



Australian
Human Rights
Commission

Social Justice Report 2012

ABORIGINAL AND TORRES STRAIT ISLANDER
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander
Social Justice Commissioner

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Social Justice Report 2012

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Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Women's Council (Aboriginal Corporation) staff performing a traditional *inma*, or song, at the Healing Foundation's Alice Springs Healing Forum 2011. NPY Women's Council won the Indigenous Governance Award for 2012.

Photo by Rhett Hamerton

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



**Australian
Human Rights
Commission**

26 October 2012

The Hon Nicola Roxon MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

Social Justice Report 2012

I am pleased to present to you the *Social Justice Report 2012* (the Report), which I have prepared in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).

The AHRC Act provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report regarding the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples, and including recommendations as to the action that should be taken to ensure the exercise and enjoyment of human rights by those persons.

The theme of governance in the Social Justice and Native Title Reports for 2012 relates directly to my priorities concerning relationships and giving full effect to the *United Nations Declaration on the Rights of Indigenous Peoples*. In this Report, I will look at governance as a tool for achieving the goals of Aboriginal and Torres Strait Islander peoples.

I will outline three components of a framework for effective governance in Indigenous communities: a foundation of community governance and self-determination; good organisational governance; and an enabling role played by government and other external parties. I will look at what this means in practice for Aboriginal and Torres Strait Islander communities and those external parties.

Appendix 2 of the Report provides a chronology of key events for 2011–2012.

Finally, the *Social Justice Report 2012* provides several recommendations for your consideration.

I look forward to discussing the Report with you.

Yours sincerely

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

Mick Gooda
Aboriginal and Torres Strait Islander

Social Justice Commissioner

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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.

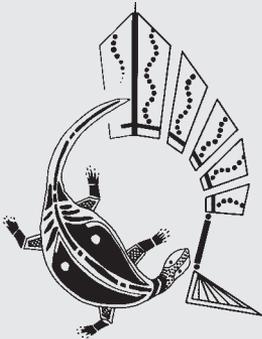
The Social Justice Commissioner:

- 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
- Tom Calma: 2004–2010
- William Jonas AM: 1999–2004
- Zita Antonios: 1998–1999 (Acting)
- Mick Dodson: 1993–1998

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 the Aboriginal and Torres Strait Islander Social Justice Commissioner. Mick commenced his term in February 2010.

Mick is a descendent of the Gangulu people of central Queensland.

As Social Justice Commissioner, he advocates for the recognition of the rights of Aboriginal and Torres Strait Islander peoples in Australia and seeks to promote respect and understanding of these rights among the broader Australian community.

Mick has been actively involved in advocacy in Aboriginal and Torres Strait Islander affairs throughout Australia for over 25 years and has delivered strategic and sustainable results in remote, rural and urban environments.

His focus has been on the empowerment of Aboriginal and Torres Strait Islander peoples. Immediately prior to taking up the position of Social Justice Commissioner, Mick was the Chief Executive Officer of the Cooperative Research Centre for Aboriginal Health for close to five and a half years. Here, he drove a research agenda which placed Aboriginal and Torres Strait Islander people 'front and centre' in the research agenda, working alongside world leading researchers.



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

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

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Executive summary

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

One of my primary responsibilities as the Aboriginal and Torres Strait Islander Social Justice Commissioner 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 to the Australian Parliament of an annual *Social Justice Report*.²

In this year's Report, I review developments in the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples between 1 July 2011 – 30 June 2012 (the reporting period). I also focus on the theme of governance, giving consideration to what enables effective, legitimate and culturally relevant governance in Aboriginal and Torres Strait Islander communities. I provide a number of cases studies which illustrate why this focus is so important.

Chapter 1: The year in review

Given this is the 20th Social Justice Report, this chapter starts with a reflection on the role of the Social Justice Reports. I then review the events that have taken place during the reporting period, including international and national developments, and my ongoing advocacy activities.

I provide commentary on significant developments related to the following:

- international fora in which Aboriginal and Torres Strait Islander peoples are involved in advocating for the rights of Indigenous peoples, including the meetings of the Expert Mechanism on the Rights of Indigenous Peoples, the United Nations Permanent Forum on Indigenous Issues, the World Intellectual Property Organisation Conference, and the Rio+20 United Nations Conference on Sustainable Development
- other international human rights-focused events, including the visit by the United Nations Special Rapporteur on violence against women which had a particular focus on Aboriginal and Torres Strait Islander women, the fourth periodic review of Australia's compliance with the Convention on the Rights of the Child
- the 40th Anniversary of the Tent Embassy

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', http://www.humanrights.gov.au/social_justice/sj_report/index.html (viewed 11 October 2012).

- the National Human Rights Framework, including the establishment of the new Parliamentary Joint Committee on Human Rights
- constitutional recognition of Aboriginal and Torres Strait Islander peoples
- the next stage of the Northern Territory Intervention – the Stronger Futures legislation
- my ongoing advocacy activities such as the conversation around lateral violence, access to justice including the indefinite detention of Aboriginal and Torres Strait Islander peoples with a cognitive impairment, Close the Gap, the promotion and protection of our languages and cultures and the Indigenous Human Rights Network Australia
- complaints made to the Australian Human Rights Commission.

I make a number of recommendations to the Government in this chapter, including several which remain outstanding from previous reports or submissions.

Chapter 2: Achieving effective, legitimate and culturally relevant Indigenous governance

Chapter 2 explores the meaning of governance and its importance to the capacity of Aboriginal and Torres Strait Islander peoples to achieve our goals.

It considers governance in Indigenous communities using a human rights based approach. In particular, I consider the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) as an instrument that provides practical guidance on what governance needs to deliver in Aboriginal and Torres Strait Islander communities. The main principles encompassed by the rights contained in the Declaration are discussed in terms of their importance to the effectiveness of governance in Indigenous communities. The relationships and functions in the governance environment as it relates to Aboriginal and Torres Strait Islander peoples must be underpinned by: self-determination; participation in decision-making including free prior and informed consent and good faith; respect for and protection of culture; and non-discrimination and equality.

I then look at what this means in practice and the evidence of what works to enable Aboriginal and Torres Strait Islander peoples to achieve our goals. The evidence is substantial and it suggests a three-part framework for effective governance in Aboriginal and Torres Strait Islander communities:

- community governance
- organisational governance
- the governance of governments and other external influences.

Ultimately, the evidence suggests that in order to achieve sustainable development in Aboriginal and Torres Strait Islander communities, there needs to be a new relationship between Aboriginal and Torres Strait Islander peoples and government. This new relationship needs to be based on power-sharing and recognition of the right of Aboriginal and Torres Strait Islander peoples to govern our own lives.

Chapter 3: Local government reform and the Intervention: disempowerment in the Northern Territory

Chapter 3 considers the way that the broader governance environment has impacted on Aboriginal communities in the Northern Territory. I case study two significant government policies which have been enacted and implemented without the appropriate involvement of the people affected: the Northern Territory Government's local government reforms; and the Australian Government's Northern Territory Intervention.

Amalgamation of Community Councils into new structures called Shires has dramatically changed the governance landscape in the Northern Territory, disconnecting Aboriginal communities from their local governments and consequently from decision-making regarding service delivery. The Northern Territory

Emergency Response occurred around the same time as the Shires were introduced and to Aboriginal peoples in the Northern Territory, they appeared part of the same assault on control over their communities. These policies, along with a range of other changes imposed by governments have resulted in widespread disempowerment and distrust of governments.

I consider the evidence generally on the health impacts of disempowerment and then specifically on the suicide rates in the Northern Territory. The implication that disempowerment and rising numbers of suicide attempts, particularly in young people, in the Northern Territory are connected is hard to escape and is extremely upsetting.

This chapter illustrates the importance of community control and empowerment in local governance of Aboriginal and Torres Strait Islander communities. It points to an urgent need for governments to reconsider the way they operate in Aboriginal and Torres Strait Islander communities. It points to some ways that the continuing Intervention under the Stronger Futures policy can have an increased chance of success, in particular by respecting and genuinely engaging with the communities involved.

Chapter 4: Effective governance in practice in Aboriginal and Torres Strait Islander communities

Throughout my term as Social Justice Commissioner, I have come across many excellent examples of community controlled initiatives and successful governance structures which are working well to achieve positive results for the Aboriginal and Torres Strait Islander communities which they serve.

In Chapter 4, I provide a variety of case studies looking at a range of communities in Aboriginal and Torres Strait Islander Australia including local, regional and national communities. They all highlight the importance of the three interrelated components of the framework discussed in Chapter 2.

The chapter starts with two discrete local community initiatives – *Milyirtjarra Kuurl Mirka Palyalpayi* (Making Good Food at Warburton School) and the Warlpiri Youth Development Aboriginal Corporation. As both of these organisations have expanded, they have required unique governance and operational solutions to address specific community needs and engage with the wider governance environment.

The chapter then looks at a non-Indigenous service provider in the early childhood education sector, Ngroo Education. Ngroo has built into its model the need to prioritise community governance and authority structures in each local community which it services.

All of the community organisations highlight the fundamental importance of community governance structures in any initiatives if those initiatives are to succeed in improving the lives of Aboriginal and Torres Strait Islander peoples. They ensure that the governance structures and models of operation incorporate and reflect legitimate community governance structures, whether they are incorporated or not. They also ensure that their organisational governance incorporates the principles, skills and capacity necessary to engage effectively in the broader governance environment.

I also consider some of the governance arrangements in the context of regional and national Aboriginal and Torres Strait Islander communities.

The governance arrangements in the Torres Strait are an example of a regional community pursuing a power-sharing arrangement designed specifically for the communities of that region. It shows that sovereignty is not absolute, as it is often asserted by nation-states. The Australian nation already shares internal sovereignty in a number of ways and this case study illustrates that there are myriad other ways in which power can be shared with Aboriginal and Torres Strait Islander communities.

The National Congress of Australia's First Peoples (Congress) is our new national representative body. Congress has community legitimacy as a priority and was developed on the basis of extensive community

consultations. It also has a unique structure to ensure that it builds on our existing strengths, particularly the expertise of our peak bodies, and has the organisational capacity to engage in the broader governance environment, particularly with governments.

The National Health Leadership Forum (NHLF), which is based in Congress, is made up of all the national Aboriginal and Torres Strait Islander peak health bodies and uses the existing capacity of our peak health bodies. It presents a unique opportunity for government to partner with a highly-skilled and organised Aboriginal and Torres Strait Islander leadership body to address Aboriginal and Torres Strait Islander health equality.

The Congress and NHLF case studies illustrate how important the choices of governments are at this point in time. Aboriginal and Torres Strait Islander peoples have formed credible national level governance institutions in the wake of the Australian Government's abolition of our last national representative body and our regional representative structures (and in many cases are local representative structures).

Chapter 4 concludes with a case study on the new Australian Indigenous Governance Institute (AIG Institute). The AIG Institute has been established by a number of Aboriginal and Torres Strait Islander leaders and academics who have been engaged in discussions about governance in Indigenous communities for a long time. It fills a gap in the Australian Indigenous governance landscape and will build on the excellent work already done by the Australian Institute of Aboriginal and Torres Strait Islander Studies, the Centre for Aboriginal Economic Policy Research at the Australian National University, Reconciliation Australia and others in the space.

These case studies show that Aboriginal and Torres Strait Islander peoples are fulfilling our roles in the framework for effective governance. We now need governments to step up. We need governments to relinquish control over our communities and start to build a genuine partnership with us. A partnership in which we are able to determine our own destinies and take control, supported by governments and other external parties where appropriate and when necessary.

Recommendations

Chapter 1

- 1.1 That the Australian Government should provide a formal written response to this Report and subsequent Social Justice Reports.
- 1.2 That the Australian Government engage with Aboriginal and Torres Strait Islander peoples to develop a strategy for implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 1.3 That the Australian Government commit to ongoing funding support for the international engagement of Aboriginal and Torres Strait Islander peoples to advocate for their human rights.
- 1.4 I reiterate the Commission's recommendation that the *United Nations Declaration on the Rights of Indigenous Peoples* be included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- 1.5 That all political parties recommit to constitutional recognition of Aboriginal and Torres Strait Islander peoples and support the recommendations of the Expert Panel.
- 1.6 I reiterate the Commission's recommendations regarding the implementation of the Stronger Futures legislation. In particular, I recommend that all future consultations are conducted in accordance with the 'features of meaningful and effective consultation' outlined in the *Native Title Report 2010*.
- 1.7 That the Australian Government renew its commitment to implement all recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- 1.8 I reiterate the recommendation from the *Social Justice Report 2009* that the Australian Government, through Council of Australian Governments, set criminal justice targets that are integrated into the Closing the Gap agenda.
- 1.9 Regarding Aboriginal and Torres Strait Islander people with a cognitive impairment in the criminal justice system, I recommend:
 - 1.9.1 That the Australian Government work with state and territory governments to develop and maintain a national standard of comprehensive data collection in relation to people with a cognitive impairment in the criminal justice system. This standard must ensure that statistics are collected relating to Aboriginal and Torres Strait Islander peoples.
 - 1.9.2 That the Australian Government work with state and territory governments to develop a national standard for screening for cognitive impairment in the criminal justice system. This standard should include safeguards to ensure screening is undertaken in a culturally competent manner.
 - 1.9.3 That all governments with legislative regimes which allow for the indefinite detention in prison, without conviction, of people with cognitive impairment urgently review those regimes.
 - 1.9.4 That all governments urgently prioritise appropriate alternative accommodation for people with cognitive impairment found unfit to plead.
 - 1.9.5 That all governments give priority to the complex needs of Aboriginal and Torres Strait Islander people with a cognitive impairment both in the community and in any interaction with the criminal justice system.
 - 1.9.6 That the Australian Government initiate and host a national conversation about people with a cognitive impairment within the criminal justice system.

- 1.10 That the Australian Government continue to engage with the National Health Leadership Forum in genuine partnership to develop and implement the National Aboriginal and Torres Strait Islander Health Plan.

Chapter 2

- 2.1 That the Australian Government acknowledges that effective Indigenous governance is central to sustainable development in Aboriginal and Torres Strait Islander communities.
- 2.2. That the Australian Government builds its own capacity to enable and support effective Indigenous governance.
- 2.3 That all governments properly resource Aboriginal and Torres Strait Islander communities to strengthen their contemporary governance structures. This resourcing must be part of a new relationship between Aboriginal and Torres Strait Islander peoples and governments based on genuine power-sharing and partnership.

Chapter 3

- 3.1 That the Australian and Northern Territory Governments invest in developing and strengthening governance structures and systems in Northern Territory Aboriginal communities to ensure they are culturally legitimate and aligned to community needs and priorities.
- 3.2 That any reforms to governance arrangements in the Northern Territory be done in genuine consultation, and where appropriate in partnership, with the Aboriginal communities affected. Consultations should be undertaken in accordance with the features of meaningful and effective consultation contained in the *Native Title Report 2010*.

Chapter 1: Year in review

- 1.1 The 20th Social Justice Report **18**
- 1.2 International developments **22**
- 1.3 National developments **33**
- 1.4 Ongoing advocacy activities **58**
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1.1 The 20th Social Justice Report

(a) Social Justice Reports

This year we reach a milestone with the publication of this, the 20th Social Justice Report. The position of Aboriginal and Torres Strait Islander Commissioner was established in 1993 - the year 2013 will represent the 20th Anniversary of the role. At this juncture, I think it is important to reflect on the achievements and contributions of the Social Justice Reports and on some of the challenges my predecessors and I have faced and still face in monitoring and protecting the human rights of Aboriginal and Torres Strait Islander peoples.

The Australian Government created the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the (then) Human Rights and Equal Opportunity Commission in response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence.¹

Amendments to the *Human Rights and Equal Opportunity Act 1986 (Cth)* established the position with the purpose of monitoring and reporting annually on the status of the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander Australians.²

At the time, the Attorney-General identified the position as a way to address the 'need for us as a nation to regularly focus on the extent to which Aboriginal and Torres Strait Islander people are able to exercise the basic human rights that the rest of the nation take for granted.'³

One of the main functions of the role of Social Justice Commissioner under the legislation is the production of an annual Social Justice Report. The Social Justice Commissioner also produces the Native Title Report each year in fulfilment of the requirement to report in the *Native Title Act 1993 (Cth)*.⁴

(i) Role of the Social Justice Report

The Social Justice Reports have played an important role in monitoring the enjoyment and exercise of the rights of Aboriginal and Torres Strait Islander peoples. They have also played an important role in advocating for law and policy reform.

The Reports measure Australia's respect for and protection of human rights for Aboriginal and Torres Strait Islander peoples against international human rights standards. They have interpreted the political reality of Australia over the past twenty years through the lens of international human rights instruments.

The Reports also provide a voice for Aboriginal and Torres Strait Islander people to raise issues and promote the positive developments in our communities. In the Reports, these positive developments are often demonstrated through case studies and I will provide more of those in the final chapter of this Report.

Providing an historic point of reference

While our struggle for social justice for Aboriginal and Torres Strait Islander peoples began well before 1993, the Social Justice Reports provide an historic point of reference for events after that time. The Reports provide us with an opportunity to reflect on the crucial developments over the years leading up to the commencement of the Aboriginal and Torres Strait Islander Social Justice Commissioner, and to tell the story of our campaigns,

1 Australian Human Rights Commission, 'Aboriginal and Torres Strait Islander Social Justice', http://www.humanrights.gov.au/social_justice/index.html (viewed 11 October 2012).

2 *Human Rights and Equal Opportunity Act 1986 (Cth)*, s 46B.

3 The Hon M Duffy MP, Attorney-General, *Second Reading Speech - Human Rights and Equal Opportunity Legislation Amendment Bill (No.2)* (1992).

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

struggles, hopes and priorities since 1993. The Reports also reflect the progress made in reconciliation and the gradual realisation of our rights.

The creation of the role of the Aboriginal and Torres Strait Islander Social Justice Commissioner and the responsibility to report on the exercise and enjoyment of the human rights by Aboriginal and Torres Strait peoples came at a significant time in our history. For example, the year 1993 was declared by the United Nations the International Year for the World's Indigenous People, aimed at 'strengthening international cooperation for the solution of problems faced by indigenous communities in areas such as human rights, the environment, development, education and health'.⁵

The *Native Title Act* commenced operating in 1993. The *Mabo* decision had been handed down in June 1992 and the Prime Minister Paul Keating was courageously advocating for our rights. We all remember Keating's Redfern address in December 1992 in which he implored the broader population to embrace the opportunity for wider change:

Mabo is an historic decision - we can make it a historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians.

The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain.⁶

The Reports tell the story of developing relationships. They tell the story of relationships both within our communities and of the relationships with Governments and with non-Indigenous Australians. Unfortunately the story reflects the tumultuous nature of these relationships, with moments of great optimism and potential for healing as well as times of conflict and discrimination.

I take a lot of hope from the positive milestones over the last 20 years. Milestones such as the national apology to the stolen generations on 13 February 2008 by the Prime Minister of the day, Kevin Rudd; as well as the 'Peoples walk for reconciliation' across the Sydney Harbour Bridge and subsequently other bridges all over Australia. The Sea of Hands movement for reconciliation has seen 2.5 million people plant hands in locations across the country.⁷ Such milestones reveal the level of goodwill that exists in so many sections of our society and provide a glimpse into the successes of the sustained campaign for reconciliation.

But too often the rhetoric of hope and change is not reflected in policy and action. The Reports show this journey between 1993 and 2012 and the almost cyclical patterns of hope and disappointment.

Since 2004, the Reports have included a Chronology of significant events relating to the administration and developments of Aboriginal and Torres Strait Islander affairs, which provide a quick reference point for key milestones and developments. This year's chronology can be found at Appendix 2.

Setting the agenda

On many occasions, the Reports have set the agenda in Aboriginal and Torres Strait Islander affairs. Achievements of previous Reports span a wide range of policy areas. The Report has gained the reputation as a leading document in the protection of Aboriginal and Torres Strait Islander peoples' human rights.

5 *International Year of the World's Indigenous People*, UN Doc A/RES/47/75 (1992). At <http://www.un.org/documents/ga/res/47/a47r075.htm> (viewed 11 October 2012).

6 The Hon P Keating MP, Prime Minister, *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 11 October 2012).

7 ANTAR, 'Sea of Hands', <http://antar.org.au/sea-hands> (viewed 11 October 2012).

One example of this contribution is the role the Social Justice Reports have played in the conversation about constitutional reform. This work took place over the full lifespan of the Reports – starting in 1995 and featuring most recently in 2010.

The Reports also acted as a catalyst for the formation of the Close the Gap Campaign for Indigenous Health Equality – a coalition of at least 40 peak health bodies, human rights organisations and NGOs. My predecessor Dr Tom Calma can be credited for the strength with which this campaign has developed and its achievements, beginning with securing a commitment from Government to achieving health equality for Aboriginal and Torres Strait Islander people within a generation.

The Reports have consistently considered Aboriginal and Torres Strait Islander self-determination and governance, including community and organisational governance. In particular, the reports offered incisive and measured scrutiny of our ground-breaking but short-lived elected representative body, the Aboriginal and Torres Strait Islander Commission (ATSIC), until its abolition in 2005.⁸

Dr Calma, who served his term during the period after ATSIC was abolished, used the esteem in which the Reports are held to successfully lead advocacy for a new national Indigenous representative structure.⁹ This advocacy culminated in the incorporation of the National Congress of Australia's First Peoples (Congress) in 2010.

Scrutinising government

Perhaps most importantly, the Reports scrutinise government, questioning the decisions and policies which affect Aboriginal and Torres Strait Islander peoples' lives. They have managed to track policy and legislative developments and frame them in broader social contexts and within a human rights framework. The thorough examinations of ATSIC's abolition¹⁰ and the Northern Territory Emergency Response (NTER),¹¹ amongst many others, have provided a crucial counterpoint to Government assertions and have acted as a tool for accountability.

(b) Evaluation of the Social Justice and Native Title Reports

In 2011 an evaluation was conducted of both the Social Justice and Native Title Reports. I am pleased to say

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- 8 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, Human Rights and Equal Opportunity Commission (2002). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport01/index.html (viewed 11 October 2012); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission (2003). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport02/index.html (viewed 11 October 2012); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, Human Rights and Equal Opportunity Commission (2004). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport03/exec.html (viewed 11 October 2012); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport05/index.html (viewed 11 October 2012); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2007). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport06/index.html (viewed 11 October 2012).
- 9 *Social Justice Report 2006*, above; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 11 October 2012); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Building a Sustainable National Indigenous Representative Body – Issues for consideration* (2008). At http://www.humanrights.gov.au/social_justice/repbody/paper.html (viewed 11 October 2012).
- 10 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, Australian Human Rights Commission (2005). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport04/index.html (viewed 11 October 2012); and *Social Justice Report 2005*, note 8.
- 11 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007). At http://humanrights.gov.au/social_justice/sj_report/sjreport07/chap3.html#fnB66 (viewed 11 October 2012).

that the evaluation found both Reports are highly appreciated and respected.

The evaluation was undertaken through consultation with our stakeholders. The consultations included interviews with members of key groups and a stakeholder survey.

The evaluation found both Reports to be valued by community groups, individuals and NGOs involved in Aboriginal and Torres Strait Islander affairs. When asked about the Social Justice Report 89% of respondents to the survey found it to be useful or very useful.

Maintaining the accessibility of the Reports has always been a priority of Social Justice Commissioners. The evaluation indicated that they have appropriate formats, structure, language and style; that they provide 'highly credible, evidence based information ... which could not be found elsewhere'; and that they influence government policy.¹²

(c) Social Justice Reports going forward

Despite the strength of the reports we must continue to strive to make them more effective in advocating for improvement in the lived reality of Aboriginal and Torres Strait Islander peoples.

One repeated recommendation of the Reports is that the Minister/Government should formally respond to the Reports and the progress made in implementing recommendations from past Reports.¹³ The Social Justice Reports are statutory requirements, tabled in Parliament. They should be given due weight and respect by the Government of the day.

I reiterate the recommendation that the Australian Government should provide a formal written response to this Report and subsequent Social Justice Reports. [Recommendation 1.1]

In reflecting on the optimistic atmosphere in 1993, it is hard not to be disappointed by the lack of progress on so many issues. The promise of a changed relationship with government, more reflective of our unique position as First Peoples of this country, went backwards during the Howard era and is only now very slowly recovering.

But reflecting with disappointment on missed opportunities should not mean we are disheartened about the potential for progress.

I have set an agenda of hope for my tenure as Aboriginal and Torres Strait Islander Social Justice Commissioner by focussing on building stronger and deeper relationships, both within Aboriginal and Torres Strait Islander communities and between Aboriginal and Torres Strait Islander peoples and the broader community and governments. The Social Justice Report is the key tool with which I am advancing this agenda. My first Report considered our relationships as a nation and looked particularly at the need for constitutional recognition of Aboriginal and Torres Strait Islander peoples in our modern nation's founding document – the Australian Constitution. My second Report considered the relationships within Aboriginal and Torres Strait Islander communities and looked particularly at lateral violence.

The Reports are also a 'report card' on developments. I will discuss below the developments that have taken place during this reporting period.

12 Australian Human Rights Commission, *Evaluation of the Social Justice and Native Title Reports* (2011).

13 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 48. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 11 October 2012); M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *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 11 October 2012).

1.2 International developments

There have been a number of developments at the international level during this 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 *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration)
- The Fourth Session of the Expert Mechanism on the Rights of Indigenous Peoples (EMPRIP)
- The Eleventh Session of the United Nations Permanent Forum on Indigenous Issues (Permanent Forum)
- World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
- Special Rapporteur on violence against women study tour
- The United Nations Conference on Sustainable Development - RIO+20
- United Nations Committee on the Rights of the Child (CRC Committee).

An update on each of these is provided below.

Of these events, the Indigenous Peoples Organisations (IPO) Network of Australia prioritised Aboriginal and Torres Strait Islander peoples engagement in the EMRIP, Permanent Forum, WIPO and Rio+20 by financially supporting attendance at these meetings. Individuals and organisations participating in the IPO Network have also provided input into the CRC Committee and the Special Rapporteur on violence against women study tour on issues relevant to Aboriginal and Torres Strait Islander peoples.

In my role as the Aboriginal and Torres Strait Islander Social Justice Commissioner, I also attended the EMRIP and UNPFII and my team contributed to the Commission's work with the CRC Committee and the Special Rapporteur on violence against women study tour.

(a) United Nations Declaration on the Rights of Indigenous Peoples

September 13, 2012 marks the fifth anniversary of the adoption of the Declaration by the United Nations General Assembly. While the Australian Government initially voted against its adoption in the General Assembly, this position was reversed in April 2009 by formally supporting the Declaration.

The Declaration is critical to Indigenous peoples' economic, social, and cultural development because it constitutes 'the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.'¹⁴

Over the past 12 months, discussions have occurred addressing in particular the legal effect of the Declaration. Despite positive comments at the time of supporting the Declaration, the Australian Government has since argued that the Declaration is not legally binding on States because it does not hold the same legal status as an international covenant or treaty. The General Assembly has provided clarification on this particular issue, saying:

14 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art 43.

...even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal obligations that are related to the human rights provisions of the Charter of the United Nations, various multilateral human rights treaties and customary international law. The Declaration builds upon the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to connect to a consistent pattern of international and State practice, and hence, to that extent, they reflect customary international law.¹⁵

A number of these discussions have also been aimed at increasing understanding on important principles contained within the Declaration, such as self-determination; participation in decision-making; free, prior and informed consent; good faith; the promotion and protection of culture; and equality and non-discrimination. These discussions are held in the hope of improving the capacity of governments and Indigenous peoples around the world to give full effect to the Declaration in their domestic contexts.

(i) Implementing the Declaration in Australia

The Declaration underpins all of the work I do in my role as Aboriginal and Torres Strait Islander Social Justice Commissioner and I have been advocating its use in all areas of focus throughout my term to date.

The Commission, with the support of The Christensen Fund and Oxfam Australia has developed a number of community materials designed specifically to increase use and understanding on the Declaration within our Aboriginal and Torres Strait Islander communities. These materials included:

- a double sided poster
- a summary Community Guide to the Declaration
- a 48 page Community Guide to the Declaration.

The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) also provided funding support to fund additional printing of the materials. The guide is available on the Commission's website.

We are currently finalising an educational DVD introducing the Declaration, and an interactive website to further increase our understanding and engagement with the Declaration in advocating our rights.

I have also had a number of discussions with the Government and Congress advocating a series of dialogues with key stakeholders including Aboriginal and Torres Strait Islander peoples, federal and state governments, and industry. I hope these dialogues will address how the principles of the Declaration can be applied in the Australian domestic context and result in guidance on how to give full effect to the rights in the Declaration, such as those relevant to our health; education; economic, social and cultural development; and our lands, territories and resources.

It is expected that these dialogues will occur over the coming months and contribute to the development of a National Implementation Strategy for the Declaration that will be finalised and committed to by all relevant stakeholders at a National Summit.

15 United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011), para 68. At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/288> (viewed 11 October 2012).

I recommend that the Australian Government engage with Aboriginal and Torres Strait Islander peoples to develop a strategy for implementing the *United Nations Declaration on the Rights of Indigenous Peoples*. [Recommendation 1.2]

(b) Expert Mechanism on the Rights of Indigenous Peoples

The fourth session of EMRIP was held in Geneva in July 2011. EMRIP is an important institution as it provides thematic expertise to the major human rights body of the UN, the Human Rights Council. As one of the two Indigenous specific fora of the United Nations, EMRIP has a standing item on the Declaration.

The IPO Network presented a statement, which I also endorsed, on the Study on Indigenous Peoples and the right to participate in decision-making.¹⁶ It stressed the importance of the role of Indigenous organisations in service delivery; that internal decision-making processes of Indigenous peoples be respected; and the incorporation of the Declaration into state's legislative instruments, frameworks, policies and procedures.

As Social Justice Commissioner, I provided a statement to EMRIP addressing the right to participate in decision-making.¹⁷

I also provided a submission on the right to participate in decision-making which was accompanied by Chapter 3 of the *Social Justice Report 2010*, 'From community crisis to community control in the Fitzroy Valley'.¹⁸

(c) United Nations Permanent Forum on Indigenous Issues

The Eleventh Session of the Permanent Forum was held in New York in May 2012. The Permanent Forum provides an opportunity for permanent, high level representation of Indigenous peoples at the UN and reports directly to the Economic and Social Council. It also has a standing agenda item on the Declaration.

The Eleventh Session had a special theme: *The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests (articles 28 and 37 of the Declaration)*. The IPO Network contributed to conversations surrounding the doctrine of discovery, including the extinguishment of Indigenous peoples' rights to lands, territories and resources; the recognition of Indigenous people in nations' constitutions; and the forced removal of children.

I attended the Permanent Forum along with an Aboriginal and Torres Strait Islander Peoples delegation, the majority of whom attended as part of the IPO Network.

The IPO Network submitted several interventions across agenda items including:

16 S Miller, *Joint statement on behalf of the Indigenous Peoples Organisations Network of Australia on Agenda Item 4: Study on Indigenous Peoples and the right to participate in decision-making* (Delivered at the Fourth Session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 11-15 July 2011). At http://www.humanrights.gov.au/social_justice/international_docs/expert_mechanism.html (viewed 11 October 2012).

17 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 3: The right to participate in decision making* (Delivered at the Fourth Session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 11-15 July 2011). At http://www.humanrights.gov.au/social_justice/international_docs/expert_mechanism.html (viewed 11 October 2012).

18 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Participation in decision-making*, Submission to the Expert Mechanism on the Rights of Indigenous Peoples, Fourth Session (11 July 2011). At http://www.humanrights.gov.au/social_justice/international_docs/expert_mechanism.html (viewed 11 October 2012).

