provides thematic expertise to the major human rights body of the United Nations (UN), the Human Rights Council. As one of the two Indigenous specific forums of the UN, the EMRIP has a standing agenda item on the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

As Social Justice Commissioner, I provided statements to the EMRIP addressing:

- The Declaration and encouraging its implementation and advocating for reporting mechanisms to be included as part of the Universal Periodic Review Process.³

1 The IPO Network is a broad coalition of Aboriginal and Torres Strait Islander organisations and individuals who are involved in the advocacy and protection of Indigenous rights and fundamental freedoms at an international and national level.

2 The IPO Network received funding from the former Department of Families, Housing, Community Services and Indigenous Affairs until 30 June 2013. The Australian Human Rights Commission administered the funds to support the participation and engagement of Aboriginal and Torres Strait Islander Peoples at relevant international fora.

3 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda Australian Human Rights Commission on Agenda Item 6: United Nations Declaration on the Rights of Indigenous Peoples* (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9-13 July 2012). At http://www.hreoc.gov.au/social_justice/international_docs/2012_EMRIP_item6.html (viewed 6 September 2013).

- The role that National Human Rights Institutes can play at WCIP 14.⁴ This was a joint statement between the Australian Human Rights Commission and the New Zealand Human Rights Commission.
- The role of languages and culture in the promotion and protection of the rights and identity of Indigenous peoples.⁵

The IPO Network also submitted statements on the above agenda items. I endorsed the statement by the IPO Network on the right to participate in decision-making.⁶ This statement by the IPO Network:

- explored the history of Aboriginal and Torres Strait Islander peoples and extractive industries
- stressed the importance of the right to free, prior and informed consent
- referred to the ‘three pillars’ of the *Guiding Principles on Business and Human Rights*⁷ as they relate to Indigenous peoples and the right to participate in decision-making.

United Nations Permanent Forum on Indigenous Issues

The twelfth session of the UNPFII was held in New York in May 2013. The UNPFII provides an opportunity for permanent, high-level representation of Indigenous peoples at the UN and reports directly to the Economic and Social Council. Like the EMRIP, it also has a standing agenda item on the Declaration.

The twelfth session was a review year and addressed recommendations from the following themes:

- health
- education
- culture
- implementation of the Declaration.

The IPO Network submitted several interventions across those agenda items including:

- education⁸

4 M Gooda and K Johansen, *Joint Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda and Human Rights Commissioner, New Zealand Human Rights Commission, Karen Johansen on Item 3: World Conference on Indigenous Peoples* (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9-13 July 2012). At <http://www.humanrights.gov.au/australian-human-rights-commission-expert-mechanism-rights-indigenous-peoples-0> (viewed 21 October 2013).

5 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda on Item 5: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples* (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, 9-13 July 2012). At <http://www.humanrights.gov.au/statement-gugu-badhun-limited-behalf-indigenous-peoples-organisations-network-australia-0> (viewed 6 September 2012).

6 B Wyatt, *Statement by the Indigenous Peoples Organisation Network on Agenda Item 4: Follow-up report on Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries* (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, 9-13 July 2012). At <http://www.humanrights.gov.au/statement-national-native-title-council-behalf-indigenous-peoples-organisations-network-australia> (viewed 21 October 2013).

7 J Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc A/HRC/17/31 (2011). At www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf (viewed 29 August 2013).

8 B Robertson, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 3b: Education* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

- culture⁹
- health¹⁰
- implementation of the Declaration¹¹
- World Conference on Indigenous Peoples¹²
- future work of the UNPFII¹³
- interactive dialogue with the Special Rapporteur.¹⁴

In the months leading up to the UNPFII, a Joint Statement on the Implementation of the Declaration was negotiated with the Australian Government. The statement was supported by the National Congress of Australia’s First Peoples (Congress) and outlined the Government’s commitment to working with the Commission and Congress on a national strategy to increase awareness of and encourage dialogue about the Declaration. This included support for embedding the Declaration in how business is done in terms of policy development, program implementation and service delivery.¹⁵

World Intellectual Property Organisation

The right to the protection of traditional knowledge is well founded in international law.¹⁶ Since 2001, WIPO has been developing international instruments for the protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse. WIPO delegates on the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore met throughout the Reporting Period to continue discussions regarding drafts of an international treaty on the protection of:

- traditional cultural expression
- genetic resources
- traditional knowledge.¹⁷

9 T Goreng, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 3c: Culture* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

10 NACCHO, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 3a: Health Equality* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

11 B Robertson, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 7: Implementation of the Declaration on the Rights of Indigenous Peoples* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

12 K Gray, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 6: Discussion on the World Conference on Indigenous Peoples* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

13 N Gorrie, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 8: Future Work* (Delivered at the Twelfth Session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

14 B Wyatt, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 7b: Interactive Dialogue Special Rapporteur* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013).

15 M Doherty and J Bedford, *Joint Statement by the Australian Government and the Australian Human Rights Commission on Agenda Item 7: Implementing the Declaration* (Delivered at the twelfth session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013.)

16 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 11 and 31; *International Covenant on Economic, Social and Cultural Rights*, 1966, art 15(1)(c); *International Covenant on Civil and Political Rights*, 1966, art 27; *Convention on Biological Diversity*, 1992, art 8(j). Further analysis available in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), ch 7. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 11 October 2012).