- constitutional recognition¹⁹
- the doctrine of discovery²⁰
- child protection²¹
- children and youth²²
- health²³
- language and culture²⁴
- food and food sovereignty²⁵
- water.²⁶

As Aboriginal and Torres Strait Islander Social Justice Commissioner I submitted interventions on agenda items relevant to:

- constitutional reform²⁷
- implementation of the Declaration²⁸

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- 19 D Thiele, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 3: Study on national constitutions and the United Nations Declaration on the Rights of Indigenous Peoples with a view to assessing the nature and extent of the inclusion of indigenous peoples' human rights in national constitutions, with reference to the rights affirmed in the Declaration* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 20 B Wyatt, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 3: Discussion on the special theme for the year: 'The Doctrine of Discovery'* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 21 S Duffy, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 4a: Implementation of the Declaration on the Rights of Indigenous Peoples: Child Protection* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 22 S Brown, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 4a: Implementation of the Declaration on the Rights of Indigenous Peoples: Child Protection* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 23 J Mohamed, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 4a: Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Discussion on the rights of Indigenous Peoples to health* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 24 J Gertz, *Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 4a: Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Languages and Culture* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 25 M Holden, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 6: Half-day Discussion on the rights of indigenous peoples to food and food sovereignty* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 26 B Wyatt, *Joint Statement by the Indigenous Peoples Organisations Network of Australia on Agenda Item 6: Half-day Discussion on the rights of indigenous peoples to food and food sovereignty* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 27 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 3: Study on national constitutions and the United Nations Declaration on the Rights of Indigenous Peoples with a view to assessing the nature and extent of the inclusion of indigenous peoples' human rights in national constitutions, with reference to the rights affirmed in the Declaration* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).
- 28 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4(a): Implementation of the Declaration on the Rights of Indigenous peoples* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).

- the Special Rapporteur on the rights of indigenous peoples²⁹
- violence against women.³⁰

WIPO appeared at the Permanent Forum under agenda item 5, which allowed for dialogue between UN agencies and funds.³¹ The IPO Network also participated in this dialogue concerning the UN's protection of Indigenous knowledge and intellectual property rights.

(d) World Intellectual Property Organisation Conference

The rights to the protection of traditional knowledge are well founded in international law.³² Despite this, mechanisms both domestically and internationally remain inadequate for the protection and maintenance of traditional knowledge. The inadequacy of protections for Indigenous knowledge in Australia was discussed in detail in the *Native Title Report 2008*.³³

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 on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore met throughout this last year to continue discussions regarding drafts of international instruments on the protection of:

- cultural expression
- genetic resources
- traditional knowledge.

There is discontent amongst many Indigenous peoples about the separation of these three areas. To afford Indigenous intellectual property the best protections the three areas should be included in a single instrument.

At the WIPO meeting in Geneva in July 2012, Les Malezer, Co-Chair of Congress, and Jim Walker, from the Foundation for Aboriginal and Islander Research Action, contributed to an Indigenous panel which discussed protections of traditional cultural expressions and the Declaration.

WIPO also met with the Indigenous representatives at the Permanent Forum in New York in May 2012. It faced criticisms that its policies and processes do not do enough to protect the traditional knowledge of

29 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4(b): Dialogue with the Special Rapporteur on the rights of indigenous peoples* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).

30 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 3: Report on the expert group meeting: combating violence against indigenous women and girls, article 22 of the United Nations Declaration on the Rights of Indigenous Peoples* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18th May 2012).

31 Economic and Social Council, *Provisional agenda*, UN Doc E/C.19/2012/1. (27 February 2012). At <http://www.un.org/Docs/journal/asp/ws.asp?m=e/c.19/2012/1> (viewed 12 October 2012).

32 *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. 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).

33 *Native Title Report 2008*, above.

Indigenous peoples.³⁴

A main criticism was that WIPO does not operate according to the standards of the Declaration as it does not adequately include Indigenous representatives in decision-making processes which affect us. Unlike other UN bodies, WIPO only takes into account proposals from Indigenous peoples if they were supported by the state. This has resulted in systematic underrepresentation and has not allowed Indigenous peoples full access to adequate intellectual property protections.³⁵

The recommendations, relating to the protection of Indigenous knowledge, contained within the *Native Title Report 2008* remain relevant today.³⁶ Australia has an opportunity to be a leader in this area and the protection of our knowledge's is crucial to the survival and sustainability of the oldest living cultures in the world.

I encourage the Australian Government to work with Aboriginal and Torres Strait Islander peoples, particularly those engaged in the WIPO discussions, to develop adequate domestic protections of the knowledge of Aboriginal and Torres Strait Islander peoples.

(e) Violence against women

Violence against Indigenous women and girls is a human rights issue on which I continue to campaign. Article 22 (2) of the Declaration affirms the rights and specific needs of Indigenous women and children, including the full protection and guarantees for Indigenous women and girls against all forms of violence and discrimination.

In May I submitted a statement to the Permanent Forum on combating violence against Indigenous women and girls. The statement made several recommendations including that states provide a holistic response to violence against Indigenous women and girls.³⁷

The Commission also delivered an Independent Interim Report to the Committee on the Elimination of Discrimination Against Women.³⁸ This reported raised specific concerns about violence against Aboriginal and Torres Strait Islander women. These concerns included the increased vulnerability of Aboriginal and Torres Strait Islander women to violence; lack of access to culturally appropriate support services; as well as outlining the coronial inquest into the domestic violence-related homicide of Andrea Pickett in Western Australia.³⁹

Another notable event was the visit to Australia of the Special Rapporteur on violence against women.

(i) Special Rapporteur's visit

The Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, visited Australia on a study tour in April 2012. The tour's main focus was on violence against Aboriginal and Torres Strait Islander women, though other issues were also discussed.

Sex Discrimination Commissioner Elizabeth Broderick, Deputy Sex Discrimination Commissioner Andrea

34 Economic and Social Council, 'Indigenous Forum Holds Dialogue with World Intellectual Property Organization; Speakers Call for Reform, Greater Inclusion of Indigenous in Decision-making', Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, 6th & 7th Meetings (AM & PM), New York, 7-18th May 2012, UN Doc HR/5090. At <http://www.un.org/News/Press/docs/2012/hr5090.doc.htm> (viewed 11 October 2012).

35 Economic and Social Council, above.

36 *Native Title Report 2008*, note 33, Ch 7.

37 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner, on Agenda Item 3, Report on the expert group meeting: combating violence against indigenous women and girls, article 22 of the United Nations Declaration on the Rights of Indigenous Peoples* (Delivered at the Eleventh Session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18 May 2012).

38 Australian Human Rights Commission, *Independent Interim Report to CEDAW Committee* (August 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120910_CEDAW.html (viewed 11 October 2012).

39 Australian Human Rights Commission, above, pp 13-14.

Durbach, and the Principal Advisor of the Sex Discrimination Team Alison Aggarwal accompanied the Special Rapporteur on various legs of the tour across five states and territories.⁴⁰

The Special Rapporteur participated in roundtable discussions with NGOs, government, service providers and community representatives. I met with the Special Rapporteur on three occasions and accompanied her to three roundtable discussions/meetings. Key areas of discussion are outlined in Text Box 1.1.

As it wasn't a formal mission, the Special Rapporteur will not be issuing a report on her visit. However, the Commission has published a report on the tour.⁴¹ The report records the key issues raised and discussed. It also provides a synopsis of the status of violence against women in Australia at the moment and what government and non-government organisations are doing to address violence against women.

The study tour covered a range of issues including:

- the implementation, monitoring and evaluation of the *National Plan to Reduce Violence against Women and their Children* (National Plan)
- domestic violence and sexual assault, including programs for men to reduce violence against women
- the impact of culture, race and gender on the extent, nature and management of violence against women.

The Commission's report summarises the prevalence of violence against Aboriginal and Torres Strait Islander women:

Aboriginal and Torres Strait Islander women are 45 times more likely than non-Indigenous women to be victims of domestic violence. However, logistical, sociological and cultural factors may hinder reporting and, therefore, these figures may underestimate the actual prevalence rate of violence. The distrust of police and the justice system also contributes to reduced reporting, prosecution and conviction of perpetrators.⁴²

The discussions in the roundtables have been detailed in the Commission's report. The key areas of discussion relevant to Aboriginal and Torres Strait Islander people are summarised in Text Box 1.1.

Text Box 1.1:

Key areas of discussion in the roundtables

The key areas of discussion in the Aboriginal and Torres Strait Islander roundtables included:

- the prevalence and complex context of violence, including contributing factors of the historical legacy of colonisation and dispossession and the failure of government to understand and address the specific needs of Aboriginal and Torres Strait Islander peoples effectively
- the need to ensure effective consultation and engagement with Aboriginal and Torres Strait Islander communities in developing policies, programs and services

40 The tour went to New South Wales, Western Australia, Northern Territory, Victoria and the Australian Capital Territory.

41 Australian Human Rights Commission, *Australian study tour report – visit of the UN Special Rapporteur on violence against women* (September 2012). At http://www.humanrights.gov.au/sex_discrimination/publication/UNSRVAW%20report%202012/index.html (viewed 11 October 2012).

42 Australian Human Rights Commission, above, p 27.

- the need for enhanced protection of Aboriginal and Torres Strait Islander women across the justice system
- the need for enhanced access to services for victims of violence, including a more holistic approach to services, and the need for those services to be culturally safe and appropriate
- the need for services to address the underlying causes of domestic and family violence, including providing services with a focus on education and prevention
- the need to ensure programs are tailored to the circumstances of the specific community
- the need to engage men, both as perpetrators and potential leaders in preventing violence against women
- the need to ensure that violence is not going unreported for fear of having children removed, leaving children caught up in the cycle of family violence.

Some of the more general themes which emerged from the roundtables which are relevant to Aboriginal and Torres Strait Islander communities included:

- ‘Mainstreaming’ violence against women programs risks a formal rather than substantive equality approach to program design and content.
- The lack of recognition of the impact of intersectional discrimination based on sex, race, disability, and sex/gender identity on violence against women, often undermines the utility or effectiveness of plans and programs aimed at reducing violence.
- Men’s programs can often divert essential resources from critical women’s services.
- There is a greater need for coordination across local, state and federal governments in the implementation of the National Plan to reduce violence against women and their children.
- There is a need for appropriate monitoring and evaluation of the implementation and outcomes of the National Plan.
- The immediate and long-term impact of violence on children – both as victims and observers – was a key issue of discussions.

(ii) Progressing the conversation

Since 2011 I have been a White Ribbon Ambassador in the campaign against violence against women. This campaign encourages men to take a stand and state that violence, in any form, is never acceptable. The campaign encourages men to pledge that they do not excuse violence against women, and are committed to supporting community action to stop violence by men against women.

In the coming year, I will advocate for service funders and providers, particularly government, to listen more carefully to Aboriginal and Torres Strait Islander women about how domestic violence can be better tackled in their communities. My hope is that they heed the calls for support of community initiated action, to cut red tape and to make the safety and security of our women and children central to policy and program development.

(f) RIO+20

The United Nations Conference on Sustainable development (known as Rio+20) took place in Rio de Janeiro in June 2012. The conference focused on two themes:

- a green economy in the context of sustainable development poverty eradication
- the institutional framework for sustainable development.⁴³

Attendance at the conference included 50,000 delegates representing 190 states. Indigenous peoples were represented at the conference as a 'major group'. The IPO Network supported the attendance of two delegates: Brian Wyatt, and Dr Anne Poelina.

The conference produced a draft resolution for the General Assembly, *The Future We Want*.

The Indigenous group was able to influence the development of *The Future We Want*, ensuring that it included the valuable contributions to sustainability that can be made by Indigenous peoples.

Some key affirmations and recognitions in the document included:

- Explicit recognition of the Declaration in *The Future We Want*.
- That green economy policies in the context of sustainable development and poverty eradication should enhance the welfare of Indigenous peoples and their communities, other local and traditional communities and ethnic minorities, recognizing and supporting their identity, culture and interests, and avoid endangering their cultural heritage, practices and traditional knowledge, preserving and respecting non-market approaches that contribute to the eradication of poverty.⁴⁴
- The importance of traditional sustainable agricultural practices, including traditional seed supply systems, for many Indigenous peoples.⁴⁵
- That the traditional knowledge, innovations and practices of Indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity, and their wider application can support social well-being and sustainable livelihoods.⁴⁶
- That sustainable development requires the meaningful involvement and active participation of Indigenous peoples.⁴⁷

Unfortunately, the final document made no mention of land rights. It is also disappointing that the document failed to include reference to and acknowledgment of Indigenous peoples in sections on sustainable tourism, forests and mining.

While at the Conference, the Australian Government launched the Indigenous Peoples and Local Communities Land and Sea Managers Network.⁴⁸

43 United Nations Conference on Sustainable Development, 'Objective & Themes', <http://www.uncsd2012.org/objectiveandthemes.html> (viewed 11 October 2012).

44 General Assembly, *The future we want*, UN Doc A/66/L.56 (24 July 2012), p 9. At <http://www.uncsd2012.org/thefuturewewant.html> (viewed 11 October 2012).

45 General Assembly, above, p 22.

46 General Assembly, above, p 35.

47 General Assembly, above, p 7.

48 The Hon J Gillard MP, Prime Minister and The Hon T Burke MP, Minister for Sustainability, Environment, Water, Population and Communities, 'Australia announces global Indigenous network' (Media release, 21 June 2012). At <http://www.environment.gov.au/minister/burke/2012/mr20120621.html> (viewed 11 October 2012).

(g) United Nations Committee on the Rights of the Child

Australia ratified the *Convention on the Rights of the Child* (CRC) in 1990. In June 2012, the CRC Committee conducted the fourth periodic review of Australia's compliance with the CRC.

The IPO Network supported attendance by Australia's national Indigenous peak body, the Secretariat of National Aboriginal and Islander Child Care (SNAICC), as well as women and children's advocate Dr Hannah McGlade, at Australia's appearance before the CRC Committee. SNAICC were actively engaged in the NGO reporting to the CRC Committee prior to attending the review.

The Commission also provided a submission to the CRC Committee, raising concerns about the protection and promotion of children's rights in Australia.⁴⁹ The Commission's submission raised specific concerns regarding the protection of the rights of Aboriginal and Torres Strait Islander children.⁵⁰

In its Concluding Observations, the CRC Committee made a number of recommendations to the Australian Government.⁵¹ Many of the Commission's concerns were reflected in the Concluding Observations. The CRC Committee raised the following issues of concern in relation to Aboriginal and Torres Strait Islander children:

- the serious and widespread discrimination faced by Aboriginal and Torres Strait Islander children including in the provision of basic services and over representation in the criminal justice system
- inadequate consultation and participation of Aboriginal and Torres Strait Islander peoples in policy formulation, decision-making and implementation processes regarding programmes which affect them
- socio-economic, health and other forms of disadvantage
- the need for adequate provision of human and financial resources for the promotion of models of bilingual education
- the obstacles to birth registration including inadequate support from authorities, poor literacy skills and a lack of understanding of the advantages and processes of registration and the discriminatory impact of this
- the fact that Aboriginal and Torres Strait Islander women and children are particularly affected by violence
- concerns about the number of children removed from their families into care, away from their homes and communities and that this process often does not allow for the preservation of cultural and linguistic identity.

Australia is yet to ratify the third Optional Protocol to the CRC which involves an individual complaints procedure, an inter-state complaints procedure and an inquiry procedure. Individual complaints made under the Optional Protocol will be a valuable mechanism for identifying both systemic and individual violations of the CRC in Australia, and will assist in persuading the Australian Government to address any violations of children's rights. The Commission will continue to lobby for Australia to ratify this protocol.

The Committee welcomed the establishment of the role of the National Children's Commissioner within

49 Australian Human Rights Commission, *Submission to the Committee on the Rights of the Child: Information concerning Australia and the Convention on the Rights of the Child* (August 2011). At http://www.humanrights.gov.au/legal/submissions/2011/201108_child_rights.html (viewed 11 October 2012).

50 Australian Human Rights Commission, *Submission to CRC*, above.

51 Committee on the Rights of the Child, *Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012). At http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf (viewed 11 October 2012).

the Australian Human Rights Commission. I too welcome the establishment of the National Children's Commissioner and look forward working closely with the Commissioner to advocate for the rights of Aboriginal and Torres Strait Islander children.

(h) Future international engagement

Aboriginal and Torres Strait Islander peoples are actively engaged internationally. We participate collectively through the IPO Network, and we participate in regional and global caucuses including the Pacific Regional Caucus, the Global Women's Caucus and the Global Indigenous Caucus. Aboriginal and Torres Strait Islander peoples have also participated in crucial international developments including the drafting of the Declaration.

Previously, ATSIC committed funding to support international engagement. After the abolition of ATSIC, those funds were initially dispersed to mainstream departments to support international engagement. More recently, the Aboriginal and Torres Strait Islander Social Justice Commissioner has received some funding to support the participation of Aboriginal and Torres Strait Islander peoples at United Nations fora relevant to the rights of Indigenous peoples. While these funds assist participation at international fora, in many instances Aboriginal and Torres Strait Islander human rights advocates use their own income to support their participation at this level.

The latest funding agreement concluded on 30 June 2012 and further funding has not yet been confirmed. The Commission has provided a new funding proposal to the Australian Government in order to continue to support this level of international engagement of Indigenous peoples.

Support for our future engagement at this level over the coming years is important given the United Nations commitment to hold the World Conference on Indigenous Peoples scheduled for 2014. Again Aboriginal and Torres Strait Islander people have been actively engaged in the planning and organisation of this important meeting and are also involved in facilitating a regional Pacific preparatory meeting to give specific consideration to the vast diversity of issues faced by Indigenous peoples in the Pacific region.

I recommend that the Australian Government commit to ongoing funding support for the international engagement of Aboriginal and Torres Strait Islander people to advocate for their human rights.

[Recommendation 1.3]

1.3 National developments

In January 2012, Aboriginal and Torres Strait Islander peoples celebrated the 40th anniversary of the Aboriginal Tent Embassy. A number of significant legislative and policy developments affecting the human rights of Aboriginal and Torres Strait Islander peoples have also occurred during this reporting period.

I will consider some of these developments below including:

- providing an update on the process to recognise Aboriginal and Torres Strait Islander peoples in Australia's Constitution
- a discussion on the passing of the Stronger Futures in the Northern Territory legislation
- providing an update on some of the ongoing policy considerations of the Social Justice Commissioner including lateral violence, access to justice, Close the Gap, and the protection and promotion of language and culture.

(a) 40th Anniversary of the Tent Embassy

January 26, 2012 marked the 40th anniversary of the establishment of the Aboriginal Tent Embassy at what is now Old Parliament House in Canberra in 1972.

The original protest was motivated by the McMahon Government's refusal to acknowledge land rights. After the Supreme Court of the Northern Territory denied Aboriginal people their claims to land in the Gove land rights case in 1971,⁵² the Commonwealth Government gave an undertaking to consider how to legislate for land rights.⁵³ The decision that there would be no reform and any rights to land would be provided through leases allowed for under existing Northern Territory legislation was set to be announced on 26 January 1972. When this announcement was foreshadowed, the soon-to-be founders of the Aboriginal Tent Embassy drove from Sydney to the lawns of Parliament house in Canberra to plant a beach umbrella, marking the establishment of the Embassy.

The Tent Embassy protest – along with the Wave Hill walk off by the Gurindji people starting in 1966, and the Gove land rights case of 1971 – have been cornerstones in the history of the sovereignty and land rights movements in Australia.

The efforts of these early campaigners helped to galvanise support and commitment to overcome a number of critical challenges for Aboriginal and Torres Strait Islander peoples at that time such as land rights, health and housing, which sadly remain just as relevant and as urgent today as they were 40 years ago.⁵⁴

Despite the fact we still have a long way to go, the original Tent Embassy helped to make self-determination – community empowerment and control over our own affairs – an overriding factor in the thinking about policies affecting our peoples. The Tent Embassy reminds us that we have not yet achieved equality and have not yet been fully and properly recognised as the First Peoples of this country.

Finally, the Tent Embassy acts as a reminder of our ability to unite to campaign for better outcomes, bringing our concerns and struggles for equality to the forefront of public attention and political debate.

52 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

53 C Dow, *Aboriginal Tent Embassy: Icon or Eyesore?*, Parliamentary Library (2000).

54 M Gooda, *Aboriginal and Torres Strait Islander Social Justice Commissioner*, 'Aims of Tent Embassy remain as relevant today as they were 40 years ago' (Media release, 25 January 2012). At http://www.humanrights.gov.au/about/media/media_releases/index.html (viewed 11 October 2012).

(i) Events on 26 January 2012

Aboriginal and Torres Strait Islander peoples came together in great numbers in Canberra to celebrate the 40th anniversary, and to acknowledge the important contribution that this gathering place made to the advancement of the rights of Aboriginal and Torres Strait Islander peoples across the country.

Unfortunately, the anniversary celebrations were overshadowed by the story of the Prime Minister and Opposition Leader being rushed away from a function amid apparent fears for their safety.⁵⁵ No charges were ultimately laid as a consequence of the protest.⁵⁶

People celebrating the anniversary were moved to demonstrate after rumours spread that the Opposition Leader had called for the removal of the Tent Embassy. Footage of the scene was broadcast across Australia and the world. Whatever the reality of the protest, the footage and pictures presented a chaotic scene.

The ongoing symbolism of the Tent Embassy is an important reminder of the civil rights and land rights movements as significant markers in the history of Australia. It reflects our ongoing struggle to overcome the many challenges we face into the future.

However, as much as I understand and feel the anger and frustration vented at the Prime Minister and Opposition Leader, there can be no place for violence in our responses to this anger and frustration.

(b) National legislative and policy developments

In the *Social Justice Report 2008*, the Social Justice Commissioner identified 'six main areas where reform is needed to ensure full protection for Indigenous peoples and to modernise our human rights system.' These are reproduced in Text Box 1.2.

Text Box 1.2:

2008 Social Justice Commissioner's six main areas of reform regarding the human rights of Aboriginal and Torres Strait Islander peoples.

1. Commonwealth Government to formally declare its support for and implement the *United Nations Declaration on the Rights of Indigenous Peoples*.
2. A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights.
3. Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination.
4. The establishment of a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making that affects our interests.

55 'Riot police rescue Gillard, Abbot from protestors', *ABC News Online*, 26 January 2012. At <http://www.abc.net.au/news/2012-01-26/riot-police-escort-gillard-abbott-from-protest/3795036> (viewed 11 October 2012).

56 'No Charge over Protest', *Canberra Times*, 1 June 2012. At <http://www.canberratimes.com.au/act-news/no-charges-over-protest-20120531-1zkwl.html> (viewed 11 October 2012).

5. The establishment of a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation.
6. A focus on human rights education and the building of a culture of human rights recognition and respect.⁵⁷

Measured against these factors, there has been positive progress: Government declared its support for the Declaration in 2009; constitutional reform is on the political agenda; we have a new national representative body (Congress); and there is an improved focus on building a culture of human rights recognition and respect.⁵⁸

In this section I am going to talk about the progress made with regards to:

- the National Human Rights Framework
- constitutional recognition
- Stronger Futures in the Northern Territory.

(i) National Human Rights Framework

The National Human Rights Framework is the primary way in which the Government is taking forward a human rights agenda.⁵⁹ The Framework was developed in response to the Report of the National Human Rights Consultation Committee, after the Government rejected the main recommendation for a national Human Rights Act or Charter.⁶⁰

The National Human Rights Framework includes:

- human rights education for the community
- the development of an updated National Action Plan on Human Rights
- the establishment of a Parliamentary Joint Committee on Human Rights (JCHR)
- a requirement that all new legislation be accompanied by a 'statement of compatibility'
- the consolidation of all Federal anti-discrimination laws.⁶¹

There are several developments regarding the National Human Rights Framework which have a bearing on the protection of Aboriginal and Torres Strait Islander peoples' rights.

57 *Social Justice Report 2008*, note 9, p 16.

58 The Hon C Branson QC, President, Australian Human Rights Commission, *Rights, hearts and minds: Towards a national culture of Human Rights* (Speech delivered at Bob Hawke Prime Ministerial Centre/Graham F Smith Peace Trust, 14 June 2012). At http://www.humanrights.gov.au/about/media/speeches/speeches_president/2012/20120615_natural_culture.html (viewed 11 October 2012).

59 For information on the Human Rights Framework see, Attorney-General's Department, 'Australia's Human Rights Framework', <http://www.ag.gov.au/humanrightsframework> (viewed 11 October 2012).

60 Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009), Part 5, p 378. At <http://www.humanrightsconsultation.gov.au/Report/Documents/NHRCReport.pdf> (viewed 11 October 2011).

61 Attorney-General's Department, note 59.

Parliamentary Joint Committee on Human Rights including statements of compatibility

The Parliamentary Joint Committee on Human Rights was established on 13 March 2012 by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). Section 7 of that Act sets out the functions of the committee:

1. to examine Bills for Acts, and legislative instruments, that come before either House of the Parliament for compatibility with human rights, and to report to both Houses of the Parliament on that issue
2. to examine Acts for compatibility with human rights, and to report to both Houses of the Parliament on that issue
3. to inquire into any matter relating to human rights which is referred to it by the Attorney-General, and report to both Houses of the Parliament on that matter.

'Human rights' is defined in the Act as the rights contained in the following international treaties:⁶²

- (a) the International Convention on the Elimination of all Forms of Racial Discrimination⁶³
- (b) the International Covenant on Economic, Social and Cultural Rights⁶⁴
- (c) the International Covenant on Civil and Political Rights⁶⁵
- (d) the Convention on the Elimination of All Forms of Discrimination Against Women⁶⁶
- (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁷
- (f) the Convention on the Rights of the Child⁶⁸
- (g) the Convention on the Rights of Persons with Disabilities⁶⁹

It does not include the Declaration.

The Commission recommended that the Declaration be expressly included in the JCHR's remit by including it in the definition of human rights in the Act.⁷⁰

The Declaration largely reiterates fundamental human rights already ratified by Australia in these seven core treaties with a particular focus on how those rights apply to Indigenous people. However, I am concerned that the Declaration is not explicitly included in the definition of 'human rights' in the Act.

The impact of not specifically assessing legislation against the Declaration will be that mainstream laws will not be considered in terms of the unique and inherent rights of Indigenous peoples.

I reiterate the Commission's recommendation that the *United Nations Declaration on the Rights of Indigenous Peoples* be included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*. [Recommendation 1.4]

62 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 3(1).

63 Adopted by the General Assembly at New York on 21 December 1965 ([1975] ATS 40).

64 Adopted by the General Assembly at New York on 16 December 1966 ([1976] ATS 5).

65 Adopted by the General Assembly at New York on 16 December 1966 ([1980] ATS 23).

66 Adopted by the General Assembly at New York on 18 December 1979 ([1983] ATS 9).

67 Adopted by the General Assembly at New York on 10 December 1984 ([1989] ATS 21).

68 Adopted by the General Assembly at New York on 20 November 1989 ([1991] ATS 4).

69 Adopted by the General Assembly at New York on 13 December 2006 ([2008] ATS 12).

70 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).

However, despite this exclusion, I am optimistic that the JCHR's scrutiny will still be able to offer some much needed protection for Aboriginal and Torres Strait Islander people's rights. I see this happening for a number of reasons.

In conducting its scrutiny, the JCHR can choose to make use of the very practical guidance that is contained in the Declaration as to how the rights in the major treaties are able to be enjoyed fully and equally by Aboriginal and Torres Strait Islander peoples.

Other parliamentary committees have scrutinised legislation for their human rights compatibility. However, that scrutiny has not been with the proscribed focus on human rights compatibility – specifically with international law – which the JCHR will have.

If the experience of the United Kingdom's Joint Committee on Human Rights is anything to go by, our JCHR will fill a gap by providing rigorous, systematic, credible, human rights-based scrutiny, against international standards.⁷¹ It will hopefully manage to raise itself above the fray of party politics which often impacts on what is supposed to be cross-party committee work.⁷² This has the potential to especially benefit politically fraught areas of policy such as Aboriginal and Torres Strait Islander affairs.

One consequence of this type of rigorous parliamentary scrutiny will hopefully be that over time human rights are considered more systematically by departments when drafting legislation and developing policies. The requirement for a 'statement of compatibility' will mean that in preparing the Explanatory Memorandum for all Bills, particular attention will need to be paid to the human rights implications.⁷³ This has had a very positive impact on policy and legislative development in other jurisdictions.⁷⁴

The first Chair of the JCHR is Harry Jenkins, MP – an experienced and respected Member of Parliament who was the Speaker of the House of Representatives from 2007-2011. I am pleased that the Government saw fit to appoint someone of Mr Jenkins' stature to this position.

I am also pleased that the first Deputy Chair of the JCHR is Ken Wyatt, MP, the first ever Aboriginal and Torres Strait Islander MP and currently the only Aboriginal and Torres Strait Islander person in Parliament. I see his appointment as an indication that Aboriginal and Torres Strait Islander peoples' rights will be at the forefront of the JCHR's considerations.

National Human Rights Action Plan

In March 2012, the Commission made a submission to the Attorney-General's Department in response to the Consultation on the Exposure Draft of the new National Human Rights Action Plan. A number of the Commission's recommendations (and those from earlier input into the development process) related to Aboriginal and Torres Strait Islander people.⁷⁵ The Commission has been working closely with the Government on the development of the updated Action Plan.

71 M Hunt, H Hooper and P Yowell, *Parliaments and Human Rights Redressing the democratic deficit*, Arts and Humanities Council (2011). At <http://www.ahrc.ac.uk/News-and-Events/Publications/Documents/Parliaments-and-Human-Rights.pdf> (viewed 11 October 2012).

72 G Harmer, *Can responsible government survive in Australia?* Australian Parliament House (2004), p 299. At http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/hamer (viewed 11 October 2012).

73 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), Part 3.

74 Law institute of Victoria, *Charter Impact Report* (2011). At <http://www.liv.asn.au/News-and-Publications/Victoria-Human-Rights-Charter> (viewed 11 October 2012).

75 Australian Human Rights Commission, *Submission to the Attorney-General's Department Consultation on exposure draft National Human Rights Action Plan* (March 2012). At http://www.humanrights.gov.au/legal/submissions/2012/20120309_NHRAP.html (viewed 11 October 2012)

In the Vienna Declaration and Programme of Action, adopted in June 1993, the World Conference on Human Rights recommended to States to consider the desirability of drawing up a national action plan identifying steps whereby States would improve the promotion and protection of human rights. National Human Rights Action Plans are about 'strengthening national human rights institutions and infrastructures.'

The fundamental purpose of a national human rights action plan is to improve the promotion and protection of human rights in a particular country. It does this by placing human rights improvements in the context of public policy, so that governments and communities can endorse human rights improvements as practical goals, devise programmes to ensure the achievement of these goals, engage all relevant sectors of government and society, and allocate sufficient resources.⁷⁶

Presently, 29 countries have developed these voluntary plans.⁷⁷ Action Plans are considered in the Universal Periodic Review Process and are referred to by treaty bodies; they are growing in significance in the international sphere.

This Action Plan will be Australia's third. Australia's 1994 Action Plan, and its 2004 update, have been widely acknowledged as having had very limited impact. I am encouraged by the much more substantial consultation which has occurred in working towards this third National Action Plan and look forward to it being finalised and released.

Consolidation of federal anti-discrimination legislation

Unlike the other Commissioners at the Commission, as Social Justice Commissioner I do not have responsibility for administering any specific anti-discrimination legislation. The consolidation process is not expected to change this.

However, Aboriginal and Torres Strait Islander people have a strong interest in seeing that this process not only preserves existing levels of protection, but provides more effective means of eliminating discrimination and promoting equality and human rights. At the time of writing, the release of the exposure draft legislation was imminently expected.

(ii) Constitutional reform

Since commencing my role as Social Justice Commissioner, I have been committed to constitutional reform as a key component of my agenda to reset and build relationships. A referendum focused on including Aboriginal and Torres Strait Islander people in Australia's Constitution is an opportunity to redefine our national identity based on recognition, respect and inclusion.⁷⁸

A brief history

The campaign for constitutional recognition has been long-running and the Social Justice Reports have played a part in that campaign over the years. Several Social Justice Reports have looked at the historical context of the Constitution and the campaign, from the time it was drafted to the present day, to include Aboriginal and Torres Strait Islander peoples as Australia's First Peoples. Text Box 1.3 points to the Social Justice Reports which provide more detail on the history of the campaign for constitutional reform.

76 Office of the United Nations High Commissioner for Human Rights, *Handbook on National Human Rights Plans of Action*, United Nations (29 August 2002), p 9. At www.ohchr.org/Documents/Publications/training10en.pdf (viewed 11 October 2012).

77 Office of the United Nations High Commissioner for Human Rights, 'National Plans of Action for the Promotion and Protection of Human Rights'. At http://www2.ohchr.org/english/issues/plan_actions/ (viewed 11 October 2012).