17 WIPO, *Conferences, meetings and seminars*. At http://www.wipo.int/meetings/en/topic.jsp?group_id=110 (viewed 22 October 2013).

Members of the IPO Network attended the twenty fourth session of the WIPO IGC, held in Geneva in April 2013 and the twenty fifth session of the WIPO IGC also held in Geneva in July 2013. The theme of the twenty fifth session of the WIPO IGC was Intellectual Property and Genetic Resources, and Traditional Knowledge and Folklore. Participation by Aboriginal and Torres Strait Islander delegates ensured that the draft articles of the treaty document reflected the perspectives of Indigenous peoples, in particular, our rights to protect, control, maintain and develop our intellectual property over traditional knowledge.¹⁸

World Conference on Indigenous Peoples

On 21 December 2010, the UN General Assembly agreed to organise a High-Level Plenary Meeting of the General Assembly, to be known as the World Conference on Indigenous Peoples (WCIP 14) in order to:

- share perspectives and best practices on the realisation of the rights of Indigenous peoples
- pursue the objectives of the Declaration
- invite the President of the General Assembly to conduct open-ended consultations with member states and with Indigenous peoples' representatives in the framework of the UNPFII, the EMRIP and the Special Rapporteur on the rights of indigenous peoples to determine the modalities for this meeting, including Indigenous peoples' participation at the WCIP.¹⁹

The WCIP 14 will result in an action orientated outcome document based on consultation with member states and Indigenous peoples.²⁰ A high-level plenary session differs significantly from an event designated by the UN as a world conference, including the level financial support, prominence of the event and the number of representatives able to attend. Indigenous peoples have successfully lobbied to expand the high-level plenary session to include more involvement, input and representation of Indigenous peoples in the proceedings.²¹

Pacific Preparatory Meeting

To prepare for the WCIP 14, Indigenous peoples worldwide met in the seven global geo-political regions, including the women's and youth caucus to identify issues of concern and discuss strategies to realising our rights outlined in the Declaration.²²

The purpose of the preparatory meetings was to draft regional and caucus outcome documents and declarations to present recommendations from each region at the Indigenous Global Preparatory Meeting held in Alta, Norway in June 2013.

18 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Report on the twenty fourth session*, UN Doc WIPO/GRTKF/IC/24/8 (2013), p 8. At http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=243383 (viewed 22 October 2013).

19 *Indigenous issues*, GA Resolution 65/198, UN Doc A/RES/65/198 (2010).

20 United Nations World Conference on Indigenous Peoples: A High-Level Plenary Meeting of the General Assembly, *Background*. At <http://wcip2014.org/background> (viewed 10 October 2013).

21 Aotearoa Indigenous Rights Trust, Asia Indigenous Peoples Pact and the Sámi Parliament of Norway, *Concept paper for the World Conference on Indigenous Peoples 2014* (2011), p 4. At http://wcip2014.org/wp-content/uploads/2013/02/20110728-Concept_paper_for_the_World_Conference_on_Indigenous_Peoples_2014.pdf (viewed 21 October 2013).

22 United Nations World Conference on Indigenous Peoples: A High-Level Plenary Meeting of the General Assembly, *Preparatory Process*. At <http://wcip2014.org/background/preparatory-process> (viewed 10 October 2013).

Congress and the New South Wales Aboriginal Lands Council (NSWALC) co-hosted the Preparatory Meeting for Pacific Indigenous Peoples in Redfern from 19-21 March 2013.²³ The Pacific Preparatory Meeting identified the following themes within *The Pacific Declaration*:

- review of involvement by Indigenous peoples in the UN system
- the first and second decade of Indigenous peoples
- organisation of the WCIP 14
- health
- justice
- violence against women
- self-determination, decision-making and free, prior and informed consent
- lands, territories and resources
- education
- climate change
- decolonisation
- equality and non-discrimination
- oceans
- the Declaration and an Optional Protocol
- respecting and protecting cultural heritage
- treaties, agreement and other constructive arrangements.²⁴

Recommendations from *The Pacific Declaration* were then considered at the Global Preparatory Meeting.

Indigenous Global Preparatory Meeting

In June 2013, the Sami Parliament hosted representatives of Indigenous peoples worldwide at an international preparatory conference in Alta, Norway. This meeting aimed to strengthen mutual cooperation, and identify and coordinate important problems and issues affecting the world's Indigenous peoples and their human rights ahead of the WCIP 14.²⁵ The *Alta Outcome Document* was adopted as a global platform for Indigenous peoples to take to the WCIP 14.²⁶

I attended the preparatory conference in Alta, Norway along with other Aboriginal and Torres Strait Islander delegates and observers, which included members of the IPO Network. Aboriginal and Torres Strait Islander delegates presented on the themes and recommendations of *The Pacific Declaration* and worked with other Indigenous delegates from around the world to draft and adopt the *Alta Outcome Document*. The *Alta*

23 Preparatory Meeting for Pacific Indigenous Peoples on the World Conference on Indigenous Peoples 2014 Redfern, *The Pacific Declaration* (2013), p 1. At <http://wqip2014.org/regions-caucuses/pacific> (viewed 10 October 2013).

24 Preparatory Meeting for Pacific Indigenous Peoples on the World Conference on Indigenous Peoples 2014 Redfern, *The Pacific Declaration* (2013). At <http://wqip2014.org/regions-caucuses/pacific> (viewed 10 October 2013).

25 United Nations World Conference on Indigenous Peoples: A High-Level Plenary Meeting of the General Assembly, *Meetings*. At <http://wqip2014.org/world-prep-comm-june-2013> (viewed 11 October 2013).

26 United Nations World Conference on Indigenous Peoples: A High-Level Plenary Meeting of the General Assembly, *Preparatory Process*. At <http://wqip2014.org/background/preparatory-process> (viewed 11 October 2013).

Outcome Document developed collective proposals and recommendations and is now the main tool for our contribution to the WCIP 14.²⁷ In my role as Social Justice Commissioner, I will continue to engage in the processes leading in to the WCIP 14 and report further on the outcomes in next year's *Social Justice and Native Title Report*.

27 Global Indigenous Preparatory Conference for the United Nations High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples 10-12 June 2013, *Alta Outcome Document* (2013). At <http://wcip2014.org/wp-content/uploads/2013/06/Draft-Alta-outcome-document-clean-copy-for-dissemination-ENG.pdf> (viewed 11 October 2013).

Appendix 3

Key developments in native title 2012-13

Overview

This appendix reviews the following key developments in native title over the reporting period from 1 July 2012 to 30 June 2013 (Reporting Period):

- native title determinations and agreements
- the proposed Native Title Amendment Bill 2012 (Cth)
- other legislative amendments including the *Tax Laws Amendment (2012 Measures No 6) Act 2012* (Cth) and the *Courts and Tribunals Amendment (Administration) Act 2013* (Cth)
- reviews by the Australian Government on the native title system; the Working Group on Taxation of Native Title and Traditional Owner Benefits and Governance, the Review of the Role and Functions of Native Title Organisations, and the Australian Law Reform Commission Inquiry into Native Title.

Native title determinations and agreements

Native title determinations

Determinations of native title during the Reporting Period are shown in Figure 1.

Figure 1: Native title determinations for the period from 1 July 2012 to 30 June 2013¹

Native title consent determinations	28
Litigated native title determinations	4
Unopposed (non-claimant) native title determinations	4
Native title claims referred to mediation	21

These figures show the continuing long-term trend of achieving native title determinations by consent between the parties.

The Federal Court of Australia (Federal Court) observes that there has been a marked increase in the number of applications resolved by consent since 2010-11; from 10 native title consent determinations in 2010-11 to 37 consent determinations in 2011-12 and 28 consent determinations in 2012-13.² While I welcome these higher numbers of native title determinations, I remain concerned about the lengthy period of time to resolve native title. The Federal Court reports that:

1 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 August 2013.

2 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 August 2013.

The average resolution time for applications has increased since 1994 with a slight levelling in recent years. As at 30 June 2013, the median time for resolution of applications was 12 years and 11 months.³

I note that there is a trend towards decreasing the number of claims in mediation and increasing the number of claims in active case management before the Federal Court.⁴ I will continue to monitor the effect of these practices for resolving native title on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.

Indigenous Land Use Agreements

The National Native Title Tribunal (Tribunal) registered 122 Indigenous Land Use Agreements (ILUAs) during the Reporting Period. Figure 2 shows the number of ILUAs registered in each state and territory.

Figure 2: ILUAs registered in the period from 1 July 2012 to 30 June 2013⁵

Queensland	94
South Australia	11
Western Australia	10
Victoria	5
Northern Territory	2

The high number of ILUAs registered in Queensland reflects the approach in that State to negotiate ILUAs as part of native title consent determinations.

The Tribunal observes that there has been a significant increase in the number of ILUAs registered since 2009: in 2009-10, there were 47 registered ILUAs; and this number increased to 150 ILUAs registered in 2011-12 and 122 ILUAs registered in 2012-13.⁶

Future act agreements

There were 23 future act agreements facilitated by the Tribunal during the Reporting Period. The Tribunal notes that this is a lower number than previous years; this is because a significant number of notified proposed tenements were withdrawn and there was a reduction in the number of future act determination applications referred to mediation.⁷

3 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 August 2013.

4 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 August 2013.

5 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 August 2013.

6 R Webb, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 19 August 2013.

7 R Webb, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 19 August 2013.

Native Title Amendment Bill 2012 (Cth)

On 28 November 2012, then Attorney-General Nicola Roxon introduced the Native Title Amendment Bill 2012 (Cth) (Amendment Bill) into the Federal Parliament. The Amendment Bill lapsed at the dissolution of the House of Representatives on 5 August 2013.⁸

The Senate referred the Amendment Bill on 29 November 2012 to the Senate Legal and Constitutional Affairs Legislation Committee (Senate Committee) for inquiry and report.⁹ Concurrently, the House of Representatives referred the Amendment Bill to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HSCATSIA) for report and inquiry.¹⁰ In a media alert on 17 December 2012, HSCATSIA noted that it intended to consider ‘whether a sensible balance has been struck in the Bill between the views of various stakeholders’ and/or ‘proposals for future reform of the Native Title process.’¹¹

The Commission provided submissions to both the Senate Committee and HSCATSIA inquiries. I also participated in a ‘roundtable’ held by the HSCATSIA on 8 February 2013 and a public hearing conducted by the Senate Committee on 6 March 2013.