78 For more information see, *Social Justice Report 2010*, note 13.

Text Box 1.3:

A history of the constitutional recognition campaign in the Social Justice Reports

- In the *Social Justice Report 2010*, I looked at the existing inadequate provisions of the Constitution. I traced the history of the campaign for reform and I outlined the benefits which constitutional recognition would bring to Aboriginal and Torres Strait Islander peoples and to the nation as a whole.⁷⁹
- The *Social Justice Report 2008* explored constitutional reform in the changed political context after the 2007 election and suggested options for the substance and process of reform. It recommended a program of consultations as well as the need to begin a process to remove section 25 and replace it with a clause guaranteeing equality before the law and non-discrimination.⁸⁰
- The *Social Justice Report 1995* explored the value of constitutional change and possible options for reform. It identified three potential benefits of constitutional reform:
 - recognition as unique peoples with a special place in Australian history and society
 - secure protection of rights which are now recognised, for example, Native Title
 - processes and frameworks by which we may strengthen or develop our societies or define our rights in the future.⁸¹

Expert Panel, the consultation process and You Me Unity

As reported in the *Social Justice Report 2010*, in December 2010 the Prime Minister Julia Gillard appointed the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel). I was an ex-officio member of the Expert Panel, whose mandate was 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.

Throughout 2011, the Expert Panel conducted a nation-wide consultation process.

The Expert Panel used a number of tools to inform Australians and to conduct their consultations including:

- public meetings
- community visits
- speaking at various forums and events
- a public website

79 See *Social Justice Report 2010*, note 13, Chapter 2.

80 *Social Justice Report 2008*, note 9.

81 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995), Chapter 4. At http://www.humanrights.gov.au/pdf/social_justice/sj_report95.pdf (viewed 11 October 2012).

- a submissions process.⁸²

Members of the Expert Panel shared the responsibility of attending over 250 public consultations across Australia between May and October 2011. We had conversations with over 4000 people, including individuals and representatives of business, media and community organisations. The process targeted the involvement of Aboriginal and Torres Strait Islander people, with visits to as many Aboriginal and Torres Strait Islander communities as possible. The discussion paper was made available in 15 Aboriginal and Torres Strait Islander languages.

Image 1.1:

Locations of public consultations by the Expert Panel⁸³

Locations of public consultations by the Expert Panel, May to October 2011



Produced by the Information Services Branch, Department of Families, Housing, Community Services and Indigenous Affairs.

The Expert Panel established the website [YouMeUnity.org.au](http://www.youmeunity.org.au) as a tool of the national consultation and to continue the national conversation after the Expert Panel had finalised its report. This website received 3500 submissions during the consultation process.

There seemed a real appetite amongst people to advance constitutional recognition. Many commented that

82 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012). At <http://www.youmeunity.org.au/final-report> (viewed 11 October 2012).
 83 Expert Panel on Constitutional Recognition of Indigenous Australians, above, p 6.

they were excited by the possibility of playing an active role in an act of true reconciliation that would shape our nation for the better. Given the number of consultations I attended around the country, there appears to be widespread optimism about the potential of this process to advance reconciliation in Australia and healing for Aboriginal and Torres Strait Islander peoples.

The consultations, along with polling, independent analysis and contributions from Aboriginal and Torres Strait Islander leaders and constitutional law experts were used to inform the final report and its recommendations.

Report of the Expert Panel

The Expert Panel presented its final report, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, to the Prime Minister in February 2012.

The Report provides a number of recommendations based on our four guiding principles. These principles dictated that the proposal must:

- 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.⁸⁴

The Panel made recommendations regarding changes to the constitution and the process for changing the constitution. The five recommendations for changes to the Constitution are in Text Box 1.4.

Text Box 1.4:

Expert Panel's recommendations for changes to the Constitution⁸⁵

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;

84 Expert Panel on Constitutional Recognition of Indigenous Australians, above, p 4.

85 Expert Panel on Constitutional Recognition of Indigenous Australians, above, p xviii.

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.

The Report's eight recommendations about the process of preparing for and conducting a referendum are in Text Box 1.5.

Text Box 1.5:

Expert Panel's recommendations on the process for the referendum⁸⁶

- (a) In the interests of simplicity, there should be a single referendum question in relation to the package of proposals on constitutional recognition of Aboriginal and Torres Strait Islander peoples set out in the draft Bill (Chapter 11).
- (b) Before making a decision to proceed to a referendum, the Government should consult with the Opposition, the Greens and the independent members of Parliament, and with State and Territory governments and oppositions, in relation to the timing of the referendum and the content of the proposals.
- (c) The referendum should only proceed when it is likely to be supported by all major political parties, and a majority of State governments.

86 Expert Panel on Constitutional Recognition of Indigenous Australians, above, p xix.

- (d) The referendum should not be held at the same time as a referendum on constitutional recognition of local government.
- (e) Before the referendum is held, there should be a properly resourced public education and awareness program. If necessary, legislative change should occur to allow adequate funding of such a program.
- (f) The Government should take steps, including through commitment of adequate financial resources, to maintain the momentum for recognition, including the widespread public support established through the You Me Unity website, and to educate Australians about the Constitution and the importance of constitutional recognition of Aboriginal and Torres Strait Islander peoples. Reconciliation Australia could be involved in this process.
- (g) If the Government decides to put to referendum a proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples other than the proposals recommended by the Panel, it 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.
- (h) Immediately after the Panel's report is presented to the Prime Minister, copies should be made available to the leader of the Opposition, the leader of the Greens, and the independent members of Parliament. The report should be released publicly as soon as practicable after it is presented to the Prime Minister.

It is not clear yet what position the Government and Opposition will take on the specific recommendations of the Panel, but I am hopeful that all parties will see the care and precision that went into framing the recommendations and ultimately support them being put to the Australian public in a referendum.

Education campaign

The consultations conducted by the Expert Panel assisted in educating the Australian people about the need for constitutional reform. However further education will be necessary to ensure a referendum is successful.

Although the Government has not yet formally responded to the Panel's Report, it has provided funding to Reconciliation Australia to lead a nationwide education campaign. The commitment of Government is reflected in this funding: \$10 million over 2 years to educate Australians on this important historic step in our nation's development. I commend the Government's commitment in funding the education campaign, which reflects recommendation (f) of the Expert Panel's report.

The Expert Panel established You Me Unity to assist in the consultation process. Reconciliation Australia now has carriage of You Me Unity, which continues as a platform for the national conversation about updating our Constitution to recognise Aboriginal and Torres Strait Islander peoples.⁸⁷ The Reconciliation Australia public education campaign will be known as You Me Unity. I welcome the appointment of Tim Gartrell, an experienced political campaigner, as the education campaign director and of Tanya Hosch, a Torres Strait Islander woman, as his Deputy.⁸⁸

87 You Me Unity, 'About Us', <http://www.youmeunity.org.au/about> (viewed 11 October 2012).

88 Reconciliation Australia, 'Tim Gartrell to lead Constitutional recognition team', (Media release, 17 May 2012). At <http://www.youmeunity.org.au/blog/view/tim-gartrell-to-lead-constitutional-recognition-team> (viewed 11 October 2012).

Next steps

At the time of writing, the Minister for Families, Community Services and Indigenous Affairs announced that there would not be a referendum in the life of this Parliament or at the next election.⁸⁹ The reason given was that the nation is not sufficiently aware of the issues involved and that a failed referendum would set reconciliation back substantially.⁹⁰ A preliminary report prepared by Reconciliation Australia advised the Government that only 39 percent of non-Indigenous Australians were aware of the proposal to change the constitution.⁹¹

Instead, the Government has proposed putting before Parliament an Act of Recognition. This will include a sunset clause to make clear that it is a temporary measure intended to maintain momentum towards constitutional change.⁹²

I agree that there is not sufficient time between now and the next election to adequately educate Australians on the need for these changes. This is disappointing, but it would be a devastating blow to reconciliation if a referendum were to fail.

The important point that must be made in relation to any interim measure is that we must not lose sight of the end goal – constitutional reform. All efforts between now and a referendum must maintain the momentum and work to achieve this.

The next steps need to engage the entire nation – to inform all Australians about the Constitution and its current flaws and to make personal connections so that individuals feel invested in achieving a successful referendum and a part of creating an inclusive nation for all of us.

With the education campaign getting into full swing, it is time for all political parties to reaffirm their non-partisan commitment to constitutional recognition, including by working together on the Act of Recognition.

I look forward to working with the Australian people, with You Me Unity, and with the Government in the coming months and years in pursuing this important milestone in our nation's history.

I recommend that all political parties recommit to constitutional recognition of Aboriginal and Torres Strait Islander people and support the recommendations of the Expert Panel. [Recommendation 1.5]

(iii) Stronger Futures in the Northern Territory

In June 2012, the Australian Parliament passed the Stronger Futures legislation – the latest instalment in the Northern Territory Intervention following the original NTER and subsequent amendments.

While Stronger Futures is designed to address specific concerns in Aboriginal and Torres Strait Islander communities in the Northern Territory, elements of this approach will have wider reaching implications. In particular, legislative developments relating to access to social security and welfare support programs will have national implications as they are being rolled out in five additional sites in different states and territories across the country.

89 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'Progressing Indigenous Constitutional Recognition', (Media release, 20 September 2012). At <http://www.jennymacklin.fahcsia.gov.au/node/2098> (viewed 11 October 2012).

90 J Macklin, above.

91 J Macklin, above.

92 J Macklin, above.

The Stronger Futures legislation

The Stronger Futures legislation was developed in response to the Government's *Stronger Futures in the Northern Territory discussion paper*.⁹³ Consultations were conducted over a 6 week period with communities across the Northern Territory. The Government then introduced the Stronger Futures in the Northern Territory Bills into Parliament for consideration on 23 November 2011. The Bills passed through Parliament on 29 June 2012. A full chronology of the Intervention is at Appendix 3.

Stronger Futures is made up of three pieces of legislation:

- the *Stronger Futures in the Northern Territory Act 2011* (Cth) – came into effect on 16 July 2012
- the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2011* (Cth) – came into effect on 16 July
- the *Social Security Legislation Amendment Act 2011* (Cth) – came into effect on 29 June 2012.⁹⁴

The Stronger Futures legislation allows some of the previous measures under the NTER to continue and modifies others. In summary, the Stronger Futures legislation:

- repeals the *NTER Act*⁹⁵
- retains existing alcohol bans in prescribed Northern Territory communities but introduced the mechanism of community 'alcohol management plans' to transition communities from blanket bans to community developed and owned plans⁹⁶
- amends laws relating to alcohol abuse, including by adding 6 months imprisonment as an available penalty for possession of less than 1350ml of alcohol in an alcohol protected area⁹⁷
- introduces a new regulation-making power which allows the Australian Government to make regulations to modify Northern Territory laws relating to leasing on town camp and community living area land⁹⁸
- repeals the provisions relating to the acquisition of extensive statutory rights under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)⁹⁹ and provisions relating to the acquisition of compulsory five-year leases¹⁰⁰
- 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 regulations¹⁰¹
- 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

93 FaHCSIA, *Stronger Futures in the Northern Territory discussion paper* (June 2011). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory/stronger-futures-in-the-northern-territory-discussion-paper> (viewed 11 October 2012).

94 FaHCSIA, 'Additional Information on Stronger Futures Legislation'. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory/additional-information-on-stronger-futures-legislation> (viewed 11 October 2012).

95 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), s 1.

96 *Stronger Futures in the Northern Territory Act 2012* (Cth), Part 2.

97 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 75B (1).

98 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 34.

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

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

101 *Stronger Futures in the Northern Territory Act 2012* (Cth), Part 4.

new ban or if bans are to be removed¹⁰²

- amends the *Crimes Act 1914* (Cth) (as amended by the NTER) introducing an exception to the rule preventing consideration of customary law or cultural practice in bail and sentencing for certain offences involving cultural heritage¹⁰³
- amends sections of the social security legislation which enable a new process for dealing with unsatisfactory school attendance¹⁰⁴ (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)¹⁰⁵
- amends the operation of the Income Management scheme by allowing recognised state/territory authorities to refer people to Income Management (recognised state/territory authorities or their employees must have ‘functions, powers or duties in relation to the care, protection, welfare or safety of adults, children or families’).¹⁰⁶

In the discussion below, I will consider the process undertaken by the Australian Government to secure this legislation, including the consultation process and the Senate Inquiry. I will also comment on future considerations, focused on implementing the legislation.

Stronger Futures consultation process

In June 2011 the Australian Government released the *Stronger Futures in the Northern Territory discussion paper* to explore options in anticipation of the expiry of the legislative basis for much of the NTER.¹⁰⁷

I outlined my concerns about this process in the *Social Justice Report 2011*.¹⁰⁸ They included the following issues.

- Despite the breadth of the discussion paper there were major issues, such as Income Management, left off the agenda.¹⁰⁹
- The fact that the discussion papers were not provided in local language hindered the involvement of some communities.¹¹⁰
- After the release of the discussion paper, consultations were conducted over a six week period across the communities to be affected by the legislation. Six weeks is too short a timeframe for proper consultation given the breadth and complexity of issues that were involved.¹¹¹ Feedback that I received from communities in the Northern Territory was that the nature of the consultations did not allow for genuine engagement. This concern was reflected in many of the submissions to the

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

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

104 *Social Security Legislation Amendment Act 2012* (Cth), Division 3A.

105 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.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/submissions.htm (viewed 11 October 2012).

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

107 FaHCSIA, *Stronger Futures in the Northern Territory discussion paper*, note 93.

108 *Social Justice Report 2011*, note 13, p 27.

109 Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (October 2011). At http://www.fahcsia.gov.au/sites/default/files/documents/09_2012/stronger-futures-consult_1710111_0.pdf (viewed 11 October 2012).

110 Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (August 2011), p 13. At http://www.amsant.org.au/index.php?option=com_content&view=article&id=154&Itemid=258 (viewed 20 March 2012).

111 *Social Justice Report 2011*, note 13, p 27.

subsequent Senate Inquiry.¹¹²

- A common concern was that the consultation process did not allow for any changes to the Government's approach, with local input being used to justify the mostly top-down policies.¹¹³
- Many communities were left with the understanding that they would be re-consulted before the legislation was tabled; this did not occur.¹¹⁴

The *Native Title Report 2010* presented to Government a list of 'features of a meaningful and effective consultation process'.¹¹⁵ The Stronger Futures consultations do not appear to have been conducted in line with these recommendations.

There has been much said about the consultation process, by me and others. Aboriginal people and Torres Strait Islanders in the Northern Territory communities affected by the Intervention are frustrated, angry and hurt by what they feel has been a betrayal.¹¹⁶ Government are yet to realise that doing the same thing the same way will more often than not result in the same outcome. They will also draw the same criticisms.

Government has defended the consultations, but has largely failed to address the key concerns.¹¹⁷

The Senate Committee Inquiry into the Stronger Futures bills

The Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures Bill 2011 and two related bills, received over 450 submissions and held seven public hearings: five in the Northern Territory and two in Canberra. This included the Commission's submission and a hearing in Canberra at which Race Discrimination Commissioner Dr Helen Szoke and I gave evidence.¹¹⁸

The Commission's submission to the Senate Committee Inquiry

The Commission provided a comprehensive submission to the Senate Committee Inquiry into the Stronger Futures Bill 2011 and two related bills.

The Commission's submission made 33 recommendations as to how the bills could be improved to be more compatible with Australia's human rights obligations.¹¹⁹ These included proposals to ensure the measures contain adequate safeguards such as review mechanisms. Our full submission is available on our website and the Committee's website.¹²⁰

112 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Inquiry into Stronger Futures in the Northern Territory Bill 2011, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011, Social Security Legislation Amendment Bill 2011* (March 2012). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/report/index.htm (viewed 11 October 2012).

113 Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (August 2011), pp 12-14. At http://www.amsant.org.au/index.php?option=com_content&view=article&id=154&Itemid=258 (viewed 11 October 2012).

114 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed Stronger Futures in the Northern Territory Bill (2011) and accompanying Bills* (February 2012), p12. At <http://nationalcongress.com.au/policyandadvocacy/> (viewed 11 October 2012).

115 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), Appendix 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 11 October 2012).

116 National Congress of Australia's First Peoples, note 114.

117 L Martin, 'Macklin defends NT Intervention', *The Sydney Morning Herald*, 28 June 2012. At <http://news.smh.com.au/breaking-news-national/macklin-defends-nt-intervention-20120628-214n1.html> (viewed 11 October 2012).

118 Senate Community Affairs Legislation Committee, Public Hearing Program, Inquiry into Stronger Futures in the Northern Territory Bill 2011 and two related bills (Transcript - Thursday 1 March). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/hearings/index.htm (viewed 11 October 2012).

119 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105, pp 7-13.

120 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105.

Our submission made the following key points:

- The Stronger Futures Bills must be implemented in accordance with human rights standards. This includes ensuring that the Stronger Futures Bills are consistent with the *Racial Discrimination Act 1975* (Cth) and the *Convention on the Elimination of Racial Discrimination*.
- The Commission strongly encouraged the Government to adopt our approach to effective consultation and engagement with Aboriginal peoples in relation to further developing and implementing the Stronger Futures Bills; and to commit to working with Aboriginal communities in the Northern Territory to develop appropriate responses that meet the identified needs of individual communities.
- A key priority for the Government should be to resource the development of community governance structures to enable Aboriginal peoples to engage with and control decision-making about their own development goals, particularly those pertaining to the Stronger Futures priority areas. The Government should review and reform its internal structures and workforce to ensure cultural competency, cultural safety and cultural security.¹²¹

Several of our concerns were addressed by amendments to the Bills as they passed through Parliament.

Committee's report

The Committee's report, published on 14 March 2012, made 11 recommendations.¹²²

- Three recommendations (1, 3 and 6) involved amending the Bills. All three were accepted and enacted (or partially enacted) into the legislation.
- Three recommendations (4, 7 and 8) go to providing further information and clarity (around customary law provisions and SEAM).
- Two recommendations (5 and 11) go to review (non-legislative).
- Two recommendations (9 and 10) go to engagement and consultation with Aboriginal and Torres Strait Islander people. They specifically refer to the Australian Human Rights Commission.

The recommendations are in full in Text Box 1.6.

121 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105, p 7.

122 Senate Community Affairs Legislation Committee, note 112.

Text Box 1.6:

The recommendations of the Senate Committee¹²³

Recommendation 1: The committee recommends that the Stronger Futures in the Northern Territory Bill 2011 be amended to allow infringement notices to be issued in relation to minor alcohol offences and to make it clear that infringement notices may be issued relating to the possession and supply of liquor.

Recommendation 2: The committee recommends that processes be implemented to ensure that the Minister responds to alcohol management plan applications in a timely manner.

Recommendation 3: The committee recommends section 23 (1)(eb) of the *Aboriginal Land Rights (Northern Territory) Act 1976* be amended to remove the text 'at the Land Councils expense'.

Recommendation 4: The committee recommends that the Commonwealth include in its engagement program with remote NT communities going forward a specific component designed to build understanding of customary law provisions and support for this measure and in particular to clear up misunderstandings that have arisen.

Recommendation 5: The committee also recommends that the measure and its level of understanding in communities be reviewed in 5 years' time as part of the review and evaluation of the proposed National Partnership agreement.

Recommendation 6: The committee recommends that the government amend the Social Security Legislation Amendment Bill to require that only agencies that have in place appropriate internal and external review and appeal processes be approved by the Minister to make income management referrals.

Recommendation 7: The committee recommends the Commonwealth and NT governments provide greater clarity regarding SEAM and the Every Child, Every Day measures, how they interact and will operate in parallel together. Further education needs to be provided to communities where these policy changes will apply in the Northern Territory as of 1 July 2012 and advice provided by both governments must be clear as to what policy applies in different areas throughout the Northern Territory.

Recommendation 8: The committee recommends the SEAM 2012 evaluation, and any other material monitoring the effectiveness of SEAM and the Every Child, Every Day initiative, be made publicly available as soon as possible following its completion. Timing of the evaluation's release is particularly important given the inappropriate delay in releasing the 2010 evaluation of SEAM.

Recommendation 9: The committee recommends governments work closely with the Australian Human Rights Commission to build a culturally competent workforce.

Recommendation 10: The committee recommends that when conducting further consultation in relation to Stronger Futures the Commonwealth government:

- work with the framework provided by the Australian Human Rights Commission for meaningful and effective consultation processes that are culturally safe, secure and appropriate; and
- give consideration to the effective use of Land Councils in consultation processes given their knowledge and expertise in consulting appropriately with communities.

Recommendation 11: The committee recommends that in addition to the reviews of the legislation already announced, the Commonwealth also ensure that any National Partnership Agreement is the subject of an independent and public review and evaluation after 5 years.

I was disappointed that the Committee did not make more recommendations as to the legislation itself. For example, I would like to have seen the Committee's recommendation regarding processes for approving community alcohol management plans (recommendation 2) actually recommend that processes be specified in the legislation.

However, the emphasis in the Committee's Report on the importance of consultation and engagement was positive. In particular, I was pleased with recommendations 9 and 10: that the Government should use our 'features of a meaningful and effective consultation process'; and that the Government should work closely with the Commission in building a culturally competent workforce.

The discussion on governance in the subsequent chapters of this Report will highlight how important I think these recommendations are.

The Government is yet to formally respond to the Committee's report.

Looking forward – implementing Stronger Futures

Although some of the Commission's concerns were addressed by amendments to the Bills, many were not. As such I have several outstanding human rights concerns with the Stronger Futures legislation. For example the Commission recommended that:

- the Government establish community advisory mechanisms for the implementation of SEAM, and to provide options for communities to voluntarily 'opt-in' to the scheme
- the consultation requirements be legislatively strengthened
- a mandated floor price be introduced on alcohol in the Northern Territory
- customary law or cultural practices are only excluded from consideration in bail and sentencing decisions for offences that involve violence or sexual abuse.

Appendix 4 sets out the amendments made to the Stronger Futures bills.

The Stronger Futures measures are in place for 10 years, while the Social Security measures including SEAM do not have a sunset clause and as such are now permanently in place until amended or repealed.

It is the implementation that is now the most important aspect of Stronger Futures. The implementation of the legislation will determine whether people's day-to-day experience of Stronger Futures is one in which they feel their human rights are respected and they have control over their own lives; or one in which they feel their human rights are flouted.

In our submission to the Senate Inquiry, the Commission highlighted as an overriding concern the engagement of Aboriginal and Torres Strait Islander peoples in the delivery of government services and programs.¹²⁴ We emphasised that a lack of cultural competency within Government, particularly within the bureaucracy that interacts with Aboriginal and Torres Strait Islander communities, is a major barrier to engagement and

124 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105.

empowerment.¹²⁵

As I have discussed already, the consultation processes which preceded Stronger Futures do not seem to have been appropriately conducted. The effect of this has been to generate further distrust of Government among the communities affected. The Government needs to learn lessons from that consultation process and apply them to the implementation of Stronger Futures.

Future consultations in implementing Stronger Futures

The Stronger Futures legislation stipulates in nine provisions that consultation should occur:

1. The Northern Territory Licencing Commission is to have regard to ‘the circumstances and views of people who are living in the area’ about whether alcohol restriction signage is erected and in what form.¹²⁶
2. Communities must have consulted sufficiently about an alcohol management plan before it will be approved by the Minister.¹²⁷
3. A community consultation process is required in relation to the rules prescribing areas as alcohol protected areas.¹²⁸
4. Before making regulations changing Northern Territory laws relating to town camps, the Minister must consult with the Northern Territory Government, the lessee of the town camp land, and ‘any other person the Minister considers appropriate to consult’.¹²⁹
5. Before making regulations changing Northern Territory laws relating to community living areas, the Minister must consult with the Northern Territory Government, the owner of the land, and the land council.¹³⁰
6. The Secretary must consult with people being serviced before making a determination as to whether a community store needs to hold a community store licence.¹³¹
7. An ‘authorised officer’ may consult with ‘such people that [they] consider appropriate’ in making an assessment of a community store.¹³²
8. The Minister must consult with the community before making a determination regarding whether an area is considered to be a prohibited materials area.¹³³
9. The Minister must consult with the community before making a determination regarding whether an area is to cease to be a prohibited materials area.¹³⁴

However, in practice, these requirements have little legal effect.

Only one of the requirements to consult with Aboriginal and Torres Strait Islander people has an impact on the validity of the decision. This provision requires that the Northern Territory Licencing Commission consult

125 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105.

126 *Stronger Futures in the Northern Territory Act 2012* (Cth), Div 4 s 14(5), (6).

127 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 17(6).

128 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27(6).

129 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 34(8).

130 *Stronger Futures in the Northern Territory Act 2012* (Cth), Div 3 s 35(4).

131 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 41(2).

132 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 67(3).

133 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), s 100A (4).

134 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), s 115 (3).

'people in the area' before preparing content for and erecting signs outside communities stating that the community is an alcohol protected area.¹³⁵

All other requirements to consult with Aboriginal and Torres Strait Islander people affected by the relevant measures are effectively optional: those requirements state that consultation 'may' occur,¹³⁶ or carry the caveat that 'failure to consult does not affect the validity' of the rule/regulation/determination.¹³⁷

Further, only three of the consultation requirements have any legislative guidelines as to what should constitute a consultation and these requirements do not reach an appropriate standard.¹³⁸ The other six consultation requirements contain no guidelines as to what constitutes a consultation.

The Commission recommended the strengthening of consultation requirements as well as additional consultation requirements in the areas of Income Management, alcohol management and community safety.¹³⁹ Further, some of the areas outlined above are intended to be special measures. In order for those measures to achieve their intended outcomes, they must have the full and free participation of those whose lives they are designed to improve.

Special measures under Stronger Futures

The Stronger Futures alcohol, land reform, and food security measures, as well as amendments relating to pornography, are considered by the Government to be special measures within the meaning of s 8(1) of the *Racial Discrimination Act 1975* (Cth) (RDA).¹⁴⁰

Special measures allow differential treatment of a certain racial group for the sole purpose of securing the advancement of an individual or group to ensure equal enjoyment or exercise of human rights.¹⁴¹

It is the Commission's position that an important part of being able to legitimately legislate for a 'special measure' is the consent of those affected by the measure.

The Commission considers that the international law on the requirement for consent to a 'special measure' by those affected is clear.

The Committee on the Elimination of Racial Discrimination has stated:

State parties 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.¹⁴²

The consent of people affected by special measures is fundamentally tied to the right to self-determination.

135 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 14(5).

136 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 67(3).

137 *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 27(6), 34(8), 35(4), 41(2); *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), ss 100A(4), 115(3).

138 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), ss 100A(4), 115(3); *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27(6).

139 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105, pp 31, 51, 64.

140 See Explanatory Memorandum, *Stronger Futures in the Northern Territory Bill 2011* (Cth), pp 1-3, 20, 29. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4736_ems_f6c14ab7-6aa9-49f1-b604-2e4503a32f6d/upload_pdf/362725.pdf;fileType=application%2Fpdf (viewed 11 October 2012); Explanatory Memorandum, *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011* (Cth), pp 12, 15. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4737_ems_f57fea5a-ccc3-43f0-948f-7e5f90788943/upload_pdf/362724.pdf;fileType=application%2Fpdf (viewed 11 October 2012).

141 *International Convention on the Elimination of all forms of Racial Discrimination*, 1966, Art 1(4); See also Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32 (2009) The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc CERD/C/GC/32 (2009). At http://www2.ohchr.org/english/bodies/cerd/docs/GC32_English.pdf (viewed 11 October 2012).

142 Committee on the Elimination of Racial Discrimination, above, para 18.

The Committee on the Elimination of Racial Discrimination has called upon parties to ICERD to:

ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent.¹⁴³

The Declaration has affirmed the right of Indigenous peoples to self-determination and has endorsed the standard of 'free, prior and informed consent' in dealings with Indigenous peoples. Article 19 states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 6(1)(a) of the International Labour Organization (ILO) Convention No. 169 obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever it is considering legislative or administrative measures which may affect them directly. Article 6(2) requires that consultations are carried out 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent' to the proposed measure.¹⁴⁴

Although, the obligation to consult under the provisions of the Convention is interpreted as not requiring that an agreement is reached with indigenous peoples, article 6(2) nonetheless requires that there shall be an 'objective of achieving agreement or consent' to the proposed measure.¹⁴⁵

The Commission has repeatedly stated in our interventions and in our submissions to Parliamentary inquiries regarding the NTER that we consider that consultation and consent are critical to determining whether a measure is beneficial to a particular group. This is especially the case where the benefits are said to derive from a limitation on the rights of that group. As we said in 2007:

Measures that may impact negatively on rights, such as limitations upon the availability of alcohol, may be considered 'special measures' where they are done after consultation with, and generally the consent of, the 'subject' group. Cases where consent is not obtained from those the subject of a measure must be very rare and limited to situations where there are competing rights or opinions within a group, as exist in relation to prohibitions on alcohol.

In the present case, the rights of children and the rights of adult individuals the subject of these proposed measures may differ, and this raises complex issues in relation to consent to 'special measures'. It does not, however, deny the need for proper consultation.¹⁴⁶

In our intervention in *Morton v Queensland Police Service*, the Commission said the following regarding the importance of consultation and consent in determining the legitimacy of a special measure:

143 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 23: Indigenous Peoples: 18/08/1997*, UN Doc A/52/18, Annex V (1997), para 4(d). At <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed 11 October 2012).

144 J Henrikson, *Key Principles in Implementing ILO Convention No. 169*, pp 20-21. At http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_118120.pdf (viewed 11 October 2012).

145 J Henrikson, above, p 21.

146 Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007), paras 21-22. At http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html (viewed 11 October 2012).

The Commission submits if a measure must be ‘appropriate and adapted’ to the purpose of advancing a particular group, then it is impossible to form a view as to whether a measure is ‘appropriate and adapted’ to the relevant purpose of advancing the particular group without considering the wishes of the group.

In this case, the legislation is intended to benefit a racial group or members of it, but it does so by limiting certain rights of some, or all, of that group. In these circumstances, the consent of the group is of heightened importance and any failure to seek or obtain such consent is of particular significance. This approach is required to adequately protect the rights of minorities and the right of Indigenous peoples to self-determination.¹⁴⁷

The relevance of consultation and consent to the legitimacy of a ‘special measure’ has been considered on several occasions in the Australian courts.¹⁴⁸ The weight of authority is that consultation is desirable but not ‘necessary’ to the legitimacy of a special measure.¹⁴⁹ While this is the current position of the Australian courts, I will continue to advocate for a position which more closely resembles that in international law.

What constitutes consent in any given case is unclear and dependent on the facts and of course there can be disagreements within Aboriginal and Torres Strait Islander communities. It is likely to be the case that genuine consultation on a contentious measure will produce a range of different responses, but this is not a reason for not consulting properly in the first place.

In the coming months and years, I will be trying to ensure that the Government – and in particular the individual public servants on the ground – has the cultural competency and the appropriate skill level to implement Stronger Futures effectively. The features of meaningful and effective consultation articulated in the *Native Title Report 2010* are important in this regard.

I reiterate the Commission’s recommendations regarding the implementation of the Stronger Futures legislation. In particular, I recommend that all future consultations are conducted in accordance with the ‘features of meaningful and effective consultation’ outlined in the *Native Title Report 2010*. [Recommendation 1.6]

Implementing Income Management under Stronger Futures

One of the most controversial elements of the Intervention has been the Income Management provisions. Stronger Futures has continued the laws under which Income Management operates and the application of the provisions has been expanded to five other sites across Australia which are now also subject to Income Management.¹⁵⁰

The Commonwealth Ombudsman has recently undertaken a *Review of Centrelink Income Management*

147 Submissions of the Australian Human Rights Commission, *Morton v Queensland Police Service*, 10 February 2010, paras 42-43. At http://www.humanrights.gov.au/legal/submissions_court/intervention/2010/20100210_morton.html (viewed 11 October 2012).

148 *Gerhardy v Brown* (1985) 159 CLR 70, 135; *Bropho v Western Australia* [2007] FCA 519; *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37; *Morton v Queensland Police Service* [2010] QCA 160; *R v Maloney* [2012] QCA 105.

149 See, *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J); *Bropho v Western Australia* [2007] FCA 519, 570; *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2010] QCA 37, 80, 82; *Morton v Queensland Police Service* [2010] QCA 160, 31 (McMurdo P), 114 (Chesterman J, with Holmes J agreeing); *R v Maloney* [2012] QCA 105, 52, 55, 114 (McMurdo P).

150 FaHCSIA, ‘Helping vulnerable families: Targeted income management’, <http://www.fahcsia.gov.au/our-responsibilities/families-and-children/publications-articles/income-management-fact-sheets/helping-vulnerable-families-targeted-income-management> (viewed 11 October 2012).

*Decisions in the Northern Territory.*¹⁵¹ The report, published in June 2012, focussed on two types of decisions in particular:

- decisions to refuse to exempt people from Income Management who are considered to be in the disengaged youth or long-term welfare recipient category, and who have dependent children, on the basis that they do not pass the financial vulnerability test
- decisions to subject people to Income Management because a social worker has determined that the person comes within the vulnerable welfare recipient category.