The provisions of the Amendment Bill and the Commission’s views on these amendments are:¹²

Amendments to disregard the historical extinguishment of native title in areas set aside to preserve the natural environment

The *Native Title Act 1993* (the Native Title Act) does not currently allow parties to reach agreement about disregarding extinguishment of native title except in particular circumstances set out in section 47 (pastoral leases held by native title claimants), section 47A (reserves covered by claimant applications) and section 47B (vacant Crown land covered by claimant applications).

The Amendment Bill proposed section 47C, which would allow historical extinguishment of native title over national, State and Territory parks and reserves to be disregarded where there is agreement between the relevant government party and the native title party.¹³ The intent of this amendment was to increase flexibility for parties to agree to disregard historical extinguishment of native title.

This amendment also proposed to:

- enable the government party to include a statement in the agreement that it agrees to disregard extinguishment of native title over public works within the agreement area, if the public works were established or constructed by or on behalf of the relevant government party
- provide notification requirements to give interested persons an opportunity to comment over a two month period on the proposed agreement

8 The 43rd Parliament was prorogued on the same day.

9 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Committee Report Native Title Amendment Bill 2012 [provisions]* (2013).

10 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Advisory Report: Native Title Amendment Bill 2012* (2013).

11 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, ‘Native Title: a measured and sensible approach to future reform’ (Media Release, 17 December 2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/native%20title%20bill/media.htm (viewed 16 October 2013).

12 This section is based on the Commission’s submissions to the Senate Committee and HSCATSIA inquiries: see <http://www.humanrights.gov.au/subject-index-submissions-commonwealth-parliament> (viewed 16 October 2013).

13 Native Title Amendment Bill 2012 (Cth), sch 1 item 2.

- ensure the validity of other prior interests (such as licenses and leases) and maintain public access to the area
- provide that the non-extinguishment principle applies, so that any current interests over the land would have continued to exist but would suppress rather than extinguish any native title rights to the extent of any inconsistency
- exclude Crown ownership of natural resources from the operation of section 47C.

In submissions to the Senate Committee and HSCATSIA, the Commission welcomed this amendment to expand the areas where historical extinguishment of native title can be disregarded. However, the Commission recommended expanding the proposed provision in the following two ways:

- alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B of the Native Title Act; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
- expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants.

Amendments to clarify good faith requirements in the right to negotiate provisions

The Amendment Bill proposed section 31A, which set out good faith requirements for parties in relation to negotiating a proposed agreement.¹⁴ These requirements were outlined in proposed section 31A(2) and included the negotiating parties:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- making reasonable proposals and counter proposals
- responding to proposals made by other negotiation parties for the agreement in a timely manner
- giving genuine consideration to the proposals of other negotiation parties
- refraining from capricious or unfair conduct that undermined negotiation
- recognising and negotiating with the other negotiation parties or their representatives
- refraining from acting for an improper purpose in relation to the negotiations
- any other matter the arbitral body considers relevant.

The objective of this amendment was to 'encourage parties across the [resource] sector to focus on negotiated, rather than arbitrated, outcomes.'¹⁵

In submissions to the Senate Committee and HSCATSIA, the Commission welcomed this amendment that

14 Native Title Amendment Bill 2012 (Cth), sch 2 item 6. The Amendment Bill would have also inserted section 35(1)(a) and replaced section 36(2) of the Native Title Act: see Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Native Title Amendment Bill 2012* (25 January 2013), paras 17–19. At <http://www.humanrights.gov.au/submissions/native-title-amendment-bill-2012> (viewed 16 October 2013).

15 Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth).

sought to clarify the requirements for parties who need to demonstrate they have negotiated in good faith. This amendment proposed to address the uncertainty held by native title parties following the *FMG Pilbara Pty Ltd v Cox* Federal Court decision in 2009 that found the Native Title Act does not require parties to reach a certain stage in negotiations before a party can apply to the arbitral body for a determination that the future act can proceed.¹⁶

Amendments to Indigenous Land Use Agreement processes

Proposed amendments to the ILUA processes aimed to ‘ensure parties are able to negotiate flexible, pragmatic agreements to suit their particular circumstances’.¹⁷ These amendments included provisions to:

(a) Broaden the scope of body corporate (Subdivision B) ILUAs

The Amendment Bill proposed subsection 24BC(2) in the Native Title Act, which would allow parties to make a body corporate ILUA over areas that are wholly determined but include areas where native title has been extinguished; and/or where an area has been excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.¹⁸

The Commission supported this amendment as it provided greater flexibility for the use of body corporate ILUAs.

(b) Authorisation and registration processes for ILUAs

The Amendment Bill proposed a number of complementary amendments that aimed to streamline authorisation, notification and registration processes for area agreement (Subdivision C) ILUAs.¹⁹

These amendments generally would provide a balanced and pragmatic response to resolving uncertainty about authorisation and registration processes of area agreement (Subdivision C) ILUAs.

However, due to the complexities of native title matters that may need to be considered during the registration of ILUAs, in its submissions to the Senate Committee and HSCATSIA, the Commission noted that some of these amendments may create unforeseen and/or unintentional outcomes.

In particular, the Commission was concerned that replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body would mean that persons who wish to object to a certified ILUA will only be able to seek judicial review.²⁰ While the Commission supported amendments that simplify the registration process, it is of the view that this should not occur at the expense of people being able to seek an inexpensive and independent review of the registration process.

(c) Simplify the process for amending ILUAs

The Amendment Bill also proposed certain amendments to be made to ILUAs (whether body corporate, area agreement or alternative procedure) where:

16 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141. This decision was profiled in T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 4 January 2013).

17 Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth).

18 Native Title Amendment Bill 2012 (Cth), sch 3 item 2.

19 Native Title Amendment Bill 2012 (Cth), sch 3.

20 Explanatory Memorandum, Native Title Amendment Bill 2012 (Cth).

- the amendment is specified in subsection 24ED(1) – amendments that can mostly be categorised as administrative amendments
- the parties to the agreement have agreed to the amendment
- the Registrar of the National Native Title Tribunal has been notified of the amendments in writing.²¹

The Commission supported this amendment as it would provide flexibility to enable parties to make administrative amendments to ILUAs without requiring a new registration process.

Outcomes from the Senate Committee and HSCATSIA inquiries

The Senate Committee and the HSCATSIA finalised their reports in March 2013.

Both the Senate Committee report and the HSCATSIA report referenced the Commission's submissions extensively: the Senate Committee recommended that the Amendment Bill be passed by Parliament with minor amendments to the good faith provisions and notice provisions for area ILUAs;²² and the HSCATSIA report recommended that the Amendment Bill be passed by Parliament.²³

Implications of the Amendment Bill on human rights

The Commission supported the passage of the Amendment Bill through Parliament because it is compatible with the human rights to enjoy and benefit from culture and to self-determination contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the *United Nations Declaration on the Rights of Indigenous Peoples*.²⁴

In its review of the Amendment Bill, the Parliamentary Joint Committee on Human Rights made the following comments in May 2013:

- Amendments to disregard the historical extinguishment of native title in areas set aside to preserve the natural environment:

The committee is of the view that enabling more areas to be made available for native title broadly promotes the right to enjoy and benefit from culture and the right to self-determination. The requirement to seek the consent of the government to disregard historical extinguishment may, on the face of it, be seen to limit the right to self-determination. However, on the basis of the extensive consultation and the need to consider the interests of third parties, the committee is of the view that this is a reasonable and proportionate limitation that seeks to address a legitimate objective.²⁵

- Amendments to clarify good faith requirements in the right to negotiate provisions:

The committee accepts that the right to negotiate – including the requirement that the negotiations be undertaken in 'good faith' – are an important part of respecting the rights of Indigenous peoples over their land and culture. From an international human rights perspective, whether the indicia for good faith negotiations are contained in agreed court and tribunal judgments or in legislation (which are in substance

21 Native Title Amendment Bill 2012 (Cth), sch 3 item 12.

22 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Committee Report Native Title Amendment Bill 2012 [provisions]* (2013), p vii.

23 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013), p xi.

24 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 8(2)(a) and (b), 26(3) and 27.

25 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2013), p 45, para 1.170.

largely the same) does not determine whether human rights are respected. As the good faith criteria do not appear to be incompatible with human rights, the committee considers that Schedule 2 of the bill does not appear to give rise to any human rights concerns.²⁶

- Amendments to ILUA processes:

The committee intends to write to the Attorney-General to seek clarification as to why it is necessary to restrict the objection processes to an ILUA and how this is consistent with the right of all members of a community, including individual members, to enjoy their culture.²⁷

The Committee also made comments regarding the burden of proof in relation to native title claims:

The committee intends to write to the Attorney-General to seek clarification regarding the omission from the bill of provisions addressing the burden of proof in relation to native title applications and claims and whether the current burden of proof provisions in the Native Title Act 1993 are compatible with the right to self-determination.²⁸

Further amendments to the Bill

On 17 May 2013, Greens Senator Rachel Siewert introduced further amendments to the Amendment Bill into the Senate. These amendments proposed inserting a process into the Native Title Act that would shift the onus of proof onto the respondent (usually the State).²⁹

Current status of the Amendment Bill

The Amendment Bill lapsed at the dissolution of the House of Representatives on 5 August 2013.

It is extremely disappointing that the Amendment Bill did not pass through Parliament, particularly given the majority recommendations in both the Senate Committee and HSCATSIA reports.

Although the proposed amendments were minor, they were beneficial in terms of clarifying native title processes and expanding opportunities for Aboriginal and Torres Strait Islander peoples from native title settlements. Many stakeholders made significant efforts in their contributions to consultations held by the Parliament by providing written submissions to and participating in the roundtable held by the HSCATSIA and the inquiry by the Senate Committee.

Yet, despite extensive costs and efforts expended as part of these inquiries, the Amendment Bill has lapsed following the dissolution of Parliament and this process has not led to outcomes that could improve the exercise of human rights of Aboriginal and Torres Strait Islander peoples.