In our submissions regarding both the NTER and Stronger Futures, the Commission has consistently raised concerns about the capacity of referring agencies to make decisions about who is referred to Income Management.¹⁵²

The Commonwealth Ombudsman's findings are outlined in Text Box 1.7 below.

Text Box 1.7:

Findings of Commonwealth Ombudsman's Report on the implementation of Income Management

The Ombudsman's report highlighted major concerns in both areas of decision-making as well as the quality of Centrelink's communication with customers.

Centrelink's letters to individuals involved in the Income Management regime were found to be unsatisfactory in a number of respects. The letters contained:

- a lack of information on individuals' rights of review
- inadequate provision of reasons and other relevant information behind a determination
- inaccurate or unclear information.

In relation to decision-making about a person's financial vulnerability the Ombudsman made several disturbing findings:

- The decision-making tool and process used to assess financial vulnerability did not reflect the mandatory considerations at law. Decisions often did not contemplate these mandatory considerations.
- Decision-makers were not recording key dates of decisions.
- There were contradictions between FaHCSIA's (and therefore Centrelink's) policy and the legislation regarding the time allowed between exemption refusals and reapplication: the legislation allowed immediate re-application whereas Centrelink informed customers they could not reapply for 12 months.
- The quality of decisions could not be assured.

151 Commonwealth Ombudsman, *Review of Centrelink Income Management Decisions in the Northern Territory: Financial Vulnerability Exemption and Vulnerable Welfare Payment Recipient Decisions*, Report No. 04/2012 (June 2012). At <http://www.ombudsman.gov.au/reports/investigation/2012> (viewed 11 October 2012).

152 Australian Human Rights Commission, *Submission on Stronger Futures*, note 105, pp 29-31.

- The decision-making tool combined in one document information from the customer, Centrelink records and the decision-makers views. This made it hard to determine the quality or origins of evidence.
- Few decision-makers referred applicants to money management courses.
- Decision-makers were not appropriately aware of the need to provide interpreters.

With regards to the Vulnerable Welfare Payment Recipient decision, the Ombudsman found that decisions did not:

- comply with legal requirements
- accord with policy instructions
- demonstrably meet the objectives of the measure.

This was because the template used to guide the decisions did not capture the mandatory considerations. Nor did it indicate the required nexus between vulnerability and inability to meet needs. The Ombudsman also found that inappropriate templates were used to review these decisions.

The quality of decisions under this measure was found to be poor, with:

- indicators of vulnerability rather than actual ability for self-care used to make determinations
- evidence that customers shared their income used automatically as evidence of financial exploitation
- a lack of appropriate information or out of date information used to justify decisions
- people on voluntary Income Management being placed on compulsory Income Management under this measure
- individual's circumstances not being adequately taken into account
- inadequate reviews of decisions.

The Ombudsman also had concerns about the way Centrelink engaged with customers with diminished decision-making capacity.

The Ombudsman noted in releasing the report that changes had already been made by Centrelink in response to the process.

The Ombudsman's report highlights how important it is to get the implementation of these policies and laws right. In particular, it highlights the importance of the skill level, training and cultural competence of staff on the ground, making the decisions. When imposing a system such as this, which restricts an individual's rights, it is imperative that decisions are made fairly, competently and transparently.

The Ombudsmen's report found that Centrelink is failing in its responsibility. Decision-makers responsible for implementing Income Management evidently did not possess the appropriate skills or levels of cultural competency. Aboriginal and Torres Strait Islander people have experienced very poor treatment at the hands of Centrelink in the implementation of Income Management to date.

The Ombudsman also reviewed the operation of housing programs in the Northern Territory. The report of this review, *Remote Housing Reforms in the Northern Territory*, made some very worrying findings. I will discuss

that report in my discussion on failures of the ‘governance of governments’ in the Northern Territory.

The challenge ahead

The Social Justice Commissioner and the Commission more generally has a history of scrutiny and advocacy regarding the Intervention and this will continue.¹⁵³

Together with the Northern Territory peak bodies and communities, I will closely monitor the implementation of Stronger Futures. I will also continue to work with the Government to ensure that implementation is consistent with human rights standards and that the importance of cultural competency and consultation is fully understood.

The processes which take place around these consultation requirements, and around the implementation of Stronger Futures more generally, will be critical to the effectiveness of Stronger Futures. How the processes of engagement are managed and conducted will have a significant bearing on whether Aboriginal and Torres Strait Islander people in the Northern Territory communities affected see any real benefits. For Aboriginal and Torres Strait Islander people living in the Northern Territory, a lot rides on the good faith of Government in implementing Stronger Futures.

However, we have this legislation in place for 10 years. If applied properly, the long-term investment of funding will assist Aboriginal and Torres Strait Islander people in the Northern Territory in improving their standard of living. We have an opportunity to use this approach to overcome some of the biggest challenges we face in our communities; and we have an opportunity to use this approach to get us to a point where we are able to take back control of our lives and our communities.

153 The following Commission publications contain scrutiny of the NTER: Australian Human Rights and Equal Opportunity Commission, *Submission on the NTER*, note 146; *Social Justice Report 2007*, note 11; Australian Human Rights Commission, ‘Draft guidelines for ensuring income management measures are compliant with the Racial Discrimination Act’ (2009). At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 11 October 2012); Australian Human Rights Commission, *Submission on the Suspension and Reinstatement of the RDA and Special Measures in the NTER* (2011). At http://www.humanrights.gov.au/racial_discrimination/publications/rda-nter/index.html (viewed 11 October 2012); 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* (10 February 2010). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html, (viewed 11 October 2012); Australian Human Rights Commission, *Submission on Stronger Futures*, note 105.

1.4 Ongoing advocacy activities

(a) Lateral violence

The theme of the 2011 Social Justice and Native Title Reports was lateral violence. As I outlined in those reports, it took me some time before I decided to address that issue, knowing what a difficult one it is for our communities to confront.

The reaction that I have gauged to the report has been significant. Aboriginal and Torres Strait Islander people and organisations are talking about lateral violence and I have been asked to speak about it on many occasions in the last year.¹⁵⁴ I was pleased with the levels of interest shown in the discussion I facilitated on lateral violence at the Australian Institute of Aboriginal and Torres Strait Islander Studies' Annual Native Title Conference held in Townsville in June.

Having widespread acknowledgment that lateral violence is a problem that is holding us back is the first step in countering its negative influences. It is important that a deeper level of understanding of this issue continues to develop and that people develop locally tailored ways of tackling lateral violence in their own communities and organisations.

This is beginning to happen. Although it is too early to evaluate the conversation on lateral violence and the results it is having in communities, I am pleased to have been made aware of several initiatives. For example, Congress has adopted a policy on lateral violence and other organisations have followed suit.¹⁵⁵

I am interested in what early steps governments and government bodies have taken to address their role in creating and perpetuating the conditions for lateral violence in Aboriginal and Torres Strait Islander communities. I have asked all governments what steps they have taken in this regard. I was pleased to hear from the Victorian Government that they have funded the Victorian Aboriginal Community Controlled Health Organisation to undertake a Lateral Violence Community Education Project.¹⁵⁶

I am going to be following this up more comprehensively over the next two years and look forward to providing further examples, hopefully with some promising results in future reports.

(i) Questioning Aboriginal and Torres Strait Islander identity

The *Social Justice Report 2011* and the *Native Title Report 2011* identified the ways in which external parties contribute to the cycle of lateral violence in Aboriginal and Torres Strait Islander communities. I particularly noted the significance of identity conflict in lateral violence. I talked about the history of categorising Aboriginal and Torres Strait Islander people under integration and assimilation policies and the destructive legacy that has left.

This year we have seen an example of the way in which external parties, such as the mainstream media, can cause damage to our communities and individuals within our communities through imposing colonialist notions of 'authenticity'. So misguided was the conduct of Andrew Bolt and his employer that it was found to breach the racial vilification provisions of the RDA. A summary of the successful case against columnist

154 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'AAG Elder Abuse and Neglect Conference' (Speech delivered in Alice Springs, 5 September 2012). At http://www.humanrights.gov.au/about/media/speeches/social_justice/index.html (viewed 11 October 2012).

155 National Congress of Australia's First Peoples, *Policy Statement: Lateral Violence* (2012). At <http://nationalcongress.com.au/policyandadvocacy/> (viewed 11 October 2012).

156 The Hon J Powell MP, Minister for Aboriginal Affairs, Victorian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 September 2012.

Andrew Bolt is in Text Box 1.8.

Text Box 1.8:

Eatock v Bolt

In September 2011, the Federal Court found that columnist Andrew Bolt and his employer the Herald and Weekly Times Pty Ltd (which publishes the *Herald Sun* newspaper) were found to have breached the RDA with two columns published in 2009.¹⁵⁷

The Herald and Weekly Times were found liable for publishing the articles and as Bolt's employer, they were also found vicariously liable for his actions.

The action against Bolt and his employer was brought by nine Aboriginal people after he implied that light skinned Aboriginal people identified as Aboriginal for personal gain. The nine people who took the action were used as examples in one or both of the pieces.

Bolt argued that the columns fell under the section 18D exemption for 'fair comment' in 'good faith' or stemming from an 'expression of genuine belief'. The Court did not accept that argument.¹⁵⁸

The court found that the articles were not written in good faith, contained factual errors and were in breach of the RDA.¹⁵⁹

Bolt was found to have breached section 18C of the RDA: his columns constituted an act which was 'reasonably likely to offend, insult, humiliate or intimidate' another person or group of people and the act was done because of the race or colour of the person or group of people.¹⁶⁰ Justice Bromberg accepted that each of the witnesses was in fact offended, humiliated and insulted by the articles.

This case has provoked discussion about the scope of s 18C, however the discussion has been littered with misinformation. The court did not find that discussion about Indigenous identity was off limits. Rather, it found that in this case the offending comments were made in an 'inflammatory, provocative, derisive, disparaging, mocking, cynical, and gratuitous' tone, which prevented the comments from being considered to have been made in good faith.¹⁶¹

The Bolt case is an example of our identity again being defined by others, particularly non-Indigenous others, who wield considerable influence in our society. When the motivation of a person's identification as Aboriginal or Torres Strait Islander is questioned, it challenges our right to determine our identity as Aboriginal and Torres Strait Islander peoples. The impact of this is significant on us as individuals and on our communities. Comments such as Bolt's perpetuate colonial assumptions, add fuel to tensions that are the result of our colonial experience, and can contribute to the cycle of lateral violence.

On a positive note, Aboriginal and Torres Strait Islander peoples are less and less often falling victim to this kind of divisive identity politics. Within our communities, we are aware of the damage that this causes individuals and communities. By opening up the discussion of lateral violence we can address questions

157 *Eatock v Bolt* [2011] FCA 1103 (28 September 2011).

158 *Eatock v Bolt*, above, 363.

159 'Bolt Breached discrimination act, judge rules', *ABC News*, 29 September 2011. At <http://www.abc.net.au/news/2011-09-28/bolt-found-guilty-of-breaching-discrimination-act/3025918> (viewed 11 October 2012).

160 *Eatock v Bolt*, note 158, 424.

161 *Eatock v Bolt*, note 158, 425.

of identity and harness the power of self-identification, strengthening our pride in our Aboriginal and Torres Strait Islander identity. We are unburdening ourselves of the demeaning labels of the past and reclaiming conversations about our identity.

(b) Access to justice

Access to justice has been a common theme throughout the Social Justice Reports since the role of Social Justice Commissioner was established in the aftermath of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) twenty years ago.

Access to justice needs to be ensured through protections at both a procedural and substantive level. The Human Rights Council stress that this involves the right to impartiality and non-discrimination as well as access to fair and just remedies to breaches of rights.¹⁶²

(i) Ongoing challenges

Incarceration rates

The incarceration rates of Aboriginal and Torres Strait Islander people in Australia are alarmingly high and continue to trend higher. Aboriginal and Torres Strait Islanders are currently imprisoned at a rate of 2,268 per 100,000 which is over 13 times higher than the rate of imprisonment for non-Indigenous Australians.¹⁶³ Aboriginal and Torres Strait Islander women are imprisoned at a rate over 16 times higher than the general population.¹⁶⁴ Between 2000 and 2012, the rates of Aboriginal and Torres Strait Islander imprisonment have increased 79%.¹⁶⁵

The rate of juvenile imprisonment is particularly worrying; 54.7% of the juvenile detention population are Aboriginal or Torres Strait Islander.¹⁶⁶

The rates and manner of incarceration of Aboriginal and Torres Strait Islander people with a cognitive disability is a particular concern which will be addressed below.

Deaths in custody

Social Justice Commissioners have been actively involved in campaigning to address Aboriginal and Torres Strait Islander deaths in custody. There has been a decline in Aboriginal and Torres Strait Islander deaths in custody in the last decade, but the numbers remain too high.

One of the primary recommendations of the RCIADIC was that incarceration must be used as a last resort.¹⁶⁷ I am concerned that too often this is not the case.

162 Human Rights Council, 'Panel Discussion on Access to Justice for Indigenous Peoples', Twenty First Session of the Human Rights Council, Palais des Nations, Geneva (18 September 2012).

163 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 October 2012).

164 The rate of imprisonment for Indigenous females is 402.2 per 100,000 compared the general female population rate of 24.5 per 100,000 (based on average daily imprisonment rate): ABS, above.

165 Imprisonment rates increased from 1267 per 100,000 in 2000 to 2268 per 100,000 in June 2012: Australian Institute of Criminology, *Trends in juvenile detention in Australia* (2011). At www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.aspx (viewed 11 October 2012); and ABS, above.

166 Australian Institute of Criminology, above.

167 Royal Commission into Aboriginal Deaths in Custody, *Final Report: vol 2*, Recommendation 92. At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 11 October 2012).

The recent high profile death in custody of Mr Briscoe in an Alice Springs watch-house highlights the tragic and avoidable nature of many deaths in custody. Mr Briscoe was arrested for drunkenness and within hours was found dead. Disciplinary action has been taken against 10 officers involved in the death who failed to check on him and breached other procedures. The coroner's official findings are yet to be released.

Despite the enduring relevancy of many of the RCIADIC recommendations in guiding policy development regarding our engagement with the criminal justice system and the incarceration of Aboriginal and Torres Strait Islander peoples, 21 years on, too many of the recommendations continue to be neglected.¹⁶⁸

I recommend that the Australian Government renew its commitment to implement all recommendations of the Royal Commission into Aboriginal Deaths in Custody. [Recommendation 1.7]

Juvenile justice

The *Doing Time* report, released in June 2011, identified as a national crisis the disturbing over-representation of Aboriginal and Torres Strait Islander youth in the criminal justice system.¹⁶⁹ The report's 40 recommendations spanned several sectors, attempting to provide an holistic approach. Recommendations related to health, education, the role of positive social norms, workforce transition and government policy and programs.

I welcomed this report and was encouraged by its examination into the social issues and structural shortcomings which contribute to the issue.¹⁷⁰

The Government's Response accepted (either in whole, part or principle) all of the recommendations. Disappointingly only 12 out of the 40 recommendations were accepted in whole.¹⁷¹ In this Response, there were many examples of the Government deferring responsibility to the states. Whilst there are no doubt jurisdictional issues to contend with, there is a real danger that these recommendations could fall through the cracks.

Including criminal justice targets in the COAG *Closing the Gap* agreement is a key step to ensure the coordinated, holistic response recommended by the report.¹⁷²

I reiterate the recommendation from the *Social Justice Report 2009* that the Australian Government, through COAG, set criminal justice targets that are integrated into the Closing the Gap agenda. [Recommendation 1.8]

168 C Cunneen, *Reflections on Criminal Justice Policy Since the Royal Commission into Aboriginal Deaths in Custody*, University of New South Wales Faculty of Law Research Series 2008, Working Paper 7 (March 2008). At <http://law.bepress.com/unswwpw/flrps08/art7> (viewed 11 October 2012).

169 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 11 October 2012).

170 Australian Human Rights Commission, 'Over representation of young Indigenous people in the criminal justice system needs to be urgently addressed' (Media release 21 June 2011). At http://www.humanrights.gov.au/about/media/media_releases/2011/53_11.html (viewed 11 October 2012).

171 Australian Government, *Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report: 'Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System'* (November 2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm (viewed 11 October 2012).

172 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Australian Human Rights Commission (2009), Recommendation 2.1. At http://humanrights.gov.au/social_justice/sj_report/sjreport09/index.html (viewed 11 October 2012).

Justice Reinvestment

The *Social Justice Report 2009* recommended the implementation of justice reinvestment policies.

Community campaigns for justice reinvestment are gathering momentum at both a national level, through the work of the National Congress of Australia's First Peoples and ANTaR amongst others, and in various states. Campaigns such as the *Making Justice Work Campaign* in the Northern Territory and the *Smart Justice Project* in Victoria are lobbying for justice reinvestment at a state and territory level.

In May 2012 I joined several community leaders including New South Wales Governor Marie Bashir, Sally Fitzpatrick and Dr Tom Calma as a champion for justice reinvestment as part of the NSW Justice Reinvestment Campaign for Aboriginal young people.¹⁷³

(ii) Indefinite detention of Aboriginal and Torres Strait Islander people with a cognitive impairment

Over a number of years, the Commission has raised concerns regarding Aboriginal and Torres Strait Islander people with a cognitive impairment in the criminal justice system. This has included the 2008 report by my predecessor Dr Calma, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*.¹⁷⁴ In 2005 the Commission also produced a report, *Indigenous young people with cognitive disabilities & Australian juvenile justice systems*.¹⁷⁵

In using the term '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 spectrum disorders.¹⁷⁶ In this report I am not including mental illness in my use of the term 'cognitive impairment' although it is sometimes used in this broader way.¹⁷⁷ This is because in terms of interaction with the criminal justice system significantly different responses may be required.

It is also worth noting here that many people in the criminal justice system may have both a cognitive impairment and a mental illness.¹⁷⁸

In Australia, many reports have identified the over-representation of people with cognitive impairment and mental illness in the criminal justice system.¹⁷⁹ They highlight the many barriers and challenges at each point of

173 Justice reinvestment campaign for Aboriginal young people, 'The Campaign', <http://justicereinvestmentnow.net.au/the-campaign/> (viewed 11 October 2012).

174 Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008). At http://www.humanrights.gov.au/social_justice/publications/preventing_crime/index.html (viewed 11 October 2012).

175 Australian Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities & Australian juvenile justice systems* (2005). At http://www.humanrights.gov.au/social_justice/publications/cognitive.html (viewed 11 October 2012).

176 This was the definition used by the Australian Human Rights Commission, note 174, p 3.

177 See for example A Gray, S Forell and S Clarke, 'Cognitive impairment, legal need and access to justice', Justice Issues Paper 10, Law and Justice Foundation of New South Wales (March 2009), p 1. At <http://www.lawfoundation.net.au/ljf/app/&id=2EDD47C8AEB2BB36CA25756F0018AFE0> (viewed 12 October 2012).

178 See E Baldry, L Dowse, M Clarence, *People with mental and cognitive disabilities: pathways into prison*, Background Paper for the National Legal Aid Conference Darwin (2011), p 5. At <http://www.ntlac.nt.gov.au/doco/bpcpapers/People%20With%20Mental%20and%20Cognitive%20Disabilities%20-%20Pathways%20Into%20Prison.pdf> (viewed 11 October 2012).

179 See for example E Baldry, et. al., above, p 5; Queensland Advocacy Incorporated, *Disabled Justice: The barriers to justice for persons with disability in Queensland* (2008). At http://www.qai.org.au/images/stories/docs/1987-2007/doc_199.pdf (viewed 11 October 2012); Intellectual Disability Rights Service, *Enabling Justice A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (May 2008). At <http://www.nswcid.org.au/images/pdfs/enabling%20justice%20report.pdf> (viewed 11 October 2012); Human Rights and Equal Opportunity Commission, 'Forensic Patients and Prisoners', *Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993), Vol 2, Chapter 25. At http://humanrights.gov.au/disability_rights/inquiries/mental/Volume%202.txt (viewed 11 October 2012).

contact with the criminal justice system and complex responses required.

Aboriginal and Torres Strait Islander people with cognitive impairment in the criminal justice system are a particularly vulnerable group of people. The treatment of this particularly vulnerable group represents a significant and difficult human rights challenge.

It is well known that Aboriginal and Torres Strait Islander people already face a number of disadvantages in the criminal justice system.¹⁸⁰ These disadvantages are sometimes compounded and magnified when that person also has a cognitive impairment.

In some Australian jurisdictions, when people with cognitive impairment are found unfit to plead to criminal charges, they become subject to mental health legislation. In several jurisdictions, the result for some Aboriginal and Torres Strait Islander people with a cognitive impairment accused of crimes for which they are unable to plead and stand trial, has been indefinite detention. This indefinite detention generally occurs in prisons in Western Australia and the Northern Territory, and in psychiatric hospitals in Queensland and Tasmania.

The issue of indefinite detention of Aboriginal and Torres Strait Islander people with cognitive impairment found unfit to plead has been highlighted in the past year by some disturbing cases which are summarised in the following text boxes 1.9 and 1.10.

Text Box 1.9:

The case of Marlon Noble (Western Australia)¹⁸¹

Mr Noble was accused of sexual assault in 2001 but was deemed unfit to plead in 2003 on the basis of his cognitive impairment. He was imprisoned for ten years without conviction or even trial. The Director of Public Prosecutions is reported to have said that if Mr Noble was determined fit to plead, and was found guilty, he would likely have spent less time in prison.¹⁸²

The *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*, allowed for Mr Noble's incarceration. The Act provides for the declaration of places, such as a secure care facility, to accommodate people like Mr Noble who have been deemed unfit to plead.¹⁸³ However, as no such places had been 'declared', Mr Noble was incarcerated in the same facilities as the general prison population.

Mr Noble was released in January 2012 under strict conditions, the breach of which would likely see him locked up again. Amongst other restrictions, the orders:

- require Mr Noble to stay in the same residence every night
- impose a complete alcohol ban and a ban on attending licensed premises, including restaurants
- require him to submit to random alcohol and drug testing

180 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing*, note 170.

181 Australian Human Rights Commission, 'Marlon Noble will only be truly free when his name is cleared' (Media Release, 9 January 2012). At http://www.humanrights.gov.au/about/media/media_releases/2012/1_12.html (viewed 11 October 2012).

182 M Brull, 'The sad story of Marlon Noble', *ABC: Ramp Up*, 9 December 2011. At <http://www.abc.net.au/rampup/articles/2011/12/09/3387845.htm> (viewed 11 October 2012).

183 *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*, s 24.

- ultimately prevent him from visiting the grave of his mother, who was murdered whilst he was in detention.¹⁸⁴

He has no right of appeal to these conditions.

Mr Noble's lengthy detention without trial in prison and the severity of the ongoing conditions of his release are extremely concerning.

Text Box 1.10:

The case of Christopher Leo (Northern Territory)¹⁸⁵

Christopher Leo is thought to have Fetal Alcohol Spectrum Disorder (FASD). He reportedly assaulted a woman in 2007 but was found unfit to plead on the basis of his cognitive impairment. Mr Leo was placed under a supervision order and has been detained indefinitely since.¹⁸⁶

In his initial hearing the court received evidence about Mr Leo's circumstances and accepted that he would require very close supervision to minimise risk were he to reside in the community.¹⁸⁷ However the court also found that:

custody in gaol is quite inappropriate for people like Mr Leo and they cannot receive the necessary treatment and support that should be available to them, and would be available to them if an appropriate facility to house these people existed in the Territory.¹⁸⁸

The court heard and accepted evidence that because of a lack of resources, there was no appropriate place other than prison for Mr Leo. He was therefore placed under a custodial supervision order.¹⁸⁹

In 2009, two years after Mr Leo went to jail, Justice Brian Martin conducted a review hearing. He expressed concern that had Christopher Leo been able to plead, he would have only received a 12 month sentence for the assault.

Periodic reviews of Mr Leo's detention have found that because of a lack of appropriate alternatives, prison is the only option available.¹⁹⁰ After more than 5 years, Mr Leo remains indefinitely imprisoned.

Extent of the problem

One of the biggest barriers to addressing this problem is the lack of reliable data. But we do have some statistics which go to establishing the extent of the problem.

184 M Brull, note 182.

185 S Smith, 'Mentally ill in jail "tantamount to torture"', *ABC Lateline*, 25 June 2012. At <http://www.abc.net.au/lateline/content/2012/s3532797.htm> (viewed 11 October 2012).

186 See *The Queen v Kerry Doolan & The Queen v Christopher Leo* [2012] NTSC 46.

187 *The Queen v Leo* [2009] NTSC 61, 4, excerpt of original hearing.

188 *The Queen v Leo* [2009] NTSC 61, 4, excerpt of original hearing.

189 *The Queen v Leo* [2009] NTSC 61.

190 *The Queen v Leo* [2009] NTSC 61 and *The Queen v Kerry Doolan & The Queen v Christopher Leo* [2012] NTSC 46.

Aboriginal and Torres Strait Islander people are dramatically overrepresented in the criminal justice system,¹⁹¹ especially our young people.¹⁹²

Discrete state-based surveys within prisons also indicate high rates of mental illness and mental health problems amongst Aboriginal and Torres Strait Islander prisoners.¹⁹³

The Aboriginal Disability Justice Campaign (ADJC) has recently conducted some research and attempted to establish the extent of the problem. The ADJC produced a report, *No End In Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*,¹⁹⁴ which found that Aboriginal and Torres Strait Islander people with a cognitive impairment¹⁹⁵ are over-represented in criminal justice settings across Australia but that it is difficult to quantify the exact numbers for predictable reasons:

- Cognitive impairments have often not been diagnosed prior to entry into the criminal justice system; this is likely to be the case particularly for Aboriginal and Torres Strait Islander people who are less likely to discuss and identify disability within their own communities and have less access to information and services, especially in remote communities.¹⁹⁶
- Not all Australian jurisdictions collect the relevant data – some appear to have no data on cognitive impairment at all.¹⁹⁷
- The ADJC asserts that lawyers in all states and territories where indefinite detention is possible face an ethical dilemma and are sometimes choosing not to disclose their client's disability because of the likelihood of indefinite detention.¹⁹⁸

The ADJC has also found that Aboriginal and Torres Strait Islander people are significantly over-represented within the group of indefinitely detained people with cognitive impairment:

Given the over-representation of Indigenous people in the criminal justice system, the over-representation of people with cognitive impairment in the criminal justice system, and the over-representation of people with cognitive impairment in Indigenous communities, it is not surprising that Indigenous people with cognitive impairment are also over-represented in Australian prisons. In NSW for instance, it was identified in the interviews for this research that 112 out of the 285 people identified as having a cognitive disability in prison, are Indigenous. In terms of indefinite detention, although this practice is clearly not just limited to Indigenous people, there is no doubt that Indigenous people are massively over-represented.

191 Across Australia, in June 2011, 27% of the prisoner population identified as Aboriginal and Torres Strait Islander: Corrective Services Australia, Australia Bureau of Statistics (March 2012). At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/4512.0Main%20Features2March%202012?opendocument&tabname=Summary&prodno=4512.0&issue=March%202012&num=&view=> (viewed 11 October 2012).

192 In 2008, over 50% of young people in juvenile detention centres were Aboriginal and Torres Strait Islander: Australian Bureau of Statistics 'Prisoners in Australia' (2008) cat. no. 4517.0, Canberra. At [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/\\$File/45170_2008.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/F618C51B775B2CF7CA25751B0014A2D5/$File/45170_2008.pdf) (viewed 11 October 2012).

193 A recent Queensland study found that the 12-month prevalence of mental disorder in Aboriginal and Torres Strait Islander prisoners was 73% among men and 86% among women: E Heffernan, K Andersen, A Dev and S Kinner, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons', (2012) 197(1) *Med J Aust* 197, pp 37-41. See also E Heffernan, K Andersen, S Kinner, 'The insidious problem inside: mental health problems of Aboriginal and Torres Strait Islander people in custody', (2009) 17(S1) *Australasian Psychiatry*, pp S41-S46.

194 The report will be publically available soon. I thank the ADJC for providing an advance copy. M Sotiri, E Baldry, P McGee, *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, Aboriginal Disability Justice Campaign (September 2012).

195 The ADJC similarly excluded mental illness in the use of the term cognitive impairment.

196 M Sotiri, et. al., *No End in Sight*, note 194, p 31.

197 M Sotiri, et. al., *No End in Sight*, note 194, p 22.

198 Aboriginal Disability Justice Campaign, 'Issues in the Northern Territory', *People with Disability* (2012). At <http://www.pwd.org.au/systemic/adjc-issuesNT.html> (viewed 11 October 2012); M Sotiri, E Baldry, P McGee, *No End in Sight*, note 194, pp 37 and 47.

In the Northern Territory, all of the 9 people currently on supervision orders are Indigenous. In Western Australia 11 out of the 33 people under the Mentally Impaired Accused Review Board are Indigenous.¹⁹⁹ In Queensland, it was estimated during research for this report that there were over 100 people with cognitive impairment currently detained indefinitely in psychiatric hospitals. However there is no data available about this specific population (in terms of Aboriginality). Similarly, there was very little data available in the ACT, South Australia and Tasmania about this population.²⁰⁰

The ADJC conducted interviews with over 50 key stakeholder agencies and individuals across Australia as part of the research undertaken for the *No End In Sight* report. The report identifies the legislative and resourcing situation on a state and territory basis.

In addition to indefinite detention, the ADJC report has identified key issues for Aboriginal and Torres Strait Islander people with cognitive impairment in:

- prison
- police stations
- courts
- the community.

The ADJC has identified three areas that require ongoing examination:

1. the impact of existing legislation on Aboriginal and Torres Strait Islander people with cognitive impairment
2. the way in which Aboriginal and Torres Strait Islander people with cognitive impairment interact at various points with the criminal justice system
3. the way in which the service systems outside of the criminal justice system are able to meet the needs of this population.²⁰¹

Some key understandings and observations which informed the ADJC's report are included in Text Box 1.11.

199 Information provided in email correspondence between ADJC and the Mentally Impaired Accused Review Board, WA (2012), M Sotiri, et. al., *No End in Sight*, note 194, p 24.

200 M Sotiri, et. al., *No End in Sight*, note 194, pp 23-24.

201 M Sotiri, et. al., *No End in Sight*, note 194, p 17.

Text Box 1.11:

Key areas of consideration by the ADJC²⁰²

- People with cognitive impairment who have not been convicted of a crime because they are assessed as mentally impaired, are being detained indefinitely in prisons.
- There is no legal or ethical basis for the use of indefinite detention of Indigenous people with a cognitive impairment who engage in offending behaviour.
- Indigenous people are disproportionately affected by indefinite detention.
- In some jurisdictions, people without mental illness are being held indefinitely in psychiatric hospitals.
- Indigenous people and Indigenous families are being hurt as a consequence of indefinite detention, and in some cases they are dying.
- Too often, the cycle of offending, imprisonment and re-offending has to increase in severity in order to obtain any kind of disability support.
- As a consequence of the absence of support, problems that might have required simple, low level early intervention become intractable and frequently involve serious offending behaviour.
- There is limited service delivery to deal with complex offending behaviours outside major metropolitan areas.
- These systemic arrangements described above result in serious legal and human rights concerns. This particularly vulnerable group of individuals are being excluded from services.
- The current response to people with a cognitive impairment engaging in offending behaviour does not balance the need for community protection with their right to justice.
- Indigenous communities are expected to manage and support individuals with a cognitive impairment who are a serious risk of harm to others. This is unfair and discriminatory.
- Indigenous families who have been supporting individuals with challenging behaviour within their communities, often entirely unsupported, should be acknowledged.
- Culturally relevant responses in criminal justice policies and practices should be incorporated when responding to Indigenous people with a cognitive impairment with offending behaviour.
- Programs and responses, in both government and non-government organisations that have a positive impact on Indigenous people with a cognitive impairment who engage in offending behaviour exist.

Human rights considerations

The stories reported in the media and the ADJC research appear to reflect some of the most egregious human rights violations in Australia today.

202 M Sotiri, et. al., *No End in Sight*, note 194, p 111.

The human rights issues are complex and extensive. To start with, Aboriginal and Torres Strait Islander people with a cognitive impairment, their families, and communities are not provided with appropriate support, or opportunities for diagnosis.²⁰³ Communities are left to manage extremely difficult behaviour with little if any help, especially in remote locations.²⁰⁴

Once Aboriginal and Torres Strait Islander people with cognitive impairments enter the criminal justice system, they face the well-documented disadvantages and challenges Aboriginal and Torres Strait Islander people face generally, compounded by the problems associated with their cognitive impairment.

As highlighted in the media reports of the past year, another major issue is the indefinite detention of people with a cognitive impairment without conviction in prisons. This occurs because alternative forms of accommodation do not exist to accommodate people with a cognitive impairment who have been found unfit to plead and stand trial.

Indefinite detention is in breach of Article 9 of the *International Convention on Civil and Political Rights* (ICCPR) which prohibits arbitrary detention. Article 9(3) specifically states that anyone arrested 'shall be entitled to trial within a reasonable time or to release.' Article 14(1)(b) of the *Convention on the Rights of Persons with Disabilities* (CRPD) states that '*the existence of a disability shall in no case justify a deprivation of liberty*'.²⁰⁵ Article 14(2) of the CRPD provides that

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

In several Australian jurisdictions, people with cognitive impairment are accommodated in prisons, including in maximum security prisons, with convicted criminals. Accommodating unconvicted persons with the general prison population is in breach of Article 10 of the ICCPR. Additionally, Article 10(3) of the ICCPR requires that prison systems be aimed at reformation and rehabilitation; but the ADJC is concerned that people with cognitive impairment in several Australian jurisdictions appear to be given little to no targeted support or access to appropriate rehabilitation programs.²⁰⁶

It is also suggested from the most recent ADJC research that within this group of people indefinitely detained without conviction, Aboriginal and Torres Strait Islander people are over-represented. This means that the legislative frameworks allowing indefinite detention of people with a cognitive impairment affects Aboriginal and Torres Strait Islander people disproportionately, engaging the *Convention on the Elimination of all forms of Racial Discrimination* and the *Racial Discrimination Act 1975* (Cth).

203 E Baldry, et. al., note 178, p 9.

204 M Sotiri, et. al., *No End in Sight*, note 194, p 32.

205 Australia ratified the *International Convention on the Rights of Persons with Disabilities* on 17 July 2008 with some reservations relevant to these particular provisions. Particularly, on ratification, Australia made the following Declaration: 'Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;...' At http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (viewed 11 October 2012).

206 M Sotiri, et. al., *No End in Sight*, note 194, Recommendation 35, p 15.

Developments

No End in Sight was researched and prepared by the ADJC as a 'shadow report' for the National Justice CEOs Working Group on Mental Illness and Cognitive Disability.

The aim of *No End in Sight* was to inform and provoke urgent change to legislation, diversionary programs and the provision of support services and alternative accommodation. The ADJC hopes the Commonwealth will take a lead on this issue which affects Aboriginal and Torres Strait Islander people so disproportionately.

The ADJC has identified that there are many people working very hard in this area, in government departments, prisons and the disability sector.²⁰⁷ Additionally, *No End in Sight* identified examples of good practice within the various systems operating in some states, such as:

- The data collection systems in NSW and Victoria, which provide a good basis for understanding the extent of imprisonment in a variety of categories.
- The system of screening for disability in the NSW prison system should be recognised as good practice.
- The flexible and extensive post-release accommodation options for people with a disability in NSW are also good practice.²⁰⁸

Further, some positive improvements are already underway in Western Australia and the Northern Territory, from where the Marlon Noble and Christopher Lee stories emanated:

- The Western Australian Government has committed to building Disability Justice Centres to be used as 'declared places' under the legislation (that is, as alternatives to prison), however have yet to secure appropriate locations for these facilities.
- In the Northern Territory, two secure units designed for people with cognitive impairment (as an alternative to prison) are due to be opened in late 2012.
- The Northern Territory Government has also committed to building a new facility for up to 30 people with cognitive impairment and mental health issues by 2015.

However, I remain extremely concerned about this issue given:

- the extent of the problem is not fully known
- the severity of the human rights violations suffered when a person is indefinitely incarcerated without conviction
- the vulnerability of Aboriginal and Torres Strait Islander people with cognitive impairment in this context.

Disability Discrimination Commissioner, Graeme Innes, and I are disturbed by the cases described above and the many similar cases we have heard about. We are considering how the Australian Human Rights Commission might be able to take this issue forward. We will be speaking further with the ADJC, the First Peoples' Disability Network (Australia) and other Aboriginal and Torres Strait Islander organisations about what needs to happen now. I hope to be able to report progress on this issue in next year's report.

207 M Sotiri, et. al., *No End in Sight*, note 194, p 9.

208 M Sotiri, et. al., *No End in Sight*, note 194, pp 9-10.

I recommend:

- **That the Australian Government work with state and territory governments to develop and maintain a national standard of comprehensive data collection in relation to people with a cognitive impairment in the criminal justice system. This standard must ensure that statistics are collected relating to Aboriginal and Torres Strait Islander people. [Recommendation 1.9.1]**
- **That the Australian Government work with state and territory governments to develop a national standard for screening for cognitive impairment in the criminal justice system. This standard should include safeguards to ensure screening is undertaken in a culturally competent manner. [Recommendation 1.9.2]**
- **All governments with legislative regimes which allow for the indefinite detention in prison, without conviction, of people with cognitive impairment should urgently review those regimes. [Recommendation 1.9.3]**
- **That all governments urgently prioritise appropriate alternative accommodation for people with cognitive impairment found unfit to plead. [Recommendation 1.9.4]**
- **That all governments give priority to the complex needs of Aboriginal and Torres Strait Islander people with a cognitive impairment both in the community and in any interaction with the criminal justice system. [Recommendation 1.9.5]**
- **That the Australian Government initiate and host a national conversation about people with a cognitive impairment with the criminal justice system. [Recommendation 1.9.6]**

(c) Close the Gap

The Close the Gap Campaign for Indigenous Health Equality has had a watershed year, making substantial progress in relation to partnership and planning; two key fundamental components of the *Close the Gap Statement of Intent*.

In August 2011 the National Health Leadership Forum (NHLF) was established within the National Congress of Australia's First Peoples. The NHLF is comprised of 12 national peak bodies for Aboriginal and Torres Strait Islander health. The purpose of the NHLF is to formalise the Aboriginal and Torres Strait Islander leadership of the Close the Gap Campaign to be the partnership interface for governments in the development, implementation and monitoring of health policy. In the final Chapter of this Report, I provide a detailed case study of the NHLF as an example of governance at the national level. As is outlined in the case study, the NHLF emerged out of the Close the Gap Campaign Steering Committee; the relationships that were forged in the Steering Committee were a necessary precondition for this unique partnership vehicle. The establishment of the NHLF is a defining moment for the Campaign.

Just over a month after the formation of the NHLF, Ministers Roxon and Snowdon announced the process for the development of the National Aboriginal and Torres Strait Islander Health Plan (Health Plan).²⁰⁹ The NHLF is working in partnership with the Government to develop this Health Plan.²¹⁰ The partnership recognises that a

209 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).

210 The NHLF is working with the Australian Government and is actively involved on the Stakeholder Advisory Group which has been established to guide the development of the Health Plan: Department of Health and Ageing, 'National Aboriginal and Torres Strait Islander Health Plan', <http://www.health.gov.au/internet/main/publishing.nsf/Content/natsih-plan> (viewed 11 October 2012).

'business as usual' approach will not close the gap: without the genuine and active involvement of Aboriginal and Torres Strait Islander people every step of the way in our efforts to close the gap, we risk making only minuscule progress.

In addition to these major events the Campaign continued its work to keep health equality on the political agenda & raise public awareness. In February 2011 the Campaign launched its annual Shadow Report which accompanies the Prime Minister's Closing the Gap report and statement to the Parliament.²¹¹ Consistent with the year's developments the focus of the Shadow Report was partnership and planning; it also provided an update on state and territory progress against the Statement of Intent commitments.²¹² Along with the NHLF, I again met with the Prime Minister and members of parliament at Parliament House on the day of the statement and launch of the reports. This has become a welcome tradition and provides an excellent opportunity to further develop the partnership between the NHLF and the Australian Government.

In March, the Campaign held its National Close the Gap Day with 850 events held nationally involving almost 130,000 Australians. On Close the Gap Day, 22 March, Steering Committee members hosted a Parliamentary breakfast with over 40 MPs from all sides of politics and a number of senior bureaucrats. National Close the Gap Day is complemented by other Campaign activities including the annual NRL Close the Gap Round.²¹³

I recommend that the Australian Government continue to engage with the National Health Leadership Forum in genuine partnership to develop and implement the National Aboriginal and Torres Strait Islander Health Plan. [Recommendation 1.10]

(d) The promotion and protection of our languages and cultures

The Indigenous Peoples Organisation Network of Australia, say that:

Language is central to our cultural and spiritual identity. Language is the medium by which Aboriginal and Torres Strait Islander people describe cultural practices, laws and customs, attachment to land and place, cultural items, and other cultural and spiritual activities. Furthermore, language plays a fundamental part in indigenous people's identity by connecting individuals to communities, therefore providing cultural and spiritual context in the daily lives of Aboriginal and Torres Strait Islander people.²¹⁴

Before colonisation it was estimated that Australia had 250 distinct languages with over 600 dialects. One hundred and fifty of these languages have now completely disappeared. If the current situation continues, many of the 100 remaining languages will be at risk of extinction.²¹⁵

The *Social Justice Report 2009* explored the perilous state of Aboriginal and Torres Strait Islander languages in Australia. That report:

- highlighted the interdependence of language and culture

211 Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012* (February 2012). At http://www.humanrights.gov.au/social_justice/health/index.html (viewed 11 October 2012).

212 Indigenous Health Equality Summit, *Statement of Intent*, Canberra (20 March 2008). At http://www.humanrights.gov.au/social_justice/health/statement_intent.html (viewed 11 October 2012).

213 2012 Close the Gap NRL round was 3-6 August; 2011 Close the Gap NRL round was 5-8 August.

214 J Gertz, *Statement by Gugu Badhun Limited on behalf of the Indigenous Peoples Organisations Network of Australia to the Expert Mechanism on the Rights of Indigenous Peoples, 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, Geneva, 9-13 July 2012). At http://www.humanrights.gov.au/social_justice/international_docs/2012_EM RIP_item5.html (viewed 11 October 2012).

215 Australian Institute of Aboriginal and Torres Strait Islander Studies and the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages survey 2005*, p 67. At <http://www.fatsilc.org.au/images/pdfs/NILS-Report-2005.pdf> (viewed 11 October 2012).

- stressed the benefits of preserving and revitalising languages, including increased resilience, improved health, improved cognitive functioning and increased employment options
- emphasised the intrinsic value in maintaining the linguistic underpinning of the oldest continuous cultures in the world.²¹⁶

(i) Inquiry into language learning in Indigenous communities

At the time of writing, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs had just completed an inquiry into Indigenous languages. The Committee's report *Our Land Our Languages: Language Learning in Indigenous Communities* was published on 17 September 2012.²¹⁷

The Language Inquiry was established after the Committee's previous inquiry into Indigenous youth in the criminal justice system identified language as an important component of cultural connection, strengthened intergenerational relationships and community building. Many people in that previous Inquiry referred to language as playing a significant role in the wellbeing of young Indigenous people.²¹⁸

The purpose of the Language Inquiry was to find out more about the links between Indigenous languages and improving education, community wellbeing, interpreting services and strategies to close the gap in Indigenous disadvantage. The Committee wanted to 'investigate how the use of Indigenous languages, particularly in early education, can assist in improving education and vocational outcomes where English is a second language.'²¹⁹

I made a written submission drawing the Committee's attention to the extensive work available in this area.²²⁰ A key focus of my submission was the importance of bilingual education, particularly in Aboriginal and Torres Strait Islander communities where English is not the first language.

On 18 November 2011, I was represented by my staff at a Committee hearing where they provided oral submissions, and the Australian Human Rights Commission subsequently provided a further written submission to the Committee. That supplementary submission provided evidence of the successes of National Indigenous Languages Commissions around the world and the benefits which could stem from a like body in Australia.²²¹

I hope the Report will provide a springboard for real action for the preservation and revitalisation of Indigenous languages before it's too late.

216 *Social Justice Report 2009*, note 172, Ch 3.

217 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land Our Languages: Language Learning in Indigenous Communities* (September 2012). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/languages/report/index.htm (viewed 11 October 2012).

218 House of Representatives, Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into language learning in Indigenous communities, 'Background to the Inquiry'. At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/languages/info.htm (viewed 11 October 2012).

219 Committee on Aboriginal and Torres Strait Islander Affairs, above.

220 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Letter to the House of Representatives Committee on Aboriginal and Torres Strait Islander Affairs, Submission No. 31, 18 August 2011.

221 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Supplementary Submission to the House of Representatives Committee on Aboriginal and Torres Strait Islander Affairs', Supplementary Submission No. 31a (December 2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/languages/submissions.htm (viewed 11 October 2012).

(ii) Study on the role of languages and culture in the promotion and protection of the rights and identity of Indigenous peoples

I continued my advocacy on language and culture at the Expert Mechanism on the Rights of Indigenous peoples (EMRIP). On the request of the Human Rights Council, EMRIP conducted a *study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples* for its fifth session in 2012.

The report of the EMRIP study stresses the detrimental impacts of the deterioration of language and culture. It also highlights the benefits which come with the revitalisation of languages and cultures. The process can have a positive impact on health and social issues, as well as re-instilling pride in identity.

The report also describes the basis of protection of language and culture in international law. It states that ‘the protection and promotion of indigenous peoples languages and cultures requires States to recognize them in constitutions, laws and policies.’²²² It stressed that states must ensure that the right to language and culture extends to the right to self-determination and protection from discrimination and forced assimilation.

The report emphasises the importance of the Declaration, saying that the Declaration

should be the basis of all action, including at the legislative and policy level, on the protection and promotion of indigenous peoples’ rights to their languages and cultures. Many of the rights in the Declaration relate to indigenous cultures and languages, especially indigenous peoples’ rights to self-determination and to lands, territories and resources.²²³

In a statement to the EMRIP I highlighted that more needs to be done to preserve and revitalise Aboriginal and Torres Strait Islander languages in Australia.²²⁴ I stressed that the loss of language and consequently the weakening of culture and identity had ‘served to diminish the richness and potential of national identity, with Indigenous cultures and languages having much to offer, particularly in terms of the protection of biodiversity and cultural and environmental heritage.’²²⁵

(e) Indigenous Human Rights Network Australia

The Indigenous Human Rights Network Australia (IHRNA) is a national network of people who advocate for and support Indigenous peoples’ human rights in Australia. It is the first national network of its kind focused squarely on Indigenous peoples’ human rights. I introduced the Indigenous Human Rights Network Australia (IHRNA) in the *Social Justice Report 2010*.²²⁶ It has grown significantly since then and continues to promote the human rights of Aboriginal and Torres Strait Islander peoples.

The history of IHRNA is outlined in Text Box 1.12.

222 Expert Mechanism on the Rights of Indigenous Peoples, *Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, Human Rights Council (April 2012), UN Doc A/HRC/EMRIP/2012/3. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session5.aspx> (viewed 11 October 2012).

223 Expert Mechanism on the Rights of Indigenous Peoples, above.

224 M Gooda, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda 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, Geneva, 9-13 July 2012). At http://www.humanrights.gov.au/social_justice/international_docs/2012_EMRIIP_item5_ahrc.html (viewed 11 October 2012).

225 M Gooda, above.

226 *Social Justice Report 2010*, note 13, p xvi.

Text Box 1.12:

About IHRNA: Establishment, structure and management

- IHRNA was established in 2009 and launched its social portal and website in 2010, including a presence on Facebook.
- The Commission established IHRNA in partnership with Oxfam Australia and the UNSW Diplomacy Training Program.
- IHRNA is currently hosted by the Commission with the secretariat based within the Aboriginal and Torres Strait Islander Social Justice Team.
- The Interim Steering Committee is made up of nine people including myself as Social Justice Commissioner, supporting organisations, and DTP Alumni. Its role is to provide strategic guidance to the network and oversight.
- Membership is free and open to any human rights advocate over the age of 18.

What's new with IHRNA?

In September 2011, IHRNA had 545 members; this has grown to 697 members on its social network and 460 on its Facebook account as at 4 June 2012.²²⁷

IHRNA continues to use traditional and online advocacy tools to promote the human rights of Aboriginal and Torres Strait Islander peoples. It provides a one-stop-shop for information about the Declaration as well as international human rights treaties relating to Aboriginal and Torres Strait Islander peoples. It also offers a forum for advocates to share advice and best practice.

As forecast in the *Social Justice Report 2011*, in late 2011 and early 2012, IHRNA ran a series of face to face community workshops across the country, called Regional Forums.

A total of 8 forums took place from October 2011 to May 2012 in the locations outlined in Text Box 1.13.²²⁸

227 For more information on IHRNA, go to <http://www.ihrna.info/>. If you're interested in becoming an IHRNA member go to <http://ihrnaustralia.ning.com/main/authorization/signUp>.

228 A forum was scheduled for Launceston, Tasmania, but was cancelled and is due to be rescheduled in line with timing and funding constraints.

Text Box 1.13:

Locations of forums

State

Northern Territory
New South Wales
Queensland
South Australia
Victoria
Western Australia
Australian Capital Territory

Forum site

Alice Springs
Sydney
Brisbane, Townsville
Adelaide
Melbourne
Perth
Canberra

The particular aims of the Forums were to:

- seek advice from members on the governance framework to then be confirmed at a National Summit
- gauge member feedback on strategies for implementing the Declaration
- outline human rights education relevant to Indigenous people
- demonstrate how IHRNA members and others can use IHRNA locally as community advocates.

Some of the outcomes of the Forums include:

- The introduction of community members to IHRNA and discussions of the role and future development of IHRNA.
- Exploration of local, national and international human rights issues and principles.
- Identification of ways in which the Declaration can be used in practice in Australia.
- The concept of co-hosting a National Summit was raised at the regional forums for consideration and input by participants. This idea was generally supported.

The forums also helped to identify some of the strengths and weaknesses of IHRNA as well as members thoughts on its future direction. This information will be used to inform the evaluation of IHRNA.

The purpose of the evaluation is to provide a snapshot of the outcomes achieved by IHRNA and outline suggestions for the future development of the network. It is envisaged that this process will be completed by September 2012 and will be informed by a variety of IHRNA stakeholders, namely:

- IHRNA Steering Committee
- IHRNA members
- Oxfam, DTP and AHRC participants and alumni
- regional forum participants.

The evaluation will provide a good opportunity to assess IHRNA's achievements and where it can add the most value in the promotion and protection of Aboriginal and Torres Strait Islander peoples' human rights.

(f) Australian Human Rights Commission complaints

The Commission has two roles: a policy and advocacy role and a role to investigate and conciliate complaints made under federal human rights and discrimination law. The types of complaints received informs the policy and advocacy work of the teams under the Commissioners.

The information regarding the number and types of complaints received this year has been provided by the Commission's Investigation and Conciliation Service.

The Commission receives a wide range of complaints from Aboriginal and Torres Strait Islander people, including complaints about individual acts of discrimination and complaints about systemic discrimination. This year has seen a particularly successful result for one Aboriginal and Torres Strait Islander community's complaint about systemic discrimination. Text Box 1.14 below contains a description of the complaint and its outcome.

Text Box 1.14:

Complaint of racial and disability discrimination in education

An Aboriginal and Torres Strait Islander leader of the Thamarrurr community at Wadeye in the Northern Territory lodged a representative complaint with the Commission against the Australian and Northern Territory governments. The complaint, which alleged racial and disability discrimination, was made on behalf of both past and present members of the Thamarrurr community who attended or attend the Wadeye community school.

The complainant is the Co-Principal of the school, which is administered by the Catholic Education Office. The complainant alleged, amongst other things, that members of the Thamarrurr community who attended the school have been discriminated against and denied equal access to education because of the manner in which funding has been provided to the school.

The respondents did not agree with the merit of the claim but agreed to participate in conciliation. Following a three day conciliation process facilitated by the Commission in Darwin, the parties involved in the complaint agreed to set up a consultative working group.

After further negotiations, an agreement was reached to resolve the complaint. This agreement included a public commitment by the Federal Minister for Education to provide the Wadeye community with funds of \$7.2 million to be used for a number of purposes including:

- the construction of four new classrooms at the school
- a program which has the aim of normalisation school attendance through enhanced community engagement
- increasing the school's capacity to provide assistance for students with disabilities
- the provision of literacy, numeracy and job readiness training to adults in the community.

The majority of complaints made by Aboriginal and Torres Strait Islander people were about racial

discrimination, as can be seen from Table 1.1. This table provides the number and percentage of complaints by Aboriginal and Torres Strait Islander people received in the last financial year under all the relevant Acts.

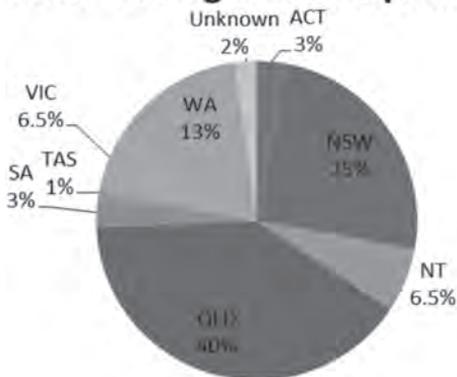
Table 1.1:
Number and percentage of Aboriginal and Torres Strait Islander complaints received in 2011-12

	RDA ²²⁹		SDA ²³⁰		DDA ²³¹		ADA ²³²		AHRCA ²³³		Total	
Aboriginal	169	35%	15	3%	20	2%	4	2%	14	3%	222	9%
Torres Strait Islander	4	1%	-	-	2	-	-	-	2	-	8	-
None of the above/ unknown	304	64%	490	97%	933	98%	192	98%	461	97%	2380	91%
Total	477	100%	505	100%	955	-	196	-	477	100%	2610	

Table 1.2 provides the geographic origin of Aboriginal and Torres Strait Islander complainants for the year 2011-12.

Table 1.2:
Aboriginal and Torres Strait Islander complaints received by geographic origin in 2011-12

State of origin of complaints



229 *Racial Discrimination Act 1975* (Cth).

230 *Sex Discrimination Act 1984* (Cth).

231 *Disability Discrimination Act 1992* (Cth).

232 *Age Discrimination Act 2004* (Cth).

233 *Australian Human Rights Commission Act 1986* (Cth).

Table 1.3 provides the outcomes of finalised complaints in the year 2011-12.

Table 1.3:

Outcomes of finalised Aboriginal and Torres Strait Islander complaints in 2011-12 compared with outcomes of all complaints

Outcome	No. of finalised Aboriginal and Torres Strait Islander complaints	% of finalised Aboriginal and Torres Strait Islander complaints	% of all finalised complaints
Conciliated	169	59%	48%
Terminated/ declined	112	39%	31%
Withdrawn	2	1%	12%
Discontinued ²³⁴	3	1%	8%
Reported (AHRCA only)	1		1%
TOTAL	287	100%	100%

²³⁴ Complaints finalised under statutory provision – *Australian Human Rights Commission Act 1986* (Cth) s 46PF(5)(a) – Satisfied that complainant does not want inquiry to continue.

1.5 Conclusion and Recommendations

I believe this year's developments highlight what I will talk more about in Chapters 2-4 of this Report – that relationships are the key to moving us forward on the journey of reconciliation. Although I have continuing concerns, I also have hope that we are slowly making progress towards addressing some of the unfinished business that affects our communities, and holds back our nation as a whole.

Some of the imminent challenges that Aboriginal and Torres Strait Islander peoples face are directly linked to the role government plays in our lives. One example is constitutional recognition; another is the continuing Intervention in the Northern Territory. These issues and many others illustrate the need for a new relationship between Aboriginal and Torres Strait Islander people and government. I will talk particularly about government's role further in Chapters 2-4.

To conclude this chapter I make recommendations regarding a number of the issues raised. Several of these recommendations reiterate previous Australian Human Rights Commission recommendations or previous Social Justice Report recommendations. In considering the relationship between government and Aboriginal and Torres Strait Islander people, outstanding recommendations from the nation's independent national human rights institution are cause for concern.

Recommendations

- 1.1 That the Australian Government should provide a formal written response to this Report and subsequent Social Justice Reports
- 1.2 That the Australian Government engage with Aboriginal and Torres Strait Islander peoples to develop a strategy for implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 1.3 That the Australian Government commit to ongoing funding support for the international engagement of Aboriginal and Torres Strait Islander people to advocate for their human rights.
- 1.4 I reiterate the Commission's recommendation that the *United Nations Declaration on the Rights of Indigenous Peoples* be included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*.
- 1.5 That all political parties recommit to constitutional recognition of Aboriginal and Torres Strait Islander people and support the recommendations of the Expert Panel.
- 1.6 I reiterate the Commission's recommendations regarding the implementation of the Stronger Futures legislation. In particular, I recommend that all future consultations are conducted in accordance with the 'features of meaningful and effective consultation' outlined in the *Native Title Report 2010*.
- 1.7 That the Australian Government renew its commitment to implement all recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- 1.8 I reiterate the recommendation from the *Social Justice Report 2009* that the Australian Government, through COAG, set criminal justice targets that are integrated into the Closing the Gap agenda.
- 1.9 Regarding Aboriginal and Torres Strait Islander people with a cognitive impairment in the criminal justice system, I recommend:
 - 1.9.1 That the Australian Government work with state and territory governments to develop and maintain a national standard of comprehensive data collection in relation to people with a cognitive impairment in the criminal justice system. This standard must ensure that statistics are collected relating to Aboriginal and Torres Strait Islander people.

- 1.9.2 That the Australian Government work with state and territory governments to develop a national standard for screening for cognitive impairment in the criminal justice system. This standard should include safeguards to ensure screening is undertaken in a culturally competent manner.
- 1.9.3 That all governments with legislative regimes which allow for the indefinite detention in prison, without conviction, of people with cognitive impairment urgently review those regimes.
- 1.9.4 That all governments urgently prioritise appropriate alternative accommodation for people with cognitive impairment found unfit to plead.
- 1.9.5 That all governments give priority to the complex needs of Aboriginal and Torres Strait Islander people with a cognitive impairment both in the community and in any interaction with the criminal justice system.
- 1.9.6 That the Australian Government initiate and host a national conversation about people with a cognitive impairment within the criminal justice system.
- 1.10. That the Australian Government continue to engage with the National Health Leadership Forum in genuine partnership to develop and implement the National Aboriginal and Torres Strait Islander Health Plan.

Chapter 2:

Achieving effective, legitimate and culturally relevant Indigenous governance

- 2.1 Introduction **84**
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2.1 Introduction

The theme of this year's Social Justice Report – governance - reflects the priorities I outlined when I commenced my term as the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2010. These priorities are to advance the full implementation on the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration); and to promote the development of stronger and deeper relationships:

- between Aboriginal and Torres Strait Islander peoples and the broader Australian community
- between Aboriginal and Torres Strait Islander peoples and government
- within Aboriginal and Torres Strait Islander communities.¹

In the *Social Justice Report 2010*, I addressed the relationship between Aboriginal and Torres Strait Islander peoples and the broader Australian community through constitutional recognition.² In the *Social Justice Report 2011*, I addressed the relationships within our own communities, specifically focusing on lateral violence.³ Both of these Reports also considered the relationship between Aboriginal and Torres Strait Islander peoples and government, and both argued the importance of governance in addressing the challenges faced by Aboriginal and Torres Strait Islander communities.

In this year's Report, I discuss these priorities from a more holistic perspective by looking specifically at governance as a key factor in the realisation of human rights and sustainable development by Aboriginal and Torres Strait Islander peoples; and through this developing stronger and deeper relationships amongst ourselves, and with the broader Australian community and governments.

In an effort to re-emphasise the central features of governance, this chapter draws on the vast amount of work already done in this area both nationally and internationally and considers how this work informs Indigenous governance. This chapter specifically examines contemporary Indigenous governance in the context of the foundational but overarching principles of the Declaration: self-determination; participation in decision-making, free prior and informed consent and good faith; respect for and protection of culture; and non-discrimination and equality. It also proposes a framework for effective, legitimate and culturally relevant Indigenous governance that has three key components:

- community governance
- organisational governance
- the governance of governments.

Finally it seeks to address key questions, which have already been asked and answered many times over, but which require further attention if we are to effectively address the governance challenges Aboriginal and Torres Strait Islander peoples face in contemporary Australia. These include:

- What is effective governance and how does it differ for Indigenous communities?

1 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011), p xiii. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 23 October 2012).

2 *Social Justice Report 2010*, above.

3 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 12 October 2012).

- What features contribute to good governance and how do you measure it?
- Why is the recognition and incorporation of Indigenous models of governance critical to success in overcoming the disadvantage faced by Aboriginal and Torres Strait Islander peoples?
- How does a human rights based approach inform frameworks for effective governance including key concepts such as sovereignty and self-determination?

2.2 Framing Indigenous governance

Governance is critical to achieving the aims of Aboriginal and Torres Strait Islander peoples.

The evidence tells us that governance is strongly linked to achieving 'practical' outcomes, particularly in our aims to achieve sustainable development. Getting governance right will improve the outcomes for Aboriginal and Torres Strait Islander peoples. Moreover, failures of governance will hinder and often prevent Aboriginal and Torres Strait Islander peoples achieving our goals.

Mick Dodson and Diane Smith have argued that 'it is only when effective governance and holistic development strategies are in place that economic and other development projects have the chance of becoming sustainable'. Or put differently, 'sustainable development is - fundamentally - a governance issue.'⁴

However, in the context of the three components of Indigenous governance which I will discuss in this chapter, organisational governance has been given particular attention to the detriment of community governance and getting the governance of governments' right.

Unfortunately, a long history of bad policies combined with poor governance has resulted in inadequate development outcomes for Aboriginal and Torres Strait Islander peoples in modern Australia. This is despite the significant research that has been done in this space over many years.

(a) What is governance?

Governance generally is a concept with a number of different, interconnected and nuanced elements. The word 'governance' comes from the Greek word meaning *to steer*. The definition in the Collins English dictionary contains two elements: 'government, control or authority' and 'the action, manner, or system of governing'.⁵

The Centre for Aboriginal Economic Policy Research (CAEPR), among many others, has noted that governance often bears the meanings associated with western ideas of what constitutes 'good governance' by nation-states.⁶

However in practicality, while governments are an important part of governance, governance means much more than *government*.

Fundamentally, governance is about power, relationships, and processes of representation and accountability—about who has influence, who decides, and how decision-makers are held accountable.⁷

Governance encompasses all of the aspects of the running of a society. Dodson and Smith have described it as

the processes, structures and institutions (formal and informal) through which a group, community or society makes decisions, distributes and exercises authority and power, determines strategic goals, organises corporate, group and individual behaviour, develops rules and assigns responsibility.⁸

4 M Dodson and D E Smith, *Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities*, Centre for Australian Economic Policy Research (CAEPR), Australian National University, Discussion Paper 250/2003 (2003), p 12.

5 *Collins English Dictionary – Complete and Unabridged*, HarperCollins Publishers (1991, 1994, 1998, 2000, 2003). At <http://www.thefreedictionary.com/governance> (viewed 12 October 2012).

6 J Hunt and D E Smith, *Building Indigenous community governance in Australia: Preliminary research findings*, CAEPR Australian National University, Working Paper No. 31/2006 (2006), p 3.

7 T Plumpre and J Graham, *Governance and Good Governance: International and Aboriginal Perspectives*, Unpublished report (1999), Ottawa in Dodson and Smith, note 4, p 2.

8 Dodson and Smith, note 4, p 1.

When thinking about the full meaning or application of governance, it is also useful to think about how the term was first used, that is in the private sphere. The narrower term 'corporate governance' originated in the 1920s to describe the management, decision-making and accountability structures of private corporations, particularly those with shareholder interests.⁹ The Organisation for Economic Co-operation and Development (OECD) defines the narrower term 'corporate governance' as:

Procedures and processes according to which an organisation is directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among the different participants in the organisation – such as the board, managers, shareholders and other stakeholders – and lays down the rules and procedures for decision-making.¹⁰

Corporate governance includes appropriate reporting and accounting systems, board roles and requirements, disclosure requirements, transparent decision-making and dispute resolution procedures.

(i) Common features of governance

Governance is not something that belongs to one group of people, nor is it specific or unique to non-Indigenous societies and their structures.

Drawing on its extensive research, CAEPR has outlined a number of commonalities in the ways governance is understood.

Text Box 2.1:

The Centre for Aboriginal Economic Policy Research - commonalities of governance¹¹

- consideration of critical institutional spheres (e.g. the state, market, hierarchy and community) as being interconnected, not separate
- a focus on a wider field of players and relationships, not simply on 'government'
- the idea of some form of cooperation and coordination as fundamental to effectiveness
- attention given to concrete systems of action, decision-making and accountability
- the foregrounding of power, control and choice
- the idea that governance effectiveness can be evaluated against benchmarks and principles
- a growing recognition that governance, and evaluations of its effectiveness, are the products of culturally-based systems.