As set out in chapter 3, I recommend that the Australian Government reintroduce the Amendment Bill and support its passage through the Parliament.

26 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2013), p 47, para 1.173.

27 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2013), p 48, para 1.178.

28 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2013), p 49, para 1.181.

29 *Amendments to be moved by Senator Siewert on behalf of the Australian Greens in committee of the whole*, Native Title Amendment Bill 2012 (Cth), sch 5 item 1.

Courts and Tribunals Legislation Amendment (Administration) Act 2013 (Cth)

The *Courts and Tribunals Legislation Amendment (Administration) Act 2013* (Cth) (Amendment Act) came into operation on 12 March 2013.³⁰

The Amendment Act is part of the native title institutional reforms announced by the Government in May 2012 which I reported on in the *Native Title Report 2012*.³¹ The Amendment Act facilitated the transfer of the Tribunal's appropriation, its staff and some of its administrative functions to the Federal Court.³² The intention of these institutional reforms is for the Tribunal and the Federal Court to achieve savings and operate more efficiently and effectively into the future.³³

Prior to the Amendment Act being passed by Parliament, the House of Representatives Standing Committee on Social Policy and Legal Affairs recommended in its Advisory Report on the Amendment Act that:

... the Attorney-General, in accordance with section 209(2) of the *Native Title Act 1993*, direct the Aboriginal and Torres Strait Islander Social Justice Commissioner to include in the yearly reports on the operation of the *Native Title Act 1993* consideration of the functioning of the National Native Title Tribunal, and in particular:

- the adequacy of Tribunal resourcing to effectively fulfil its functions, and
- its effect on the exercise of the human rights of the Aboriginal and Torres Strait Islander peoples.³⁴

The Attorney-General wrote to me in May 2013, noting this recommendation and welcoming 'my consideration of the matter to the extent...[I] think appropriate'.³⁵

I have considered both the recommendation by the House of Representatives Standing Committee and the request by the Attorney-General. Given the relatively recent implementation of these reforms and the new appointment of Raelene Webb QC as the President of the Tribunal in April 2013, it is my view that it is prudent to wait until the impact of the reforms on both the capacity of the Tribunal to effectively discharge its functions and the native title system more broadly is known before assessing the adequacy of Tribunal resourcing.

I also note that there are opportunities to monitor the level and appropriateness of Tribunal resourcing through agency annual reporting to Parliament and the Senate estimates process.

Tax Laws Amendment (2012 Measures No 6) Act 2012 (Cth)

The *Tax Laws Amendment (2012 Measures No 6) Act 2012* (Cth) (Tax Amendment Act) commenced on 28 June 2013. The Tax Amendment Act amends the *Income Tax Assessment Act 1936* (Cth) and *Income Tax Assessment Act 1997* (Cth) to clarify that native title benefits received for the extinguishment or impairment of

30 Schedule 2 of the Amendment Act came into effect on 1 July 2013.

31 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 37–38. At <http://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 3 October 2013).

32 Explanatory Memorandum, Courts and Tribunals Legislation Amendment (Administration) Bill 2013 (Cth), p 2. Amendments were also made to the *Native Title Act*, the *Family Law Act 1975* (Cth) and the *Federal Magistrates Act 1999* (Cth) to facilitate further administrative arrangements: Explanatory Memorandum, Courts and Tribunals Legislation Amendment (Administration) Bill 2013 (Cth), p 2.

33 Explanatory Memorandum, Courts and Tribunals Legislation Amendment (Administration) Bill 2013 (Cth), p 2.

34 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Advisory Report on Courts and Tribunal Legislation Amendment (Administration) Act 2013* (February 2013), p 11.

35 M Dreyfus, Commonwealth Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 3 May 2013.

native title rights and interests are not subject to income tax.³⁶

The amendments also confirm that there are no capital gains tax consequences arising from certain events involving native title rights, including:

- creating a trust, that is an Indigenous holding entity, over native title rights
- transferring native title rights to an Indigenous holding entity or Indigenous person, or
- the surrendering or cancelling of native title rights.³⁷

I welcome the Tax Amendment Act clarifying the tax status of native title payments.

However, income generated from investing a native title benefit will be subject to income tax.³⁸ I support stakeholder recommendations to expand the circumstances in which native title benefits will not be subject to income tax to include income gained from investment activity.³⁹ This would provide additional financial benefits for native title holders to maximise the investment potential from their native title lands and waters.

Taxation of Native Title and Traditional Owner Benefits and Governance Working Group

On 3 August 2013, the Government released the *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government* (Native Title Working Group Report).⁴⁰

The Native Title Working Group was established by the Australian Government in March 2013 to:

- examine existing arrangements for holding, managing and distributing land related payments
- identify options to strengthen governance and promote sustainability.⁴¹

The Group's particular focus was on the tax treatment of current arrangements and on proposed options for holding, managing and distributing land-related payments.

The key consideration in the Native Title Working Group Report is the concept of the Indigenous Community Development Corporation (ICDC) that has been developed jointly by the National Native Title Council (NNTC) and the Minerals Council of Australia (MCA).

The ICDC is an income tax exempt, not-for-profit entity with Deductible Gift Recipient (DGR) status, which is intended to invest in community development and provide long-term economic development benefits for

36 *Tax Laws Amendment (2012 Measures No 6) Act 2012* (Cth), sch 1 item 3. Also see Explanatory Memorandum, *Tax Laws Amendment (2012 Measures No 6) Bill 2012* (Cth), p 13.

37 *Tax Laws Amendment (2012 Measures No 6) Act 2012* (Cth), sch 1 item 4. Also see Explanatory Memorandum, *Tax Laws Amendment (2012 Measures No 6) Bill 2012* (Cth), p 13.

38 *Income Tax Assessment Act 1997* (Cth), s 59.50(4).

39 See National Native Title Council, *Submission to the Standing Committee on Economics on the Tax Laws Amendment (2012 Measures No. 6) Bill 2012: Tax Treatment of Native Title Benefits* (20 December 2013). At http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=economics/taxlawsno6/subs.htm (viewed 16 October 2013); M Storey, CEO Native Title Services Victoria, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Commissioner, Australian Human Rights Commission (2 September 2013).

40 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013). At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

41 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013), p 5. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

Indigenous peoples. The primary function of an ICDC is to receive, generate, manage and apply land-related funds.⁴²

As outlined in the Native Title Working Group Report, the ICDC would comprise:

- an ICDC entity established to receive an Indigenous community's land-related payments and other income, and accumulate funds for a future fund
- a not-for-profit community or charitable entity for the benefit of the community – for example, community store, health service, school, cultural tourism, natural resource management, meeting rooms and community housing
- businesses for individual profit – an ICDC could provide loans, start-up and other support services to businesses conducted by community members for individual profit.⁴³

I reported on an earlier proposal of the ICDC model in the *Native Title Report 2012*.⁴⁴

The Native Title Working Group supports the ICDC model because:

- An ICDC could be used by Indigenous communities to provide financial support for a wider range of community or economic development activities than is possible using other entities such as a charitable trust. It could contribute to developing the local Indigenous community by building local and regional businesses and social ventures that create flow-on economic and social development opportunities.
- An ICDC (as a tax exempt entity with DGR status) could facilitate the accumulation of payments towards a 'future fund' of private monies derived by an Indigenous community from native title agreements or other sources. The tax exempt status would maximise the funds available for both economic development and inter-generational investment purposes.⁴⁵

While I welcome the development of the ICDC model by the Native Title Working Group, it is my view that the governance of the ICDC will be critical to its long-term workability. Consistent with the principles of self-determination and participation in decision-making as outlined in the Declaration, the ICDC governance structure must ensure that native title holders retain control of their native title monies for the benefit of the whole native title group.⁴⁶ Further development of the ICDC must also include proper consultation with native title holders.⁴⁷

The Goldfields Land and Sea Council observes that the ICDC needs:

...to be around Indigenous owned/led regional mechanisms that include amongst other things:

42 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013), pp 25–27. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

43 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013), pp 26–27. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

44 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pp 116–117. At <http://www.humanrights.gov.au/publications/aboriginal-and-torres-strait-islander-social-justice> (viewed 9 September 2013).

45 Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013), pp 30–31. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 9 September 2013).

46 S Hawkins, CEO Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 August 2013.

47 S Hawkins, CEO Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 August 2013.

- a strong focus on achieving sustainability, durability and resilience in structures, processes and programs;
- a willingness to take into account Aboriginal law and culture in the way structures, processes and programs are devised and executed;
- a commitment to nurturing the necessary governance structures; and
- a process of capacity building, both in Aboriginal communities and in the government agencies that partner with them.⁴⁸

I will continue to monitor the development of the ICDC model and urge the Government to ensure that native title holders are properly consulted in future decisions about the ICDC.

Review of the Role and Functions of Native Title Organisations

In December 2012, the Australian Government contracted Deloitte Access Economics (Deloitte) to undertake a review of the role and functions of native title organisations.

The focus of this review is to examine the role and functions of native title representative bodies (NTRBs) and native title service providers (NTSPs) to ensure that they meet the evolving needs of native title holders once native title claims have been determined.

The review is responding to the changing native title environment in which there are an increasing number of native title determinations and a greater focus on the governance of post-native title determination outcomes. As a result, the governance of native title is moving from NTRBs / NTSPs to Prescribed Bodies Corporate (PBCs) / Registered Native Title Bodies Corporate (RNTBCs) set up to hold and manage determined native title rights and interests.

Deloitte released a discussion paper in June 2013, *Review of the Roles and Functions of Native Title Organisations*, as part of its consultation process. The discussion paper considers the following:

- The roles and statutory functions of NTRBs and NTSPs to:
 - assist the process of determining native title claims as set out in the Native Title Act and Program Funding Agreements (PFAs)
 - negotiate ILUAs and future act agreements
 - facilitate the sustainable use of benefits from agreements and settlements
 - consider differences between NTRBs and NTSPs and whether there is any benefit in NTRBs being recognised under Part 11 of the Native Title Act
 - examine whether there is any scope for the rationalisation of the number of NTRBs / NTSPs operating in the native title system, and the implications of any reduction in the numbers of NTRBs / NTSPs.⁴⁹
- The roles and functions of PBCs / RNTBCs, particularly:
 - capacity constraints facing PBCs / RNTBCs

48 H Bokelund, CEO Goldfields Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 14 August 2013.

49 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations Discussion Paper* (June 2013), pp 6–13. At https://www.deloitteaccessconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf (viewed 4 October 2013).