9 See, for example H Wells, 'The Birth of Corporate Governance' (2010) 33(4) *Seattle Law Review* 1247.

10 European Central Bank, *Annual Report 2004* (2004), in OECD, 'Glossary of Statistical Terms', <http://stats.oecd.org/glossary/detail.asp?ID=6778> (viewed 12 October 2012).

11 Hunt and Smith, note 6, pp 3-4.

(ii) What is 'good' or effective governance?

All societies are governed in some way or other, some more successfully than others.

Typically, 'good governance' is defined in terms of the mechanisms thought to be needed to promote it. For example, it has been associated with democracy and civil rights, with transparency, with the rule of law, and with efficient public services.¹² Good governance, then, is often used to refer to a type of governance system – western democratic liberal government – which is very specific to cultures such as mainstream, non-Indigenous Australia.

The United Nations Development Program notes that:

Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.¹³

This definition refers to both the mechanisms of governance – 'participatory, transparent and accountable' – and the outcomes – 'effective and equitable'. The nature of the mechanisms of governance is important to the concept of 'good governance', but the concept goes much further by requiring specific outcomes.

It is perhaps more usefully called 'effective governance'.

Effective governance achieves the aims of the people being governed:

[It is] the quality of governance, much more than its specific form, [that] turns out to have a huge impact on the fortunes of human societies. Those societies that govern well tend to do better—economically, socially, politically—than those that don't. To govern well is to increase the society's chances of effectively meeting the needs of its people.¹⁴

In order for a community to achieve its aims, the governance structures and standards of that community must be culturally relevant and meaningful.

(b) What is Indigenous governance?

The National Centre for First Nations Governance (NCFNG) describes governance from an Indigenous perspective as:

the traditions (norms, values, culture, language) and institutions (formal structures, organization, practices) that a community uses to make decisions and accomplish its goals. At the heart of the concept of governance is the creation of effective, accountable and legitimate systems and processes where citizens articulate their interests, exercise their rights and responsibilities and reconcile their differences.¹⁵

While Indigenous peoples have governed ourselves since time immemorial in accordance with our traditional

12 The World Bank, 'What is Governance?', <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREG/0,,print:Y~isCURL:Y~contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html> (viewed 12 October 2012).

13 United Nations Development Program, 'Good Governance and Sustainable Development', <http://mirror.undp.org/magnet/policy/chapter1.htm> (viewed 12 October 2012).

14 S Cornell, C Curtis, and M Jorgensen, *The Concept of Governance and its Implications for First Nations*, Native Nations Institute and The Harvard Project on American Indian Economic Development, Joint Occasional Papers on Native Affairs No. 2004-02 (2004), p 6. At http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf (viewed 13 October 2012).

15 National Centre for First Nations Governance, *Principles to Support Effective Governance*, Discussion Document (2008), p1. At http://fngovernance.org/publication_docs/Governance_Principles2008.pdf (viewed 12 October 2012).

laws and customs, when we speak of Indigenous governance we are not referring to the pre-colonial state. Rather, we are referring to contemporary Indigenous governance: the more recent melding of our traditional governance with the requirement to effectively respond to the wider governance environment.

(i) What is the difference between governance generally and Indigenous governance?

While the features of Indigenous governance are very similar to governance generally, there are a number of distinct differences.

The Indigenous Community Governance Project (ICGP) developed a set of ‘design principles’ of Indigenous governance that summarise the differences between Indigenous and non-Indigenous governance structures and mechanisms. These are summarised below at Text Box 2.2.

Text Box 2.2:

Summary of ICGP design principles of Indigenous governance¹⁶

- ‘Indigenous systems of social and political organisation are complex, fluid and negotiable.’¹⁷
- There is a difference between Indigenous and non-Indigenous meanings of accountability and legitimacy. Indigenous peoples value internal accountability and communication; governments emphasise ‘upwards’ accountability, financial micro-management and compliance reporting.¹⁸
- ‘The concept and style of leadership and decision-making in Indigenous cultures appears to be significantly different from those familiar to governments.’¹⁹ Indigenous leadership on the ground is extremely complex – it is ‘socially dispersed, hierarchical, and context specific (with ceremonial, organisational, familial, residential, age and gender dimensions). There are overlapping networks of leadership and authority in communities and regions, evident across organisations and familial webs.’²⁰
- Indigenous governance arrangements tend to be ‘networked’. Networked governance is based on inter-connected layers of groups, organisations and communities, each having their own roles and responsibilities.²¹
- Decision-making authority in a networked model is located at the closest possible level to the people affected and able to make the decision.²²
- There is an emphasis on relatively egalitarian distribution of powers, responsibilities and resources between the organisations, groups or kinship units within a networked governance

16 This summary draws on J Hunt and D E Smith, *Ten Key Messages from the preliminary findings of the Indigenous Community Governance Project, 2005*, CAEPR (2005). At http://caepr.anu.edu.au/sites/default/files/cck_misc_documents/2010/06/10keymessages.pdf (viewed 12 October 2012); J Hunt and D E Smith, *Further key insights from the Indigenous Community Governance Project, 2006*, CAEPR (2006). At http://caepr.anu.edu.au/sites/default/files/Publications/WP/Key_Insights_ICGP_2006.pdf (viewed 12 October 2012).

17 Hunt and Smith, 2006, above, p 3.

18 Hunt and Smith, 2005, above, p 6.

19 Hunt and Smith, 2005, above, p 4.

20 Hunt and Smith, 2005, above, p 4.

21 Hunt and Smith, 2006, above, p 3.

22 Hunt and Smith, 2006, above, p 3.

system, at the same time as recognising 'nodes' or 'connecting points' of greater power and authority (e.g. associated with influential leaders, groups and organisations) within the network.²³

- Relationships and shared connections are the foundation of networks.²⁴

Non-Indigenous governance structures already align with the culture of the people they are designed to govern. In the case of Indigenous governance, Indigenous peoples must develop structures that incorporate both their cultural governance requirements as well as meeting the requirements of non-Indigenous governance models. Fundamentally, the difference in Indigenous cultures and values makes Indigenous governance different.

Like governance generally, Indigenous governance is also based on productive and respectful relationships. However, strengthening Indigenous community governance requires negotiating appropriate relationships among the different Indigenous peoples within a region or community, and adapting or creating structures and processes to reflect important relationships.²⁵

In many Aboriginal and Torres Strait Islander communities, meaningful governance structures must reflect important relationships in that community. These types of relationships create additional complexity to those established solely for the purpose of conducting business, running an organisation, or governing a society in a mainstream context. This is because in many instances they are based on kinship or family and are viewed by the mainstream as nepotism or creating a conflict of interest. This is often reflected in small communities where organisations are made up of only a couple of family groups. It is often difficult to avoid the tensions that arise between the familial relationships and responsibilities and the roles imposed on individuals involved in our community organisations.

Finally, as I outlined in last year's Reports, the extent of lateral violence in our communities resulting from our experiences of colonisation and oppression is also a core difference between Indigenous and non-Indigenous governance.²⁶ The differences outlined above can result in conflict, destabilising our organisational structures and the community more generally.²⁷

There is a critical tension that arises between Indigenous and non-Indigenous models of governance as a result of the difference of governance cultures. Non-Indigenous governance predominantly seeks to manage economic risk. However, this is secondary to Indigenous peoples, who are primarily focused on trying to maintain our cultures and identities at the same time as managing the risk of people dying early as a result of the levels of disadvantage we face.

(ii) What constitutes effective Indigenous governance

In Australia, effective Indigenous governance has proven to be a significant challenge for governments and Aboriginal and Torres Strait Islander peoples, our communities and our organisations.

23 Hunt and Smith, 2006, above, p 3.

24 Hunt and Smith, 2006, above, p 3.

25 Hunt and Smith, note 6, p 67.

26 *Social Justice Report 2011*, note 3, Ch 2.

27 D Martin, *Developing Strong and Effective Aboriginal Institutions* (Paper to the Indigenous Governance Conference, Canberra, 3-5 April 2002).

For Indigenous governance to be effective it is not enough to simply import foreign governance structures into communities and expect that those communities will be able to function effectively within those structures. This is particularly relevant in terms of organisational governance in Aboriginal and Torres Strait Islander communities. The principles of organisational governance and the principles of Indigenous governance are different and can appear difficult to reconcile, particularly where:

- the membership of an organisation does not reflect the membership of the Aboriginal community the organisation represents
- a director or officer of an Aboriginal organisation has a fiduciary duty to the organisation which conflicts with a customary obligation to specific individuals for example through kinship associations
- the decision-making of an Aboriginal and Torres Strait Islander organisation depends on majoritarian principles of the dominant culture, exercised through voting of members; but this may not reflect 'culturally legitimate Aboriginal decision-making, which might rely on seniority, context, gender, and subject matter'.²⁸

Effective Indigenous governance involves ensuring that our governance structures are relevant and legitimate to the people they are designed to govern, and can operate effectively within the broader governance environment.

June Oscar, in her keynote speech to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference in June 2012, emphasised that:

It is important that we acknowledge the challenging and complex operating environment which we are all continuing to live in, seeking justice and trying to raise families, and holding onto the lived practices of our beliefs. We as Indigenous People live out our lives in two worlds according to our custom and tradition and the modern reality. Yet this acknowledgement has never ever been forthcoming. Because the western lens is applied to everything we encounter.²⁹

Effective governance structures lay the foundations so that we govern ourselves in ways that enable and empower, rather than disable and disempower.

Put simply, effective Indigenous governance is governance that works for Indigenous people.

(iii) What does effective Indigenous governance look like?

Indigenous peoples from around the world are consistently working to develop governance frameworks that accommodate the balance between maintaining cultural integrity by incorporating traditional law, customs, governance principles, structures and processes; and ensure that our models of governance accord with mainstream requirements such as financial accountability.

How Indigenous peoples have been colonised the world over has influenced how they have responded or adapted to their changed cultural, social and political environment. As such, how they have adapted their models of governance has also been influenced by their experience of colonisation.

In describing what Indigenous governance looks like, I have chosen to focus on the First Nations peoples of Canada and the Native American peoples because of the similarities between their cultures and our cultures as Aboriginal and Torres Strait Islander peoples; as well as our similar experiences of colonisation.

28 Martin, above.

29 J Oscar, *Recognising and encouraging honour and determination* (Keynote address presented at Pre-workshop, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference, Townsville, 4 June 2012). At http://www.aiatsis.gov.au/ntru/documents/JuneOscarSpeech_000.pdf (viewed 12 October 2012).

In particular, I have looked at the work being done by:

- The National Centre for First Nations Governance in Canada
- The Harvard Project on American Indian Economic Development in the United States of America
- Reconciliation Australia and the Centre for Aboriginal Economic Policy and Research.

While we need to be cautious about adopting overseas Indigenous governance successes without acknowledging and considering their different legal and constitutional frameworks,³⁰ these international projects can provide useful insights into what enables effective governance for Indigenous peoples. Some examples of the work they are doing on Indigenous governance are outlined below.

The National Centre for First Nations Governance (NCFNG)

In Canada, the NCFNG considers that effective Indigenous governance contains five important components – the people; the land; laws and jurisdictions; institutions; and resources – and that these components ‘blend traditional values of our respective Nations with the modern realities of self-governance’.³¹ Under this model, ‘each culture will determine for itself how the principles are brought to life in their specific context’.³²

Text Box 2.3:

National Centre for First Nations Governance: five components of effective Indigenous governance

Within the five components, 17 principles support effective Indigenous governance. These principles ‘blend the ancient principles and values of the respective Nations with the modern realities of self-governance’.³³

The People	The Land	Laws and Jurisdiction	Institutions	Resources
<ul style="list-style-type: none"> • Strategic Vision • Meaningful Information Sharing • Participation in Decision Making 	<ul style="list-style-type: none"> • Territorial Integrity • Economic Realization • Respect for the Spirit of the Land 	<ul style="list-style-type: none"> • Expansion of Jurisdiction • Rule of Law 	<ul style="list-style-type: none"> • Transparency and Fairness • Results-Based Organizations • Cultural Alignment of Institutions • Effective Inter-Governmental Relations 	<ul style="list-style-type: none"> • Human Resource Capacity • Financial Management Capacity • Performance Evaluation • Accountability and Reporting • Diversity of Revenue Sources

30 AIATSIS and the Australian Collaboration, *Organising for Success: policy report, successful strategies in Indigenous organisations* (2007), p 2. At <http://www.aiatsis.gov.au/research/success.html> (viewed 11 October 2012).

31 National Centre for First Nations Governance, *Governance Best Practices Report* (June 2009), p.vii. At http://fngovernance.org/publication_docs/NCFNG_Best_Practice_Report.pdf (viewed 12 October 2012).

32 National Centre for First Nations Governance, above.

33 National Centre for First Nations Governance, note 15, p 2.

The NCFNG explains the relationship between these five governance components as follows:

Effective governance begins with the People. It is only through *the People* that we can begin to shape the strategic vision that serves as the signpost for the work that those communities and their organisations engage in. When the People have shared information, collectively made decisions and determined the strategic vision, their attention moves to where they sit – *to the Land*. Aboriginal title is an exclusive interest in the Land and the right to choose how that Land can be used. It is then through *Laws and Jurisdictions* that the rights of the Land are made clear. Following from and consistent with the Laws and Jurisdictions is the emergence of *Institutions* and the identification of the *Resources* required to realise and to ensure the continuity of effective governance [italics in original].³⁴

The NCFNG emphasises the importance of outcomes, stating that effective governance of Indigenous communities involves a ‘clear vision and an unwavering commitment to specifically defined goals and objectives designed to protect and realise First Nations title and rights’.³⁵

The Harvard Project on American Indian Economic Development (the Harvard Project)

The Harvard Project has been researching and developing Indigenous governance in the context of social and economic development since 1987. The Harvard Project takes a ‘nation-building’ approach to development in Indigenous communities. It specifically asks ‘what works, where and why?’³⁶

In answering these questions, the Harvard Project concluded that:

- Indigenous nations must have real decision-making power
- there must be an institutional environment that encourages tribal citizens and others to invest time, ideas, energy and money in the nation’s future
- there has to be a fit between governing institutions and Indigenous political culture
- institutions have to match Indigenous peoples ideas about how authority should be organised and exercised otherwise they would lack legitimacy with the people being governed.³⁷

This approach focuses on governance ‘building blocks’ that enable sustainable social and economic development for Indigenous peoples.³⁸ These building blocks are outlined below at Text Box 2.4.

34 National Centre for First Nations Governance, note 31, pp vii-viii.

35 National Centre for First Nations Governance, note 15, p 1.

36 The Harvard Project on American Indian Economic Development, ‘Overview’, <http://hpaied.org/about-hpaied/overview> (viewed 12 October 2012).

37 Cornell, et. al., note 14, p 7.

38 S Cornell and J P Kalt, ‘Sovereignty and Nation-Building: the development challenge in Indian country today’ (1998) 22(3) *American Indian Culture and Research Journal* 187. At http://nni.arizona.edu/resources/inpp/2003_CORNELL.kalt_JOPNA_sovereignty.nation-building.pdf (viewed 12 October 2012).

Text Box 2.4:

The Harvard Project on American Indian Economic Development: the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations³⁹

- **Sovereignty Matters.** When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.
- **Institutions Matter.** For development to take hold, assertions of sovereignty must be backed by capable institutions of governance. Nations do this as they adopt stable decision rules, establish fair and independent mechanisms for dispute resolution, and separate politics from day-to-day business and program management.
- **Culture Matters.** Successful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own culture.
- **Leadership Matters.** Nation building requires leaders who introduce new knowledge and experiences, challenge assumptions, and propose change. Such leaders, whether elected, community, or spiritual, convince people that things can be different and inspire them to take action.

The Harvard Project has found that empowering communities to make their own decisions and take control over their own affairs is the most effective way to achieve community development and results in positive health outcomes.

The Indigenous Community Governance Project (ICGP)

Drawing on the international research, Australian researchers have adapted their studies for relevance in an Australian context.

From 2004 to 2008, Reconciliation Australia and the CAEPR undertook the ICGP to explore what works, what doesn't work and why regarding Indigenous community governance in diverse locations and contexts across Australia.

The ICGP observed that 'it is useful to think about governance as being about people – how they organise themselves as a group to manage their own affairs and achieve the things that matter to them'. They argue that in order to do that, processes, structures, traditions and rules must be set so that they can:

- determine the membership of their group
- decide who has authority, and over what
- ensure that authority is exercised properly
- enforce and implement their decisions

39 The Harvard Project on American Indian Economic Development, note 36.

- hold their decision makers accountable
- steer their future direction
- negotiate their rights and interests with others
- establish the most effective and legitimate arrangements for getting those things done.⁴⁰

The ICGP identified 10 key factors that enable effective governance for Aboriginal and Torres Strait Islander peoples. They are listed at Text Box 2.5.

Text Box 2.5:

The factors that enable effective governance for Aboriginal and Torres Strait Islander peoples identified by the Indigenous Community Governance Project⁴¹

- Indigenous relationships and systems of representation provide the basis for working out organisational structures and processes.
- Legislative, policy and funding frameworks need to adapt to different governance arrangements that are based on local realities. Equally, Indigenous communities need to consider what governance arrangements are likely to enable them to achieve their goals.
- Culturally legitimate representation and leadership requires governance structures to reflect contemporary values and conceptions about the organisation of authority and exercise of leadership.
- Building the capacity of institutions of governance (such as policies, rules and constitutions) increases the effectiveness and legitimacy of community governance arrangements.
- Effective leadership, which enables consensus-making within communities, is critical to developing strong community governance.
- Governance capacity is a fundamental factor to generate sustainable economic development and social outcomes.
- The wider federal, state, regional and community governance environment can either enable or disable the governance of Indigenous communities.
- The criteria for evaluating effective governance is different for Indigenous peoples and governments: Indigenous peoples value internal accountability and communication; governments emphasise 'upwards' accountability, financial micro-management and compliance reporting.

40 Hunt and Smith, note 6, pp 4-5.

41 Hunt and Smith, 2005, note 16.

2.3 Enabling effective governance in Aboriginal and Torres Strait Islander communities

Enabling effective governance in Aboriginal and Torres Strait Islander communities requires a solid framework that clearly outlines the aims and procedural requirements, and incorporates key principles that recognise, reflect and support the values and cultural norms of the communities affected.

This section considers what enables effective governance in Aboriginal and Torres Strait Islander communities. Firstly I will consider how a human rights based approach provides a framework for effective governance. I will then discuss the three interrelated components of effective governance in Aboriginal and Torres Strait Islander communities. These have been drawn from the substantial amount of research already conducted. Those three components are:

- community governance
- organisational governance
- the governance of governments (and other external influences).

Effective Indigenous governance involves consideration of:

- how decisions are made
- how disputes are resolved
- how Aboriginal and Torres Strait Islander peoples negotiate with governments and external stakeholders
- how Aboriginal and Torres Strait Islander peoples exercise our authority and rights
- how Aboriginal and Torres Strait Islander peoples design our governing institutions.⁴²

When developing principles which can guide an approach to enabling effective governance in Aboriginal and Torres Strait Islander communities, the human rights framework is a good place to start.

(a) A human rights based approach to enabling effective governance in Aboriginal and Torres Strait Islander communities

Human rights and effective governance are intrinsically linked:

good governance and human rights mutually reinforce each other. Human rights standards can inform governance, while good governance facilitates the promotion and protection of human rights in a sustainable manner.⁴³

The international human rights framework contains universal values, principles and standards that prescribe what constitutes effective governance. This means that applying a human rights based approach in our efforts to achieve effective governance is essential.

The international human rights framework is in its own right a governance framework for governments and communities. It can be applied internationally, nationally, regionally or to more localised structures to

42 S Cornell, *Email to Social Justice Team*, 12 October 2012.

43 Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Governance reforms help protect human rights', <http://www.ohchr.org/EN/NEWSEVENTS/Pages/GoodGovernance.aspx> (viewed 12 October 2012). See also OHCHR, *Good Governance Practices for the Protection of Human Rights* (2007). At <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (viewed 12 October 2012).

strengthen their foundations.

Human rights provide a useful framework for what constitutes effective governance in two respects:

- Human rights instruments define the universal aims of the international community and societies within it, and stipulate the minimum standards necessary to achieve them.
- Human rights instruments also provide clear guidance on the procedural requirements of effective governance, some of which are aims in themselves.

In 2007, the Office of the High Commission for Human Rights (OHCHR) published studies exploring the links between effective governance and human rights in four areas: democratic institutions, the delivery of state services, the rule of law and anti-corruption measures. With respect to service delivery, the OHCHR said:

good governance reforms advance human rights when they improve the state's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food. Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and acceptable to all, and paths for public participation in decision-making.⁴⁴

This statement emphasises the importance of governance to achieving practical outcomes with regard to substantive human rights such as education and health. It also highlights the role that governments play in ensuring that societal structures are in place to facilitate the exercise and enjoyment of human rights by all:

there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes that are deemed necessary to achieve the goals of development...human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures.⁴⁵

The UN Commission on Human Rights identified the following key attributes of effective governance:

- transparency
- responsibility
- accountability
- participation
- responsiveness (to the needs of the people).⁴⁶

Regarding this resolution, the OHCHR states that 'by linking good governance to sustainable human development, emphasising principles such as accountability, participation and the enjoyment of human rights, and rejecting prescriptive approaches to development assistance, the resolution stands as an implicit endorsement of the rights-based approach to development'.⁴⁷

The aims or outcomes focus of the human rights framework provides us with a way of measuring the effectiveness of governance. The OHCHR has said:

44 OHCHR, 2007, note 43.

45 OHCHR, 'Good governance and human rights', <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> (viewed 11 October 2012).

46 UN Commission on Human Rights, *The role of good governance in the promotion of human rights*, Commission on Human Rights resolution 2000/64, UN Doc E/CN.4/RES/2000/64 (27 April 2000). At <http://www.unhcr.org/refworld/docid/3b00f28414.html> (viewed 24 October 2012).

47 OHCHR, note 45.

Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable.⁴⁸

As the OHCHR has also said, the test of effective governance 'is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights. The key question is: are the institutions of governance effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security?'⁴⁹

Measuring the success of any governance needs to be done according to the goals and priorities of the peoples being governed. This means the goals of Indigenous peoples are what should be measured, not only those of governments. Often these align – for example in the areas of improved health and education - but the ultimate aim of improved well-being is influenced by different secondary aims in Indigenous communities, such as caring for country and protecting culture, that contribute to achieving improved health outcomes.

Governments approach to measuring effective governance in Indigenous communities must change to include consideration of the achievement of community priorities and outcomes as a measurement, in addition to just the corporate compliance and financial accountability requirements.

CAEPR have observed that one measure of successful governance in Aboriginal and Torres Strait Islander communities is that Indigenous organisations are able to:

assume responsibility for the compilation of their own measurement indicators and progress in stages to their interpretation, presentation, replication, and dissemination with the ultimate goal of their application for local planning... As with many aspects of Indigenous life, information gathering and interpretation is all too often done *for* Indigenous communities *by* non-Indigenous outsiders [italics in original].⁵⁰

Aboriginal and Torres Strait Islander people have developed a tool to measure levels of empowerment, self-determination and ultimately the well-being of the community. The *Growth and Empowerment Measure* (GEM) was developed by the Collaborative Research on Empowerment & Wellbeing Team at the University of Queensland, and the Empowerment Research Program at James Cook University.⁵¹

Text Box 2.6:

*Growth and Empowerment Measure*⁵²

The GEM is a package of questions designed to measure empowerment and well-being presented in a form similar to a survey.

The word 'Empowerment' has been adopted by the Aboriginal and Torres Strait Islander people involved in this project to mean healing from past wounds, developing strength and skills to live life in a positive way, to have good relationships with others and to work together to make communities a better place.

48 OHCHR, note 45.

49 OHCHR, note 45.

50 J Taylor, *Capacity Building for Indigenous Governance: Social indicators for Indigenous governance* (Paper prepared for the CAEPR-Reconciliation Australia ICG Project Workshop with WA and Australian Government Partners, Perth, 18 October 2005), p 6. At http://caepr.anu.edu.au/sites/default/files/ckk_misc_documents/2010/06/Social_indicators_JTaylor.pdf (viewed 13 October 2012).

51 M Haswell, *The Gem: Growth and Empowerment Measure*, Information Sheet, Muru Marri Indigenous Health Unit, School of Public Health and Community Medicine, University of New South Wales, Sydney.

52 Haswell, above.

The questions have come from lots of listening to and consultation with Aboriginal people who shared their ideas about what should be asked and how the form or questionnaire should look. The GEM was developed to measure empowerment and growth within yourself, your family and community.

So the human rights framework guides our understanding of what supports and enables effective governance in Aboriginal and Torres Strait Islander communities. The standards and principles which support and enable effective governance in Aboriginal and Torres Strait Islander communities are collated in one document for the purposes of realising the unique human rights of Indigenous peoples - the *Declaration on the Rights of Indigenous Peoples*.

(i) The Declaration on the Rights of Indigenous Peoples (the Declaration)

The Declaration provides authoritative guidance in addressing the unique governance challenges experienced by Indigenous peoples and our communities.

The Declaration was adopted by the General Assembly in 2007 and was formally supported by the Australian Government in 2009. As the Declaration affirms in Article 1, it does not create new human rights but rather reflects existing rights as they apply to our peoples:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Specifically, the Declaration 'constitutes the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.⁵³

As I have outlined in previous reports, the Declaration incorporates four key human rights principles:

- self-determination
- participation in decisions that affect us based on free, prior and informed consent and good faith
- respect for and protection of culture
- equality and non-discrimination.⁵⁴

These principles are inextricably linked and indivisible, and our Indigenous governance must be underpinned by all of these principles if we are to realise our human rights. However, as each of these human rights principles has different implications for Indigenous governance, I consider them separately below.

In addition to these foundational principles, a number of articles of the Declaration are also directly relevant to and provide guidance on achieving effective Indigenous governance. They are set out below at Text Box 2.7.

53 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art 43.

54 *Social Justice Report 2011*, note 3, Ch 3.

Text Box 2.7:

The Declaration on the Rights of Indigenous Peoples and its relevance to effective Indigenous governance

Article 3

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

Article 4

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

Article 5

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

Article 18

Indigenous peoples have the **right to participate in decision-making which would affect their rights, through representatives chosen by themselves** in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to **obtain their free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.

Article 20 (1)

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.

Article 23

Indigenous peoples have the **right to determine and develop priorities** and strategies for exercising their right to development. In particular, indigenous peoples have the **right to be actively involved in developing and determining health, housing and other economic and social programmes** affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 32

1. Indigenous peoples have the **right to determine and develop priorities** and strategies for the development or use of their **lands or territories and other resources**.
2. **States shall consult and cooperate in good faith** with the indigenous peoples concerned through their own representative institutions in order to **obtain their free and informed consent prior to the approval of any project affecting their lands or territories** and other resources, particularly in connection with the development, utilization or exploitation of mineral water or other resources.

Article 33

1. Indigenous peoples have the **right to determine their own identity** or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the **right to determine the structures and to select the membership of their institutions** in accordance with their own procedures.

Article 34

Indigenous peoples have the **right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs**, in accordance with international human rights standards.

Article 35

Indigenous peoples have the **right to determine the responsibilities** of individuals to their communities.

Article 37(1)

Indigenous peoples have the **right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements** concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

The four key principles are clearly visible across the articles of the Declaration related to Indigenous governance.

Self-determination

One of most fundamental human rights principles is self-determination, itself a critical element of governance. At its core, 'self-determination is concerned with the fundamental right of people to shape their own lives.'⁵⁵

Professor Erica-Irene Daes, former Chair of the United Nations Working Group on Indigenous Populations has observed that:

self-determination means the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non-Indigenous neighbours...⁵⁶

Self-determination can mean different things to different groups of people and there are many elements to self-determination. Importantly, self-determination will not look the same in all circumstances because it is defined by the people seeking to exercise it.

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.'⁵⁷

55 C Fletcher (ed), *Aboriginal Self-determination in Australia* (1994), p xi.

56 E Daes, 'Striving for self-determination for Indigenous peoples' in Y Kly and D Kly (eds) *In Pursuit of the Right to Self-Determination* (2000), p 58.

57 National Centre for First Nations Governance, note 15, p 1.

However, the full realisation of self-determination must be genuinely supported by our organisations and government.

Text Box 2.8 below sets out some of the key characteristics of self-determination.

Text Box 2.8:

Key characteristics of self-determination⁵⁸

Self-determination:

- cannot be viewed in isolation from other human rights but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime
- is a regulatory vehicle that broadly establishes rights for the benefit of all peoples, including Indigenous peoples
- is grounded in the precepts of freedom and equality, and opposes both prospectively and retroactively, patterns of empire and conquest
- affirms that human beings, individually and groups, are equally entitled to be in control of their own destinies and to live within governing institutional orders that are devised accordingly
- affirms that peoples are entitled to participate equally in the development of the governing institutional order, including the constitution, under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis
- includes the dual aspects of autonomous governance and participatory engagement
- is an instrument of reconciliation and conciliation, particularly for peoples who have suffered oppression at the hands of others
- promotes the building of a social and political order based on relations of mutual understanding and respect.

The right of self-determination is protected in Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR), which states:

- (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources...In no case may a people be deprived of its own means of subsistence.

Our right to self-determination is reiterated in articles 3-5 of the Declaration.

Article 5 considers how our governance within our own institutions co-exists with our participation in the governance of governments. This involves our right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions while retaining our right to participate fully in the political, economic,

⁵⁸ S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhaven (eds), *Making the Declaration Work* (2009) 186, p184.

social and cultural life of the state. In the words of James Anaya, this:

reflects the common understanding that indigenous peoples' self-determination ordinarily involves not only the exercise of autonomy but also a participatory engagement and interaction with the larger societal structures in the countries in which indigenous peoples live.⁵⁹

James Anaya describes the link between self-determination and governance:

While human beings fundamentally are the beneficiaries of the principles of self-determination, the principle bears upon the institutions of government under which human beings live. Self-determination [expresses] international concern for the essential character of government structures...⁶⁰

In 1993, Lowitja O'Donoghue argued the basis upon which government should support our self-determination:

Self-determination as a concept is not something which can be tacked onto program design or introduced through piecemeal consultation. It has to be accepted as a policy objective that pervades the relationship of indigenous peoples to the wider community.⁶¹

The Royal Commission into Aboriginal and Islander Deaths in Custody specifically recommended that:

principles of self-determination should be applied to the design and implementation of all policies and programs affecting Aboriginal people, that there should be maximum devolution of power to Aboriginal communities and organisations to determine their own priorities for funding allocations, and that such organisations should, as a matter of preference be the vehicles through which programs are delivered.⁶²

In practice, self-determination could occur through a range of governance mechanisms for Aboriginal and Torres Strait Islander peoples, such as:

- our own representative bodies
- our own schools, justice systems, health systems
- having control over our lives
- being able to participate in decisions that affect us
- being subject to our own laws
- establishing our own government
- establishing our own sovereign state.⁶³

Self-determining communities are able to make decisions collectively about how our community goals are prioritised and progressed.

One of the key misunderstandings about self-determination, particularly on the part of governments, is that self-determination can lead to a challenge to state sovereignty.

Governments often regard self-determination for Indigenous peoples as being in conflict with state sovereignty, which leads to the paradoxical situation of governments rebuffing Indigenous claims for self-

59 United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011), para 65. At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/288> (viewed 12 October 2012).

60 S J Anaya, *Indigenous Peoples in International Law* (1996), p 78.

61 L O'Donoghue, 'Keynote address: Australian Government and self-determination', in Fletcher (ed), note 55, above, p 4.

62 Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), Recommendations 188-192.

63 These options were set out in the *UN Declaration on the Rights of Indigenous Peoples Commission Network Survey* undertaken by the Australian Human Rights Commission in June-July 2012. Of the total number of respondents to the survey, only 17.4% considered establishing our own sovereign state as relevant to achieving self-determination.

determination in the name of the same principle.⁶⁴

For example, the Australian Government has expressed concerns that:

- to confer collective rights on a people will diminish individual rights
- the recognition of the right of self-determination for indigenous peoples will result in more rights for one group of people that are not afforded to others
- the recognition of Indigenous self-determination will provide legitimacy to claims of secession, the creation of separate Indigenous states, or the recognition of independent sovereignty.⁶⁵

By defining sovereignty and self-determination in a state-centric way, the self-determination of Aboriginal and Torres Strait Islander peoples domestically has been systematically reduced by government to a limiting version of self-determination rather than one which enables us to reach our full potential. The oppositional approach to self-determination sets up Aboriginal and Torres Strait Islander peoples as 'competitors of government'.⁶⁶

Text Box 2.9:

Aboriginal and Torres Strait Islander peoples' views on self-determination and sovereignty

Aboriginal and Torres Strait Islander people have used the terms self-determination and sovereignty to reflect our social, economic and political aspirations for control over our own lives and recognition of our political status as the First Peoples of this country.