- whether legislative and administrative changes could improve the capacity of PBCs / RNTBCs to fulfil their functions
- the potential services that NTRBs / NTSPs can provide to PBCs / RNTBCs – and constraints to this approach in terms of NTRBs / NTSPs not being funded to support PBCs / RNTBCs, and/or PBCs / RNTBCs not wanting support from NTRBs / NTSPs
- other possible sources of support for PBCs / RNTBCs such as Indigenous Business Australia (IBA), Indigenous Land Corporation (ILC) and the Office of the Registrar of Indigenous Corporations (ORIC).⁵⁰
- The role of private agents⁵¹ in providing anthropological, legal and commercial development services within the native title system. It notes that in some circumstances (such as where a NTRB/NTSP has a conflict of interest with representing overlapping native title claims) private agents can have a beneficial role in providing services to native title groups. However, there are also concerns about private agents contributing to disputes within and between native title groups, and eroding native title benefits by charging unreasonably high fee for services.⁵²

As Deloitte is expected to report to Government in December 2013, I will consider the outcomes of this review in next year's Social Justice and Native Title Report.

Australian Law Reform Commission inquiry into native title

On 7 June 2013, then Attorney-General Mark Dreyfus announced draft terms of reference for the Australian Law Reform Commission (ALRC) to undertake an inquiry into specific areas of the native title system. I appreciated the opportunity to comment on these draft terms of reference.

The final terms of reference for the inquiry were announced on 3 August 2013 and request the ALRC inquire into and report on two specific areas of the native title system:

- connection requirements relating to the recognition and scope of native title rights and interests, including but not limited to whether there should be:
 - a presumption of continuity of acknowledgement and observance of traditional laws and customs and connection
 - clarification of the meaning of 'traditional' to allow for the evolution and adaptation of culture and recognition of 'native title rights and interests'
 - clarification that 'native title rights and interests' can include rights and interests of a commercial nature
 - confirmation that 'connection with the land and waters' does not require physical occupation or continued or recent use, and

50 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations Discussion Paper* (June 2013), pp 14–20. At https://www.deloitteaccessseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf (viewed 4 October 2013).

51 Private agents are described as parties acting without the involvement from NTRBs/NTSPs: see Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations Discussion Paper* (June 2013), p 21. At https://www.deloitteaccessseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf (viewed 4 October 2013).

52 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations Discussion Paper* (June 2013), pp 21–23. At https://www.deloitteaccessseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf (viewed 4 October 2013).

- empowerment of courts to disregard substantial interruption or change in continuity of acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
- any barriers imposed by the Act’s authorisation and joinder provisions to claimants’, potential claimants’ and respondents’ access to justice.⁵³

The ALRC is expected to report to Government in March 2015.

In light of repeated recommendations from Social Justice Commissioners for a comprehensive review of native title, I welcome the ALRC inquiry and am optimistic that it will provide an opportunity to undertake an in-depth and holistic review of the native title system.

Conclusion

The Reporting Period reflects the native title system in a process of potential change. There are a number of working groups, inquiries and reviews that have either only recently been completed and are waiting for consideration by the Government, or are on-going. Consequently, it is difficult to analyse outcomes from these reviews and inquiries beyond continuing to observe and monitor these processes.

However, there are several observations that I would like to make. Firstly, as I note in chapter 3, it is essential that these various working groups, reviews and inquiries work together to provide a consistent approach to addressing Aboriginal and Torres Strait Islander peoples’ concerns about the native title system.

Secondly, government-instigated reviews of the native title system must have beneficial outcomes for Aboriginal and Torres Strait Islander peoples. We cannot continue to invest significant resources – both time and money – into processes that create no outcomes for native title holders on the ground. This is demonstrated by the extensive process of two government committee inquiries into the Native Title Amendment Bill 2012 (Cth), which then lapsed at the dissolution of Parliament.

And finally, we need to view these processes as an opportunity to ensure the native title system provides Aboriginal and Torres Strait Islander peoples with opportunities to achieve our economic, social and cultural aspirations in accordance with our human rights in the Declaration.

53 M Dreyfus, *Terms of Reference – Review of the Native Title Act 1993* (3 August 2013). At <http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/ReviewoftheNativeTitleAct1993-finaltermsofreference-3August2013.PDF> (viewed 9 October 2013).

Note: Terminology

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

The word 'peoples' recognises that Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives. This is affirmed by the United Nations *Declaration on the Rights of Indigenous Peoples*.¹

There is a growing debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.²

Accordingly, the terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this Report.

Sources quoted in this Report use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. International documents frequently use the term 'indigenous peoples' when referring to the Indigenous peoples of the world. To ensure consistency, these usages are preserved in quotations, extracts and in the names of documents.

1 GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 14 October 2013).

2 See Steering Committee for the creation of a new National Representative Body, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Australian Human Rights Commission (2009), pp 15, 43. At http://www.humanrights.gov.au/social_justice/reppbody/report2009/index.html (viewed 14 October 2013).

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001

Telephone: (02) 9284 9600
Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

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