Larissa Behrendt has written on the 'unique interpretation' Indigenous people attach to the term sovereignty:

It includes concepts such as representative government and democracy, the recognition of cultural distinctiveness and notions of the freedom of the individual that are embodied in liberalism. These claims take place by seeking a new relationship with the Australian state with increased self-government and autonomy, not through the creation of a new country.⁶⁷

Katie Kiss considers self-determination in the context of how we as Aboriginal and Torres Strait Islander peoples understand our ongoing responsibilities to our lands, territories, resources, cultures and identities:

I believe this is - to a certain extent - a state of mind. As traditional owners, and custodians of our lands, territories, resources, cultures, languages and stories, we have a responsibility to assert our sovereignty in order to maintain these important elements that make up our identities and status as Aboriginal and Torres Strait Islander peoples...the way we interact with each other is a reflection of our sovereignty. Questions such as who's your mob and where do you come from, are questions

64 P Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003), pp 126 and 131; J Robbins, 'A nation within? Indigenous peoples, representation and sovereignty in Australia' (2010) 10(2) *Ethnicities* 257, p 259.

65 O'Donoghue, note 61, p 8.

66 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission, Chapter 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport02/index.html (viewed 12 October 2012).

67 L Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003), pp 101-102.

about our sovereignty and as different nations across our country – just like nation-states operate in the space of international sovereignty and territorial integrity – this is about *our* international relations and acknowledging and respecting that - our people continue to be sovereign in our own right.⁶⁸

When we think about what sovereignty means in practice for Aboriginal and Torres Strait Islander peoples it really means that we are still waiting for a formal relationship with government. This formal relationship must encompass recognition of our ongoing authority to govern over this country – a previously exclusive and now shared authority.

These terms have come to be used to discuss the ‘unfinished business’ of the relationship between Government and Aboriginal and Torres Strait Islander peoples.⁶⁹ A relationship that is critical to the success or failure of any governance model in Aboriginal and Torres Strait Islander Australia.

The main point to self-determination for Aboriginal and Torres Strait Islander peoples of Australia is that it would involve a redistribution of power and acceptance that Aboriginal and Torres Strait Islander peoples are the key decision-makers in our own lives.

Participation in decisions that affect us based on free, prior and informed consent and good faith

Article 18 of the Declaration sets out the right of Indigenous peoples to participate in decisions that affect us.

The right to participate in decision-making is a fundamental part of our capacity to exercise our right to self-determination and other rights set out in the Declaration.

Three key elements are involved in ensuring our effective participation in decisions that affect us. They are contained in Article 19 of the Declaration:

- Duty to consult – Governments (or States) have a duty to consult with Indigenous peoples ‘whenever a State decision may affect indigenous peoples in ways not felt by others in society’, even if their rights have not been recognised in domestic law.⁷⁰
- Good faith – Governments must consult and engage with us in good faith which ensures that decision-making processes are fair, cooperative and consistent with our cultural practices. Consultations should be ‘carried out in a climate of mutual trust and transparency’; this includes providing sufficient time for Indigenous peoples to engage in their own decision-making process, and participate in a manner consistent with their cultural and social practices; and the objective of consultations should be to achieve agreement or consensus.⁷¹

68 K Kiss, *Self-determination and Sovereignty Workshop* (Speech delivered at the National Congress of Australia’s First Peoples, Alice Springs, 27 September 2012).

69 For example M Dodson, ‘Unfinished Business: a Shadow Across our Relationships’ in ATSIC Treaty Think Tank, *Treaty: Let’s Get it Right!* (2003), pp 30-40.

70 S J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 13 October 2010).

71 Human Rights Council, *Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2011/2, Annex para 9. At <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/AEVfinalreportStudyIPRightParticipate.pdf> (viewed 12 October 2012).

- Free, prior and informed consent⁷² – The principles of free, prior and informed consent requires that third parties in decision-making processes affecting Indigenous peoples enter into equal and respectful relationships with us. This principle applies not only to administrative acts and decisions, but also to the legislative process itself. Communities can also apply this principle in their local governance arrangements. There should be no coercion or manipulation used to gain consent. The principle is not a right of veto,⁷³ but if consent is sought in good faith, it allows Indigenous peoples to say no to a proposal.⁷⁴

Together, these aspects of the right to participate in decision-making mean that Indigenous peoples must be recognised and treated as substantive stakeholders in the development, design, implementation, monitoring and evaluation of all policies and legislation that impact on our well-being.

So, how are the elements of a duty to consult, good faith, and free, prior and informed consent reflected in a framework for effective governance in Indigenous communities? And what does participation in decision-making look like in practice?

Effective participation must ensure that decision-making which affects Aboriginal and Torres Strait Islander peoples takes into account our aspirations and worldviews. As such our participation in decision-making has two distinct parts, internal participation and external participation:

- Internal participation includes Indigenous governance, legal systems, institutions and internal decision-making structures and processes.⁷⁵
- External participation includes participation in electoral politics, participation in parliamentary processes, and direct participation in the broader governance environment.⁷⁶

In order for us to be able to exercise our right to participate in decision-making regarding the terms of projects, policies and laws that affect us, governments and external stakeholders need to:

- respect and support our representative and decision-making processes and structures
- provide us with complete access to all relevant information in a culturally appropriate manner, including in our own languages
- engage with our peoples and our representative organisations in a cooperative and fair manner that is respectful of our needs and priorities
- provide us with adequate timeframes to make a decision
- allow us to say no.

72 See United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), paras 46–49. At <http://social.un.org/index/IndigenousPeoples/UNPFIIISessions/PreviousSessions/Fourth.aspx> (viewed 12 October 2012).

73 K Deer, 'Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in J Hartley, P Joffe and J Preston (eds) *Realising the UN Declaration on the Rights of Indigenous Peoples: triumph, hope and action* (2010), p 27.

74 United Nations Permanent Forum on Indigenous Issues, note 72, paras 46–49.

75 UN General Assembly, Human Rights Council, *Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2011/2 (2011), paras 42–66. At <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/AEVfinalreportStudyIPRightParticipate.pdf> (viewed 12 October 2012).

76 UN General Assembly, Human Rights Council, *Progress report on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2 (2010), paras 67–101. At <http://www.unhcr.org/refworld/docid/4cd3aebd2.html> (viewed 12 October 2012).

Our participation in decision-making ensures non-discriminatory treatment and equality before the law, and recognises the cultural distinctiveness and diversity of Indigenous peoples.

Our participation in decisions that affect us is critical to achieving effective Indigenous governance as it enables communities to determine our priorities for development, own the solutions to the challenges we face, achieve our aims and consequently improve our quality of life.

Respect for and protection of culture

Effective governance in any community needs to reflect the culture of the people being governed. Culture has been described as:

...a complex and diverse system of shared and interrelated knowledge, practices and signifiers of a society, providing structure and significance to groups within that society... Shared knowledge including collectively held norms, values, attitudes, beliefs...while cultural practices are evidenced in the language, law and kin relationship practices of a society.⁷⁷

All peoples have this right to culture; it is affirmed in the *Universal Declaration of Human Rights* – everyone has the right to freely participate in the cultural life of the community.⁷⁸ It is also affirmed in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁷⁹ and the ICCPR.⁸⁰

However, in Australia today, the broader governance environment does not effectively reflect or accommodate the cultures of Aboriginal and Torres Strait Islander peoples. In Australia, we must recognise that we have hundreds of nations of Aboriginal and Torres Strait Islander peoples, each of which has its own distinct cultural norms, law, language and identity. To achieve the aims of Aboriginal and Torres Strait Islander communities, governance structures and processes must promote and protect our cultures.

The Declaration articulates Indigenous peoples' right to culture in Articles 8(1), 11(1), 15(1) and 31(1), and includes our right to maintain, protect and practice our cultural traditions and cultural heritage. The responsibility of governments to respect and protect our culture is also set out in Articles 8(2)(a), 11(2) and 14(3) of the Declaration. This includes the requirement to provide effective mechanisms to protect:

- our integrity as distinct peoples
- our cultural values
- our cultural, intellectual, religious and spiritual property
- our children's access to an education in our own language.

The Declaration reinforces our rights to have governance structures and processes that are compatible with respecting and protecting our culture. Culture within the context of our Indigenous governance is about enabling us, as Aboriginal and Torres Strait Islander peoples, to continue our customary and historical – as well as our contemporary – ways of organising ourselves and making decisions about matters that affect us.

The role of governments and other external parties in enabling effective governance in Aboriginal and Torres Strait Islander communities involves ensuring sufficient cultural competency to engage with Aboriginal and Torres Strait Islander peoples. Engagement must be conducted in a manner which respects our cultures and

77 M J Hallaran, *Cultural maintenance and trauma in Indigenous Australia* (paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Perth, Western Australia 2-4 July 2004), p 2. At <http://www.murdoch.edu.au/elaw/issues/v11n4/halloran114.html> (viewed 11 October 2012).

78 *Universal Declaration of Human Rights*, 1948, art 27.

79 *International Covenant on Civil and Political Rights*, 1966, art 27.

80 *International Covenant on Economic, Social and Cultural Rights*, 1966, art 15

thereby facilitates our genuine participation in decision-making that affects us.

Respecting and protecting our cultures also impacts on other human rights principles in the Declaration. In itself, fulfilling our right to maintain our cultures is a right we are entitled to enjoy equally to all other Australians, without discrimination.

Equality and non-discrimination

The principles of non-discrimination and equality are set out in Article 26 of the ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Racial discrimination is defined in Article 1(1) of the *International Convention on the Elimination of Racial Discrimination 1979*, (ICERD) as:

...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Indigenous peoples' right to non-discrimination and equality is specifically affirmed in Articles 2 and 9 of the Declaration, which articulates the right for us to be 'free and equal to all others' and to be 'free from any kind of discrimination'. Articles 8(2)(e), 15(2) and 22(2) of the Declaration outline the positive obligations on governments to take effective measures to prevent racial discrimination, and promote tolerance and good relations among Indigenous peoples and other segments of society. Equality has two elements, formal and substantive equality:

- Formal equality relies on the concept that all people should be treated identically regardless of difference.
- Substantive equality acknowledges that rights, opportunities and access are not equally distributed throughout society and a 'one size fits all' approach will not achieve equality.

The Human Rights Committee, which oversees the implementation of the ICCPR, has adopted a substantive equality approach and indicated that equality 'does not mean identical treatment in every instance'.⁸¹ Substantive equality can be created by policies that provide redress for racially specific aspects of discrimination such as cultural difference, historical subordination and socio-economic disadvantage.

In considering how to achieve the goals of Aboriginal and Torres Strait Islander peoples, it is clear that the governance arrangements which work for the broader Australian society do not work for our communities. The current governance arrangements are not achieving sustainable development in our communities. This means that while the compliance and accountability regimes should be consistent, in order to achieve equality there must be different governance arrangements to those in the broader community.

81 Human Rights Committee, *General Comment XVIII, Non-discrimination* (1989), paras 8 and 9 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/ Rev. 1, p 26. At <http://www.un.org/Docs/journal/asp/ws.asp?m=HRI/GEN/1/> (viewed 12 October 2012).

(ii) Achieving the aims of Aboriginal and Torres Strait Islander peoples: implementing the Declaration through effective governance

The Australian Government is committed to improving the exercise and enjoyment of human rights by its citizens and this is demonstrated through its work on the *National Human Rights Framework* and the development of the *National Human Rights Action Plan*.⁸²

However, as I have outlined in Chapter 1, this commitment has been inconsistent in terms of the Declaration. After signing the Declaration in 2009, the Government rhetoric was very positive, but since then the Government has argued that it has no legal obligation to implement the Declaration.⁸³

The Declaration is a remedial instrument that offers a blueprint to improving the human rights of Aboriginal and Torres Strait Islander peoples; it is not a threat to Australia's statehood. As a summary of the international human rights framework as it affects Indigenous peoples, the Declaration is a practical tool for achieving effective governance in Aboriginal and Torres Strait Islander communities. While the Declaration is not given due recognition in Australia's governance framework, effective governance in Aboriginal and Torres Strait Islander communities will continue to elude us. And while effective governance eludes us, development outcomes will continue to be poor.

If governments are serious about improving the well-being of Aboriginal and Torres Strait Islander peoples, they must embrace the principles in the Declaration and work in partnership with Aboriginal and Torres Strait Islander people to implement them. Implementing the principles of the Declaration, involves acknowledging the importance of governance in the broadest sense. In particular, it requires an understanding and acknowledgement that effective governance in Indigenous communities is about the roles of and relationships between our communities, our organisations, and external influences, especially governments.

(b) The three components of effective governance in Aboriginal and Torres Strait Islander communities

The evidence regarding the 'Indigenous governance environment' in Australia shows us that in order for Aboriginal and Torres Strait Islander people to be able to achieve our aims, there are several parties with different roles to play: Aboriginal and Torres Strait Islander people in our own communities and governments (and other external stakeholders). The evidence highlights that there are three intricately connected components to effective governance in Aboriginal and Torres Strait Islander communities:

- community governance
- organisational governance
- the governance of governments, and other external influences.

Effective governance in Aboriginal and Torres Strait Islander communities depends largely on the relationships between the components and between the parties. Each of these components and the relationships linking them *must* be grounded in and promote the principles of: self-determination; participation in decision-making, good faith, and free, prior and informed consent; respect for and protection of culture; and non-discrimination and equality.

82 For information on the Human Rights Framework see Attorney-General's Department, 'Australia's Human Rights Framework', <http://www.ag.gov.au/humanrightsframework> (viewed 11 October 2012).

83 Australian Government, *Australian Government and Non-Government Organisations Forum on Human Rights*, Canberra, 14-15 August 2012, pp 8-9.

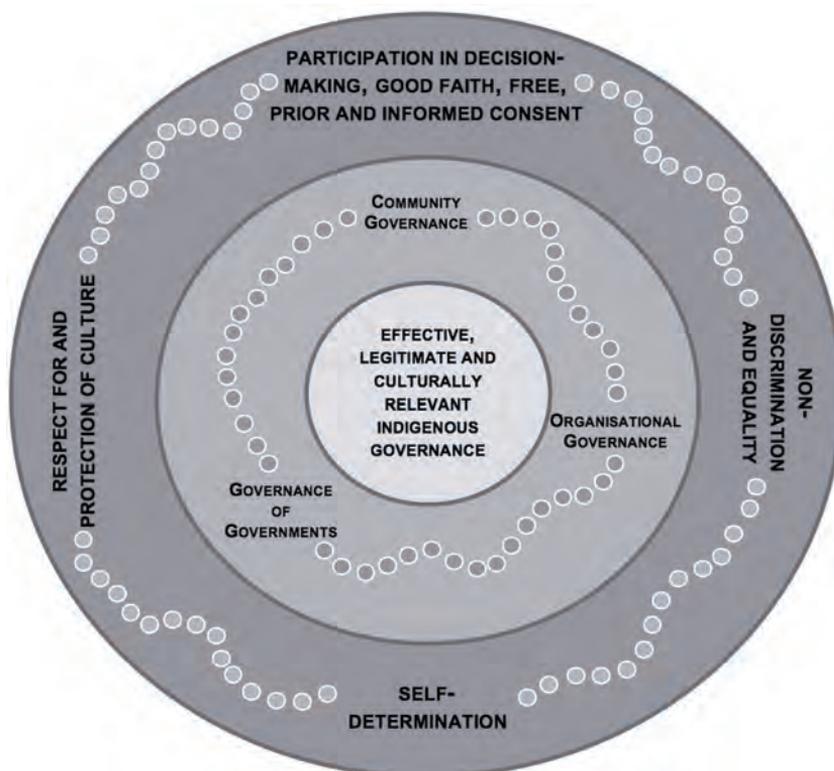
In answer to the question ‘what works’, the consistent finding is that having genuine decision-making power in the hands of communities is critical to achieving sustainable development.⁸⁴

The evidence shows what Aboriginal and Torres Strait Islander people need to do to achieve effective governance in our communities and thereby achieve our aims. It also shows what government needs to do to enable effective Indigenous governance and ultimately to enable Aboriginal and Torres Strait Islander people to achieve our aims.

Each of the three components is discussed below, while Image 2.1 represents the components and essential founding principles in any model of effective Indigenous governance.⁸⁵

Image 2.1:

Facilitating effective, legitimate and culturally relevant Indigenous governance⁸⁶



84 See for example, The Harvard Project on American Indian Economic Development, note 36.

85 I acknowledge that diagrams in the ‘Different Models of Indigenous Governance’ in the *Indigenous Governance Toolkit* at <http://www.reconciliation.org.au/getfile?id=996&file=Resource+1.4+Different+models+of+Indigenous+governance.pdf> (viewed 11 October 2012) and models in the *National Indigenous Governance and Leadership Framework/Discussion Paper* (21 October 2011) that was provided to me on a draft and without prejudice basis contributed to this diagrammatic view of Indigenous governance.

86 This diagram illustrates how the human rights principles in the Declaration underpin our Indigenous governance. The dots represent the storylines and interconnected relationships between these principles and between the three components of community governance, organisational governance and the governance of governments.

(i) Community governance

Effective Indigenous governance must start with us – with our peoples and our communities.

This part of the governance framework is informed completely by Aboriginal and Torres Strait Islander peoples and communities.

Effective community governance is underpinned by our cultures, including traditional laws, customs, norms, and values as well as our contemporary cultural norms and values. In order to achieve legitimate community governance arrangements (ie that have a clear mandate from the community) our organisational structures and processes must be based on culturally legitimate representation and leadership that reflects our traditional and contemporary values and conceptions about the organisation of authority and exercise of leadership.

Underlying ... principles of good governance is the issue of legitimacy and mandate. Each community and region will have to find some degree of match or 'common ground' between the types of governing structures and procedures it wants to develop, and the culturally based standards, values and systems of authority of community members.⁸⁷

In practice, this means that community governance is based on a solid foundation of self-determination. Effective community governance provides the mechanisms by which Aboriginal and Torres Strait Islander peoples determine our priorities; define who has the authority and responsibility to achieve them; and involve all community members in developing the processes by which our aims can be achieved.

Aboriginal and Torres Strait Islander communities need to strengthen our own community governance institutions that are derived from our own cultures, in order to support effective community governance:⁸⁸

Institutions are the 'rules of the game', 'the way things are, and are to be done'. Institutions can be formal and informal; for example, legal and judicial procedures, constitutions, policies, regulations, kinship systems, behavioural and gender norms, values, beliefs, ethical, legal and religious systems, and so on. Governance is greatly strengthened when Indigenous people develop their own rules rather than simply adopting externally created institutions, and when they also design the processes by which they will enforce their rules.⁸⁹

In the context of the broader framework, Aboriginal and Torres Strait Islander communities have most control over the community governance component,⁹⁰ although this doesn't discount the need for engagement with governments and other external parties. This engagement most often occurs through our organisational governance.

(ii) Organisational governance

Effective organisational governance enables our organisations to achieve the goals of Aboriginal and Torres Strait Islander peoples, and deliver services to our communities. Aboriginal and Torres Strait Islander organisations with effective organisational governance incorporate community governance structures which can facilitate and contribute to effective community governance, enabling communities to respond to their own challenges and service delivery needs. They also provide an interface between community and external stakeholders, particularly governments.

To be effective, Aboriginal and Torres Strait Islander organisations have to be both legitimate within the communities in which they operate, and fulfil the requirements of the broader governance environment,

87 Dodson and Smith, note 4, p 18.

88 Hunt and Smith, 2005, note 16.

89 Hunt and Smith, 2006, note 16, p 5.

90 Dodson and Smith, note 4, p 11.

including legislation and funding requirements.

Legitimacy in community can come about in a variety of ways, as will be seen in the case studies in Chapter 4. In principle, though, the governance of an organisation must be consistent with the governance culture of the community in which it operates.

Aboriginal and Torres Strait Islander organisations fulfil a range of roles which tend to fall into two categories – advocacy or representative roles, such as those of representative councils or women’s groups, and service delivery roles, such as those of the Aboriginal Medical Service. Many organisations fulfil a combination of these types of roles. The governance arrangements of these organisations might need to be different, according to the governance culture of the communities in which they are based and the purpose of the organisation.

Much focus has been placed on building the corporate governance capacity of Aboriginal and Torres Strait Islander organisations.⁹¹ For example, the Office of the Registrar of Indigenous Corporations (ORIC) has reported that during the period 2011-2012, it delivered governance-related training to 629 participants from 154 organisations.⁹²

However there has not been a parallel focus on community governance or the governance of governments. While ORIC aim to ‘ensure that incorporation models, processes and support services fit within the specific culture of the community and locality’, training provided is centred on ‘ORIC’s commitment to increase corporate governance knowledge, skills, efficiency and accountability’.⁹³

Governments’ failure to acknowledge and resource broader governance capacity-building has narrowed the focus to ‘organisational management and compliance competencies rather than... the broader process of Indigenous self-determination’.⁹⁴

However, organisational structures which work well are those which are not imposed from outside but which reflect and respond to different local conditions and relationships.⁹⁵ For example, one study found that Aboriginal and Torres Strait Islander organisations were more likely to be successful if they:

- had effective control over their operations
- paid as much attention to internal accountability (ie the community members who benefited from the organisation) as they did to external accountability (such as reporting to funding bodies and the corporate regulator)
- managed close relationships or cultural obligations well.⁹⁶

Dodson and Smith have explained how a successful Indigenous organisation blends community governance requirements and requirements of the broader governance environment:

Cultural match is not simply a matter of importing romanticised views of traditional Indigenous structures or authority, and expecting them to handle economic development decisions, financial accounts and

91 See for example, discussion in K Thorburn, ‘Mapping expectations around a ‘governance review’ exercise of a West Kimberley organisation’ in J Hunt, D Smith, S Garling, W Sanders (eds) *Contested Governance: culture, power and institutions in Indigenous Australia*, CAEPR (2008), p 331.

92 Office of the Registrar of Indigenous Corporations (ORIC), *Correspondence with the Social Justice Commissioner*, 6 September 2012, p 2.

93 ORIC, above.

94 C Willis, *Review of Governance Training for Indigenous Organisations and Communities in the Northern Territory: Final Report*, Department of Community Development, Sport and Cultural Affairs, p 3 in J Hunt, *Capacity Development in the International Development Context: Implications for Indigenous Australia*, CAEPR Discussion Paper No. 278/2005 (2005), p18.

95 Hunt and Smith, 2006, note 16.

96 AIATSIS and the Australian Collaboration, note 30, p 9.

daily business management. Creating a cultural match is more about developing strategic and realistic connections between extant cultural values and standards, and those required by the world of business and administration.⁹⁷

This balance is difficult and Aboriginal and Torres Strait Islander organisations are often on the ‘sharp end’ of the requirement to manage the differences between the governance cultures of community and government. The legislative, regulatory and funding requirements on Aboriginal and Torres Strait Islander organisations mean that organisations either do not reflect legitimate community governance arrangements, and are therefore likely to be less effective, or that organisations have to manage two systems of accountability.

Aboriginal and Torres Strait Islander organisations frequently manage the tensions caused by the dual system of requirements. There are ways of creating and establishing organisational structures and principles ‘which are robust enough to encompass and engage the often divergent Aboriginal and non-Aboriginal values and practices.’⁹⁸ This requires organisations to be culturally appropriate and meaningful but ‘also facilitate effective engagement with the dominant society rather than limiting it.’⁹⁹

Aboriginal and Torres Strait Islander organisations with good governance are innovative hybrids which combine the features of the community’s governance culture with the requirements of the governments’ governance culture. They:

- are legitimate (and representative if necessary) in the eyes of the community
- have transparent and efficient decision-making and dispute resolution procedures that encompass cultural values and community governance
- are accountable to the people they represent and service as well as to any external, partners, stakeholders and funding providers
- have the capacity to meet the requirements of the law and its funding providers
- facilitate, not obstruct, productive relationships with government and other external stakeholders.

While incorporating conflicting governance cultures can place significant pressure on organisations, successful Aboriginal and Torres Strait Islander organisations are able to straddle two worlds and use checks and balances from both governance cultures to enable this.¹⁰⁰ However, the ease with which this balance can be achieved is dependent on the actions of governments.

(iii) The governance of government and other external influences

The governance of government impacts significantly on the other two components within the framework, and the evidence confirms that it can play a determining role in whether or not we achieve our aims. In fact, ‘it seems that many of the capacity ‘problems’ in Indigenous community [and organisational] governance stem from a disabling, rather than enabling environment or system.’¹⁰¹

In particular, government affects Aboriginal and Torres Strait Islander governance through legislation, policies, and bureaucratic practices and decision-making. The evidence has repeatedly demonstrated that it is the entrenched failure of the governance of governments that is the major impediment to Indigenous people

97 Dodson and Smith, note 4, p 19.

98 Martin, note 27, p 2.

99 Martin, note 27, p 2.

100 D E Smith and J Hunt, ‘Understanding Indigenous Australian governance – research, theory and representation’, in Hunt, et. al., note 91, p 16.

101 Hunt, note 94, p 18.

developing and sustaining our own governance arrangements.

There are three areas of the governance of governments that are critical to enabling effective governance for Aboriginal and Torres Strait Islander communities:

- the capacity and skills of government
- the administrative burden of government
- the overarching relationship between Aboriginal and Torres Strait Islander peoples and communities and government.

The capacity and skills of government

It is a great, and sad, irony: the very aim of building capacity in indigenous communities is undermined because many of those charged with the task lack the capacity to do their jobs.¹⁰²

Essential services are often delivered to Aboriginal and Torres Strait Islander people by non-Indigenous organisations, either government, non-government organisations or private companies. The way these organisations are run and the basis on which they work with Aboriginal and Torres Strait Islander peoples is critical to achieving outcomes for the people they service. This includes the cultural competency of management and the staff working on the ground, and the way in which capacity is transferred to the community in the process of delivering services.

There have been a raft of reports from inside and outside government, finding that governments' own capacities have a significant impact on the ability of Aboriginal and Torres Strait Islander communities and organisations to govern appropriately and achieve our aims.

A major concern with regard to the capacity of government officers is the lack of cultural competency. For example, the Northern Territory Coordinator-General for Remote Service Delivery observed:

Many of those charged with the implementation of government policy and the delivery of programs in Aboriginal towns in the Northern Territory often have a very limited understanding of Indigenous people and their cultures. This has led to generations of interaction and intervention based on the perceptions of the non-Indigenous world on what constitutes success, and has continued to fail to support Aboriginal people in determining and meeting their own aspirations.¹⁰³

The 2010 *Strategic Review of Indigenous Expenditure* also found that a key challenge to effective service delivery included equipping those delivering the services with the skills needed to engage effectively with the Indigenous people they are supporting.¹⁰⁴

As discussed above, the key differences between what constitutes effective governance generally and what constitutes effective governance in Aboriginal and Torres Strait Islander communities differs greatly. As such, the approach taken by governments to development in our communities is misguided and does not align with the actual needs of the communities. Consequently, the tools developed to measure outcomes are often ineffective. Instead of measuring development outcomes, government measures the number of transactions or

102 M Gordon, 'NT's tough love: helping hand or a heavy hand?', *The Age*, 7 July 2012. At <http://www.theage.com.au/opinion/politics/nts-tough-love-helping-hand-or-a-heavy-hand-20120706-21mma.html#ixzz2058RZ6Ww> (viewed 12 October 2012).

103 O Havnan, *Office of the Northern Territory Coordinator-General for Remote Services Report June 2011 to August 2012* (2012), p i. At http://www.rdia.nt.gov.au/indigenous_advancement/coordinator-general/progress_reports (viewed 12 October 2012).

104 Department of Finance and Deregulation, *Strategic Review of Indigenous Expenditure – Report to the Australian Government* (February 2010), p 13. At http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 12 October 2012).

money spent.¹⁰⁵ This is demonstrated in a recent Australian National Audit Office report on an early childhood initiative:

The performance indicators in use relate to the number of service providers and the timeliness of enlisting new service providers. The indicators, while helpful to measure activity under the program, do not provide sufficient insight into the program's achievements with regard to improving access to and use of maternal and child health services.¹⁰⁶

The Australian Government is well aware that it must change the paradigm within which administrative requirements are applied to a focus on community outcomes rather than compliance.¹⁰⁷ This change of paradigm will require an investment on Governments' part to change its internal culture to one focused on understanding its role in facilitating outcomes for communities rather than controlling them.

The administrative burden of government

Governments lack of understanding of its role in enabling effective governance in Aboriginal and Torres Strait Islander communities' results in significant and unnecessary administrative burden. For example:

- different governments and government agencies are not coordinated: different layers of legislation interact with each other and processes vary between agencies¹⁰⁸
- funding is often provided on a short-term basis and the requirements of government agencies are often onerous in proportion to the amounts of funding available or provided¹⁰⁹
- the unstable policy environment creates uncertainty and additional administrative burden.¹¹⁰

'Fragmented or rapidly changing government processes; overload of reform and change initiatives; ad hoc funding; poorly coordinated and monitored programs; and multiple accountability requirements (red tape)' disable communities and organisations capacity to deliver outcomes and achieve their aims.¹¹¹

The 2004 House of Representatives Committee on Aboriginal and Torres Strait Islander Affairs' *Report into Capacity Building and Service Delivery in Indigenous Communities* recognised that governments need to improve their ability to communicate, cooperate, and integrate among themselves, as well as the ability to develop good communication and genuine partnerships with Indigenous communities.¹¹²

Hunt and Smith have argued that governments need to:

105 Morgan Disney and Associates Pty Ltd, *Red Tape Evaluation in Selected Indigenous Communities – Final Report for The Office of Indigenous Policy Coordination* (May 2006), p 9. At http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/indigenous_redtapereport.pdf (viewed 12 October 2012).

106 Australian National Audit Office, *Indigenous Early Childhood Development, New Directions: Mothers and Babies Services*, Report for the Department of Health and Aging, Audit Report No. 35 2011-12 (2012), para 28. At <http://www.anao.gov.au/~media/Uploads/Audit%20Reports/2011%2012/201112%20Audit%20Report%2035/201112%20Audit%20Report%20No35.pdf> (viewed 12 October 2012).

107 Morgan Disney, *Red Tape Evaluation in Selected Indigenous Communities*, note 105, p 10.

108 ORIC, note 92, p 8.

109 See for example, Hunt, note 94, p 26. See also K Tsey, J McCalman, R Bainbridge and C Brown, *Improving Indigenous community governance through strengthening Indigenous government organisational capacity*, Resource Sheet No 10, Closing the Gap Clearinghouse, Australian Government (January 2012). At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs10.pdf (viewed 11 October 2012); Department of Finance and Deregulation, *Evaluation of service delivery in remote Indigenous communities* (April 2009). At http://www.anao.gov.au/uploads/documents/Evaluation_of_Service_Delivery_in_Remote_Indigenous_Communities.pdf (viewed 12 October 2012).

110 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Steering Committee for the Review of Government Service Provision (2011), p 609. At http://www.pc.gov.au/_data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf

111 K Tsey, note 109, p 2.

112 See for example recommendation 13.

better coordinate internally; reduce the number of separate departmental and program-specific consultations with communities; rationalise government program delivery; undertake a community-development approach to governance building' reduce the large number of different funding mechanisms and give more broad-based, longer-term funding linked to broad community development goals.¹¹³

The overarching relationship between Aboriginal and Torres Strait Islander peoples and communities and government

As discussed throughout this chapter, enabling effective governance in Aboriginal and Torres Strait Islander communities requires relationships between governments and those communities based on trust, mutual respect and genuine partnership. This relationship is currently on very shaky ground.

The tension that currently underpins this relationship stems from the inherent imbalance of power between Aboriginal and Torres Strait Islander peoples and governments. This plays out through governments relegating Aboriginal and Torres Strait Islander governance structures to an advisory, consultative or service delivery role; or dismantling them altogether. This is discussed further in Chapter 3.

Dr Jonas as Social Justice Commissioner said that the 'service delivery model' of governments' Indigenous affairs policy over the last 30 years has 'operated, no doubt unintentionally, to constrain Indigenous social and economic development'.¹¹⁴

The current relationship reduces governance in Aboriginal and Torres Strait Islander communities to being about financial management and the delivery of government services. Stephen Cornell describes this approach as 'self-administration':

saying to Aboriginal communities, if you can demonstrate that you can adopt the best practices of western corporate governance or administration, as laid out by us we'll let you run the programs we design and fund for you. You can administer yourselves as long as you do it the way we would do it.¹¹⁵

In doing this, governments insist on retaining control over Aboriginal and Torres Strait Islander people's lives.

The Government appears reluctant to relinquish any control over decision making or resource allocation and accordingly, they have set a narrow basis for the relationship between Indigenous peoples.¹¹⁶

The evidence shows that this approach is unlikely to yield the results government and most importantly Aboriginal and Torres Strait Islander people want. What works is real decision-making power in the hands of Aboriginal and Torres Strait Islander peoples:

supporting them as they wrestle with the governmental design challenge, expecting that they will make mistakes but recognising that over time, their own resourcefulness is likely to come up with more effective solutions to governance problems than outsiders are likely to do.¹¹⁷

In 2004, the House of Representatives Committee concluded that that what is required is a power shift to enable genuine partnerships and shared power arrangements.¹¹⁸ Hunt argues the need for a power shift as follows:

113 Hunt and Smith, 2005, note 16, p 5.

114 *Social Justice Report 2002*, note 66, p 69.

115 Cornell, note 42.

116 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003*, Human Rights and Equal Opportunity Commission (2004), p 65. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport03/exec.html (viewed 11 October 2012).

117 Cornell, note 42.

118 Recommendation 13.

Until greater power and resources are shifted into Indigenous hands—whether to communities or organisations at various levels—whatever individual capabilities there are will not be transformed into capacity ... Despite the language of ‘partnership’ which implies some sort of equality and mutuality in the relationship, in reality, Indigenous organisations and communities are essentially contractors required to meet stringent accountability requirements set by government—a situation in which government holds the power. This is not a situation in which agreed evaluative standards have been negotiated by partners, and in which accountability downwards to clients is seen as more important than accountability upwards to political masters.¹¹⁹

This does not mean that government simply transfers power and walks away from Aboriginal and Torres Strait Islander communities.

A new relationship needs to be negotiated. Governments have to accept that the way to achieve the sustainable economic and social development to which they are committed is to relinquish some of their power and come to a genuine power-sharing arrangement with Aboriginal and Torres Strait Islander communities.

The question which arises, though, is whether governments really see themselves in partnership with Indigenous communities or organisations, at whatever level, in recognition of significant cultural differences between ‘mainstream’ Australia and Indigenous people as First Nation people, or whether, philosophically, government treats Indigenous people merely as disadvantaged citizens.¹²⁰

119 Hunt, note 94, pp 21-22.

120 Hunt, note 94, p 20.

2.4 A framework for effective governance in Aboriginal and Torres Strait Islander communities

From the extensive research, I can see that there are some well-understood principles for enabling and supporting effective Indigenous governance. Distilled, the overall picture can be presented as a framework for effective governance in Aboriginal and Torres Strait Islander communities.

The framework outlined below is an amalgamation of the key human rights principles and the three components of effective governance in Aboriginal and Torres Strait Islander communities.

Through this framework, Aboriginal and Torres Strait Islander communities can see what they need to focus on to build governance capacity within our own communities and organisations.

External parties, such as government, involved in delivering services or developing capacity in Aboriginal and Torres Strait Islander communities can also see their role in this framework and how they can best contribute to Aboriginal and Torres Strait Islander people achieving our community aims and priorities. The framework particularly addresses the governance of governments because government is the largest external influence on Indigenous governance.

The intricate relationships involved in the framework for effective governance in Aboriginal and Torres Strait Islander communities means that all components are interconnected. There is significant overlap between the factors and principles involved. Outlined below are the key components in the framework for effective governance in Aboriginal and Torres Strait Islander communities. It should not be read as a checklist but rather as a picture of how successful interactions in the Indigenous governance environment would look across the three components.

Text Box 2.10

Framework for effective governance in Aboriginal and Torres Strait Islander communities

Community governance

Effective governance in Aboriginal and Torres Strait Islander communities starts with community governance, and community governance is based on self-determination.

Community governance is up to Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples need to decide what it is we want to achieve and how we want to organise ourselves to achieve that. Each community – be it a discrete remote community, a traditional nation, an urban community, a regional community, or the national community – should invest in strengthening, re-building or in some cases building anew, community governance structures and mechanisms. Some or all of the elements of this process will be harder for some communities than others.

Strengthening community governance arrangements involves Aboriginal and Torres Strait Islander people:

- drawing on their unique governance cultures and traditions, and working from a basis of respect for and protection of culture
- determining what constitutes legitimacy for each community – who can speak when, for whom, to whom, and regarding what? This includes ensuring the vulnerable within

communities are represented and have a voice

- establishing processes:
 - o for the community to participate in decision-making to determine priorities and aspirations
 - o for engaging with the broader governance environment
 - o that ensure accountability to community
- incorporating what communities decide regarding legitimacy and representation into the structures and functions of community organisations
- insisting on the community governance culture being respected in relationships with other parties in the Indigenous governance environment.

Community governance must be the foundation of all governance structures, processes and relationships involved in the Indigenous governance environment, including organisational governance and the governance of governments.

Organisational governance

There are two arms of organisational governance in the framework for effective governance in Aboriginal and Torres Strait Islander communities: one relates to advocacy and the representation of community, for example representative councils, and the other relates to service delivery, for example the Aboriginal Medical Service. Sometimes our organisations play both these roles, and both are often built on representative structures.

Effective organisational governance enables our organisations to get things done.

To be effective, an Aboriginal and Torres Strait Islander organisation needs to strike a balance between legitimacy within community and the requirements of the broader governance environment. This requires our organisations to:

- reflect and incorporate community governance and authority structures in their structures and processes, so far as is appropriate considering the purposes of the organisation
- be accountable to community for outcomes as well as to any external partners, stakeholders and funding providers
- have sound corporate governance structures and processes, including for example: separation of powers, where necessary; appropriate and transparent decision-making and dispute-resolution mechanisms; human resource, information and financial management systems; and performance evaluation, accountability and reporting systems
- ensure that they have capacity to engage with and fulfil the legislative, regulatory and funding requirements imposed by government.

Governance of governments

Ultimately, government needs to be open to developing a new relationship with Aboriginal and Torres Strait Islander peoples, based on a recognition of shared sovereignty and self-determination within the Australian nation.

The role of governments in the framework for effective governance in Aboriginal and Torres Strait Islander communities is to support, enable and empower Aboriginal and Torres Strait Islander peoples

and organisations. To do this, governments need to ensure all interactions with Aboriginal and Torres Strait Islander communities and organisations are based on respect for community governance. Governments must:

- recognise that empowerment is key to achieving the cultural, social and economic development goals of Aboriginal and Torres Strait Islander people
- remain focused on an outcomes-based approach and therefore base all policies, legislation and administrative practice on a foundation of respect for self-determination, including:
 - o respecting and supporting our representative and decision-making processes and structures
 - o broadening support for organisational governance capacity building by investing in our institutional capacity building as well as our service delivery capacity¹²¹
 - o ensuring we are able to participate in decisions which affect us, including by providing us with complete access to all relevant information in a culturally appropriate manner, including our own languages and providing us with adequate timeframes to make a decision
- ensure that government policy and practice does not diminish our community and organisational capacity by:
 - o coordinating and reconciling different legislative, policy, program and administrative arrangements within and between governments
 - o building on existing strengths instead of making major policy and legislative changes on a regular basis, which requires communities and organisations to regularly amend their compliance practices
 - o reforming funding and reporting processes so that the work required of our organisations is proportionate to the funding granted and organisations have longer-term funding certainty
 - o acknowledging the resources required to engage, and therefore properly resourcing organisations to engage effectively with government
 - o ensuring appropriate levels of cultural competency and skills in all staff engaged in managing and delivering services to our communities
- measure the contribution of government and government funded initiatives using outcomes-based targets, rather than transactional targets.

The relationships between all of these components and parties must be based on good faith. This means ensuring that participation in decision-making occurs in a cooperative and fair manner and ensures transparency and fairness for all members of our communities.

121 Cornell, et. al., note 14, pp 23-28.

2.5 Conclusion and recommendations

Effective, legitimate and culturally relevant Indigenous governance is essential for Aboriginal and Torres Strait Islander peoples to address the significant challenges that we face.

The three key components of effective governance in Aboriginal and Torres Strait Islander communities – community governance, organisational governance and the governance of governments – each have a role to play in empowering Aboriginal and Torres Strait Islander communities to achieve sustainable economic, social and cultural development outcomes that align with our determined priorities.

Governments should recognise our right to self-determination and work in ways that operationalize the principles of the Declaration. Sometimes this simply means getting out of the way, removing the swathes of red tape and giving our communities the time and space to take stock, make decisions and take control. Sometimes it means providing support and building capacity. Serious consideration of the framework outlined in this chapter will significantly increase the cultural competence of governments so that they can assist us in achieving our goals and improving the quality of life experienced by Aboriginal and Torres Strait Islander people.

Our organisations need to be transparent, accountable and robust in their support of the community. Our organisations must be underpinned by our community governance. They must also have the corporate governance capacity required by the legislative and funding frameworks in which they operate.

Finally, community governance is where self-determination is exercised. While governments and our organisations should support this, effective governance for Aboriginal and Torres Strait Islander people's needs to start with us – with our peoples and with our communities. If we are to truly exercise our self-determination, we need to apply the principles of the Declaration internally in our own decision-making. We must ensure that they are reflected in our governance structures; and we must comply with them and promote them as the minimum standard required for others who seek to engage with us.

Recommendations

- 2.1 That the Australian Government acknowledges that effective Indigenous governance is central to sustainable development in Aboriginal and Torres Strait Islander communities.
- 2.2 That the Australian Government builds its own capacity to enable and support effective Indigenous governance.
- 2.3 That all governments properly resource Aboriginal and Torres Strait Islander communities to strengthen their contemporary governance structures. This resourcing must be part of a new relationship between Aboriginal and Torres Strait Islander peoples and governments based on genuine power-sharing and partnership.

Chapter 3:

Local government reform and the Intervention: disempowerment in the Northern Territory

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3.1 Background

The period since 2007 has been one of great upheaval in remote Northern Territory Aboriginal communities. Local government reforms coincided with the Northern Territory Intervention.¹ Around the same time reforms to Community Development Employment Projects (CDEP), housing arrangements, remote service delivery, and homelands policy were also introduced. The extent and regularity of imposed change faced by remote Northern Territory Aboriginal communities has unsettled the governance structures and shifted decision-making responsibility from communities to centralised government institutions.²

This chapter illustrates the complexity of governance in Aboriginal and Torres Strait Islander communities' particularly in remote areas³, and demonstrates how Aboriginal communities in the Northern Territory have suffered acutely from government impositions over the last five years.

It examines two of the abovementioned policy reforms: the amalgamation of Aboriginal Community Councils (Community Councils) into new 'Super Shires' as part of local government reforms in 2008; and the Northern Territory Intervention which commenced in 2007. In particular, this chapter highlights how imposed changes by governments, and sometimes several governments at once, cause significant upheaval for communities. For example, the local government reforms and the Intervention measures were introduced by different levels of government, but were indistinguishable to many community members.⁴

The cumulative effects of these policies disempowered communities and the nature of the interrelated impacts must be understood together.

Focus will be given to the ongoing trend of governments to proceed with policies that have been developed with little or no genuine engagement with Aboriginal and Torres Strait Islander peoples.

The localised variability in governance structures, both formal and informal, means that I am taking a broad view in this chapter, with the understanding that the governance situation is different across communities. Some communities may prefer the new arrangements. However, as demonstrated below, the overwhelming evidence to date is that the local government reforms and the Intervention have resulted in disempowerment and distrust.

1 Throughout this chapter I refer to the 'Intervention', 'Northern Territory Emergency Response' (NTER) and 'Stronger Futures'. I will use NTER and Stronger Futures when referring to the specific legislation and policies under those respective legislative packages. I use the term Intervention to refer to the ongoing Australian Government involvement in remote communities in the Northern Territory since 2007.

2 J Phillips, E Franklin and R Viswanathan, *A Better Way: Building healthy, safe and sustainable communities in the Northern Territory through a community development approach*, Australians for Native Title and Reconciliation (2011), p 34. At <http://antar.org.au/reports/a-better-way-building-healthy-safe-and-sustainable-communities-northern-territory-through-a> (viewed 11 October 2012).

3 For discussion on the complex nature of governance in Aboriginal and Torres Strait Islander communities see for example, B Ivory, 'Indigenous leaders and leadership: agents of networked governance', in J Hunt, D Smith, S Garling and W Sanders (eds), *Contested Governance: Culture, power and institutions in Indigenous Australia* (2008), p 233.

4 R Elivin, *Local government reform in the NT- reforming the governance of service delivery and the view from the Barkley*, Desert Knowledge working paper 41 (2009). At <http://www.desertknowledgecrc.com.au/publications/dkrc-0632> (viewed 11 October 2012).

3.2 Local government reform: Shires

In 2006 the Northern Territory Government embarked on a process of local government reform. The Northern Territory Government argued that the reforms were necessary because smaller Community Councils were financially unsustainable and amalgamating Community Councils into Shires covering broader regions would result in better service delivery and improved outcomes.⁵

The reforms were implemented in under two years and involved the amalgamation of around 60 Aboriginal Community Councils into eight new Shires on 1 July 2008.⁶ Initial plans were for the amalgamations to include all Community Councils across the Northern Territory. However after fierce resistance to the amalgamation by some communities, the plans to form a ninth 'Top End Shire' in the rural areas around Darwin were scrapped and the existing Community Councils retained.⁷ This caused some communities outside the proposed 'Top End Shire' area, who had engaged in the process of amalgamations on the understanding that the reforms were inevitable, to feel as though they had been treated unfairly.⁸

As can be seen in Image 3.1, the reforms drastically changed the governance landscape in the Northern Territory.

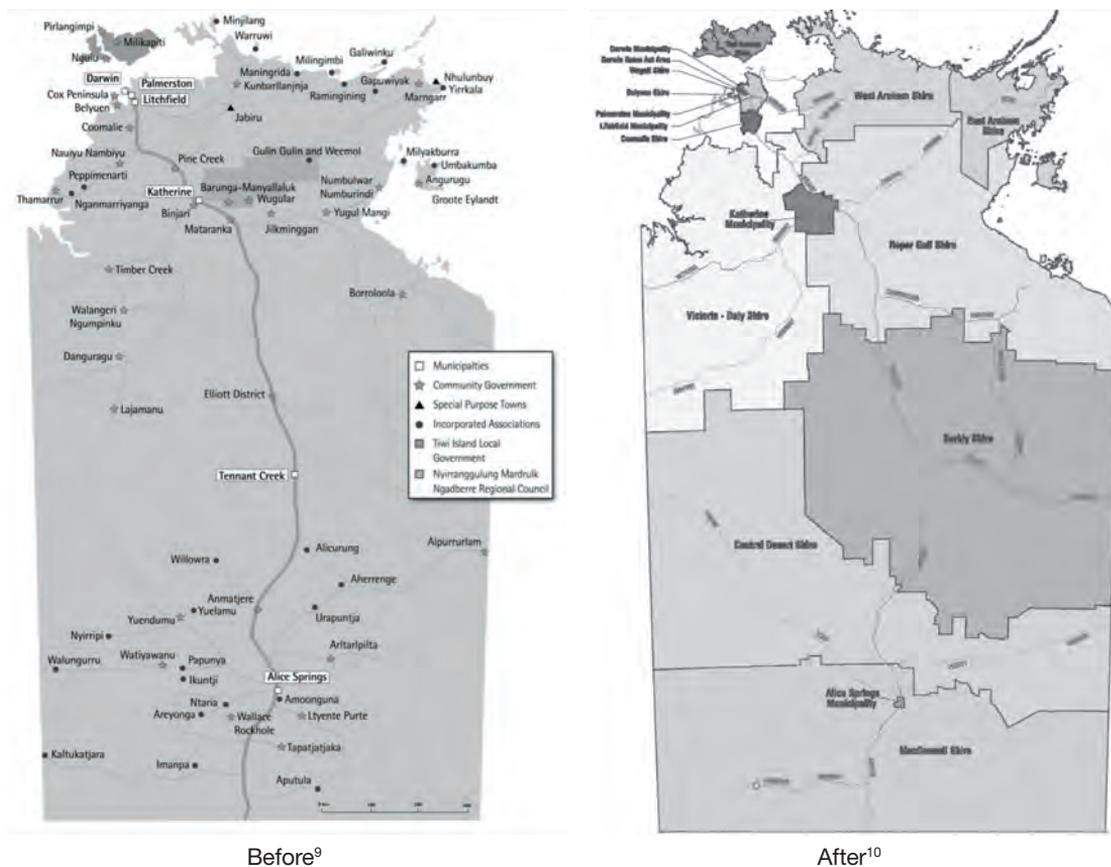
5 E McAdam, Minister for Local Government, *Minister's speech* (Speech delivered at the Local Government Association of the Northern Territory Conference, Alice Springs, 2006), in T Michel, R Gerritsen and I Thynne, *Northern Territory Scoping Study*, Australian Centre of Excellence for Local Government: Rural-remote and Indigenous Local Government Program (2010), p 12. At <http://www.acelg.org.au/library.php?id=mostRecent> (viewed 11 October 2012).

6 *Local Government Act 2008* (NT).

7 'Local govt reformer resigns over scrapping of super-shire plan', *ABC News*, 12 February 2008. At <http://www.abc.net.au/news/2008-02-12/local-govt-reformer-resigns-over-scrapping-of/1040388> (viewed 11 October 2012).

8 D Smith, 'Cultures of governance and the governance of culture: transforming and containing Indigenous institutions in West Arnhem Land', in, Hunt et. al., note 3.

Image 3.1:
Comparison map of Community Councils and Shires



The impact of the reforms has significantly diminished the capacity of communities to determine and address their specific needs. While the Community Council model was not working well in every context, Community Councils themselves had provided a vehicle through which communities balanced their particular community decision-making models with the structures required by government. In contrast, the establishment of the Shires removed the capacity for discrete Aboriginal communities to prioritise their own issues. Instead, the Shires model has centralised decision-making regarding service delivery across many communities. Completely removing the Community Councils disrupted the balance which had carefully evolved over many years.

The following analysis should not be seen as criticism of the operation of any specific Shire. Nor am I

9 From, W Sanders, *Changing Scale, Mixing Interests: Generational Change in Northern Territory Local Government*, CAEPR Working Paper No. 79/2011 (2011), p 2. Adapted from, Northern Territory Grants Commission, *2003–04 Annual Report*, Northern Territory Government (2004), p 44.
 10 Department of Housing, Local Government and Regional Services, 'Local government boundaries in the Northern Territory', Northern Territory Government. At http://www.localgovernment.nt.gov.au/shire_boundaries (viewed 11 October 2012).

dismissing the impact of the difficult environment in which Shires operate. I have heard some positive stories and know many people are working hard to make the Shires system work as well as possible for their constituencies.

I am particularly grateful to Gulf/Roper Shire Mayor Tony Jack and CEO Michael Berto and their staff who have hosted me on two occasions and have provided in depth briefings on the challenges facing these new Shires.

The failure of many systemic aspects of the design, implementation and functioning of the reforms is too overwhelming to ignore. It is ironic that many of the systemic failures attributed to Community Councils such as unsustainable funding are now emerging in the amalgamated Shires. These failures will be further explored later in this chapter.

(a) Community Councils before amalgamation

The Northern Territory moved to allow Aboriginal self-government at a local council level from 1978. From this time local governing bodies and Community Councils were established across the Northern Territory, with a large growth in the number of Community Councils through the 1980s and 1990s.¹¹

These Community Councils had broader responsibilities and a greater degree of autonomy and flexibility than other local government councils. They had control over community priorities and the manner in which services were delivered; and they had the authority to make a wide range of decisions ordinarily outside the remit of local councils.

Because of the many and varied roles they played in service delivery, government interface, and dispute resolution, Community Councils were a central part of communities.

(i) Roles of Community Councils

In order to meet the communities' needs, the role of Community Councils was broad and varied. They had developed over time in response to specific needs and as such communities felt the structures provided a certain amount of community control and ownership. In fact, communities had come to accept the Community Councils as formal decision-makers, representatives to government and service deliverers of the community.¹²

Because of this broad role, there is a need to look beyond the administrative role and the narrow economics of Community Councils when assessing them. The community reliance and attachment to their local organisations is an 'expression of Aboriginal and Torres Strait Islander cultural identity within Australian society'.¹³

For example, Community Council members would often accept that broader responsibilities such as organising funerals or addressing community issues were part of their role.¹⁴ They also provided cultural leadership and broader community organisation.¹⁵

11 W Sanders, *Local Governments and Indigenous Interest in Australia's Northern Territory: History, Demography, Areas and Finances*, Centre for Aboriginal Economic Policy Research, Australian Political Sciences Conference (September 2006).

12 Sanders, above.

13 Australian Centre for Excellence in Local Government, *Local Government service delivery to remote Indigenous communities: Review of service delivery models and approaches in various jurisdictions* (May 2012), p 69. At <http://www.acelg.org.au/news-detail.php?id=225> (viewed 11 October 2012).

14 Central Land Council, *The governance role of local boards: A scoping study from six communities* (2010), p 40. At <http://www.clc.org.au/publications/content/clc-review-of-shire-local-advisory-boards> (viewed 11 October 2012).

15 Phillips et. al., note 2, p 29.

Advocacy and government interface role

Community Councils took on a role as advocate for local communities, lobbying government and navigating bureaucratic systems to receive grants to ensure they had the funding to continue to provide services to the community.

In this role, Community Councils were a body with which Territory and Australian governments could consult to determine community needs and priorities. Individuals within communities understood the way Community Councils represented their interests to government. Over their many years of operation, Community Councils had developed individually tailored approaches to their interface role with governments. This enabled input and decision-making based on community governance structures as well as a mechanism to feed those decisions regarding their communities' needs to government.¹⁶

Service delivery role

Community Councils were often the sole service provider in their region. They took on many roles because of a lack of private or other government operators. On top of typical core local government functions such as waste management,¹⁷ Community Councils were often responsible for additional services such as:

- aged and child care
- CDEP programs
- power, water and sewerage management
- weed management
- postal services
- horticulture
- management of community stores
- airstrip management and maintenance
- community safety responsibilities which sometimes involved the organisation of night patrols or safe-houses
- provision of welfare and employment services to the community.¹⁸

One significant example is how Community Councils often acted as Indigenous Community Housing Associations. These associations facilitated community engagement in decision-making on issues related to community housing such as tenancy issues and rent models.¹⁹ This sometimes extended to making decisions with communities about who would receive housing or how community housing could be best utilised to meet the challenges and priorities of the communities.²⁰ Public housing maintenance and repairs would also often come under the responsibility of Community Councils. I will discuss the new housing arrangements in more detail later in this chapter.

16 Australian Centre for Excellence in Local Government, note 13, p 20.

17 T Michel, R Gerritsen, and I Thynne, *Northern Territory Scoping Study*, Australian Centre of Excellence for Local Government: Rural-remote and Indigenous Local Government Program (2010). At <http://www.aceelg.org.au/library.php?id=mostRecent> (viewed 11 October 2012).

18 Michel et. al., above, p 9.

19 Central Land Council, note 14, p 52.

20 Central Land Council, above.

Many of these services were delivered by the Community Council either without direct funding or with inadequate funds provided through uncertain and administratively burdensome grants.²¹

Given the limited resources of Community Councils, the involvement of community members was critical to delivering outcomes. Local people were employed by the Community Council, either through the CDEP program or on the payroll, to provide services to the community.

The ability for the Community Council to employ local people contributed to developing the capacity of those communities.

Community Councils, for example, had the responsibility, the equipment, and the workforce to maintain roads and fix homes. This meant that despite being under resourced, they were able to act both proactively and reactively to address problems as soon as practicable.

Most importantly, responsibility for service delivery and many aspects of the maintenance of communities was in the hands of the community themselves. Although underfunded, the Community Councils had the power to prioritise resources to implement their decisions.

I have been told that because of the high degree of decision-making responsibility and local participation in the running of the communities resulted in levels of empowerment for the community; individuals were able to take pride in their town. The Community Council arrangements facilitated people's ability to make positive and valued contributions to their community.²²

Dispute resolution role

Many Community Councils would use meetings to address local disputes, combining the authority of traditional structures with the legislative authority of the Community Council.²³ A community member from Yuendumu commented:

If it was a community issue and we had a meeting to discuss everything, disputes and violence on the community among family members and sorted out that particular problem that way. That worked, that worked really well. That was the power in the traditional way, the traditional owners as a group no say in this new thing.²⁴

(ii) Challenges faced by Community Councils

As outlined above, Community Councils had far greater governance and service delivery responsibilities than other local government bodies. The reliance by government on the under resourced and overburdened Community Councils to provide services caused a number of challenges, including:

- The functionality and effectiveness of councils and provision of services varied greatly.
- As small organisations, the capacity of individuals in the administration was often key to their success.
- There was a high turnover of externally sourced (non-community) staff in many Community Councils.

21 Phillips et. al., note 2, pp 31-32.

22 Council of Territory Cooperation, *Third Progress Report*, Legislative Assembly of Northern Territory (November 2010), p 22.

23 Central Land Council, note 14, p 45.

24 Central Land Council, note 14, p 46.

- There was a perception that some Community Councils were ‘high-risk’ or ‘dysfunctional’.²⁵ Some instances of financial and administrative mismanagement were reported and there were concerns that this system did not contain adequate safeguards to prevent these instances in the future.²⁶
- Community Councils were highly reliant on government funding in the form of grants and invoiced services for nearly all of their operations. This added to the burden placed upon their often limited administrative capacity.²⁷
- Claims of nepotism surrounded the administration of some Community Councils - powerful family and cultural dynamics were said to lead to certain groups dominating decision-making, sometimes to the exclusion of others.²⁸

Governments viewed these challenges as deficits exclusive to the Community Council model. However they did not consider the systemic issues that arise from government legislative and policy frameworks that also contribute to the challenges faced by Community Councils. Rather than looking at ways to improve the Community Council model, the Northern Territory Government moved to abolish it.²⁹

They imposed a new system without adequate consultation or input from the communities, and as a result this system is also fraught with challenges, both to the communities and to the Northern Territory and Australian Governments.

(b) The reforms: Shires

The new Shires were established by the Northern Territory Government through the *Local Government Act 2008* (NT).

The reforms creating the Shires were motivated by a desire to consolidate council service delivery and governance by amalgamating councils into regional centres. The Northern Territory Government believed that small councils were unsustainable and that the consolidation would address the systemic problems faced by Community Councils. The reforms were intended to ensure the delivery of ‘better and more reliable services’ and stronger leadership and governance.³⁰

In discussing the reforms, the Minister for Local Government acknowledged the ‘fine achievements’ of Community Councils and expressed hope that these achievements could be more consistently reached after the amalgamation.³¹ The Minister went on to promise communities would ‘be better off’ and that the changes would act to maintain an ‘appropriate sense of identity’ in communities.³²

However, the outcomes of the amalgamations have been concerning. There are several factors in the design

25 A report in 2006 found that 50% of Community Councils were considered to be ‘high risk’ or ‘dysfunctional’. E McAdam, Minister for Local Government, *Minister’s speech* (Speech delivered at the Local Government Association of the Northern Territory Conference, Alice Springs, 2006), in T Michel, *Who Defines ‘Sustainability’? Perspectives on the recent transition from Community Councils to Regional Shires in the Northern Territory* (Paper for the Local Government Researchers Forum, Sydney, 14-15 December 2011), p 5. <http://www.acelg.org.au/news-detail.php?id=187> (viewed 11 October 2012).

26 Michel, above, p 5.

27 T Michel and A Taylor, ‘Death by a Thousand Grants? The Challenge of Grant Funding Reliance for Local Government Councils in the Northern Territory of Australia’ (2012) 38(4) *Local Government Studies*, 485.

28 M Limerick and R Morris, *Local government service delivery to remote Indigenous communities: funding and service delivery model designs* (Paper for the Local Government Researchers Forum, Sydney, 14-15 December 2011), p 6. At <http://www.acelg.org.au/news-detail.php?id=187> (viewed 11 October 2012).

29 Smith, note 8.

30 McAdam, note 5, p 12.

31 McAdam, note 5, p 12.

32 McAdam, note 5, p 12.

and implementation of the new system which have generated anger and distrust and resulted in communities feeling they have had control over their lives removed. I will discuss factors relating to the failures of governance in the new arrangements in more detail below. In particular:

- The new arrangements lack legitimacy in the eyes of the communities. This has come about particularly through the removal of decision-making authority from communities and the electoral system used to elect Shire councillors.
- The centralisation of control over service delivery has resulted in a loss of community control, including the loss of the power to prioritise and make decisions regarding community needs. This has also resulted in diminished capacity of communities to deliver their own services in line with their own priorities.

The reforms effectively split previous Community Council responsibilities between two structures. The Shires took over responsibility for the delivery of services and overarching governance roles; while Local Boards were established within the Shires structure in an attempt to retain connection between community governance structures and local government decision-making.

(i) The legitimacy of the new arrangements

The beginnings of the Shires did not bode well for their legitimacy in communities.

The Northern Territory Government undertook a series of consultations and dialogues from 2002-2006 about the potential to reform local government arrangements under the reform agenda of the *Building Stronger Regions, Stronger Futures* policy. The policy aimed to have flexible timeframes and flexible structures to allow for the development of 'culturally-based representative and electoral relationships'.³³

However in 2006 the policy and community planning was scrapped and replaced by the one-size-fits-all Shire structures, which were rushed into existence and remain in place today.

The Shires were created by the Department of Housing, Local Government and Regional Services who then appointed CEOs to each Shire. The CEOs had already begun work prior to the first elections of council members to the Shires and this meant that Shire councillors did not have any say in the employment of their own CEO despite the councillors being held responsible for their performance. This also meant that the early decisions establishing new organisational arrangements and processes for each Shire were made by the CEO, often without input and approval by the elected councillors.³⁴

The creation of the Shires required a more regional focus in the planning and prioritisation of issues rather than only addressing those issues relative to the community from which members were elected. Consequently, local government representatives now had to make decisions on a broader regional basis, which meant they were required to act as representatives for communities other than their own.

In an attempt to ensure communities were not disenfranchised or excluded from local government processes by the reforms, the *Local Government Act 2008* (NT) enabled the creation of Local Boards to act as advisory bodies to the Shires.

33 Smith, note 8, p 82.

34 Council of Territory Cooperation, note 22, p 21.

Decision-making authority: from Community Councils to Local Boards

Local Boards are appointed by the Shire and are made up of members of the community as well as any Shire councillors who represent or reside in the communities’ ward.³⁵ The legislation enables Shires to allow for a form of election or community process to select members of the Local Board. However, Shires are not obliged to set up these boards.³⁶

The functions of Local Boards are set out in section 52 of the *Local Government Act 2008* (NT):

- (1) The functions of a local board are:
 - (a) to involve local communities more closely in issues related to local government; and
 - (b) to ensure that local communities are given an opportunity to express their opinions on questions affecting local government; and
 - (c) to allow local communities a voice in the formulation of policies for the locality as well as policies for the area and the region; and
 - (d) to take the views of local communities back to council and act as advocates on their behalf; and
 - (e) to contribute to the development of the relevant regional management plan and the relevant municipal or shire plan.
- (2) A local board is subject to control and direction by the council.³⁷

The functions and powers of the Local Boards are very different to those of Community Councils. Table 3.1 provides a comparison between the functions and powers of Community Councils and Local Boards.

Table 3.1:
Comparison of Community Councils and Local Boards

Community Councils	Local Boards
Decision-making powers	Act in an advisory capacity – no decision-making power unless delegated by Shire
Financial delegation and access to resources	No financial delegation or resources
Councillors hold paid positions	Members are unpaid
Councillors elected	Election process not required, but may be allowed by Shires
Control over service delivery	No control over service delivery
Responsible for delivery of many, varied services	No service delivery functions

³⁵ *Local Government Act 2008* (NT) s 51.
³⁶ *Local Government Act 2008* (NT) s 49.
³⁷ *Local Government Act 2008* (NT) s 52.

In 2010, the Central Land Council (CLC) undertook a scoping study on the governance role of Local Boards. The study looked at six communities located within two Shires and noted that Local Boards operate in very different ways across different Shires.³⁸

Ultimately, the CLC found that the Local Board system was an inadequate replacement for Community Councils.

The report highlighted a number of concerns about the operation of the Local Board system, including:

- its lack of legitimacy in the eyes of the community
- its failure to ensure communities are represented in local government decision-making
- the culturally inappropriate ways Local Boards worked.³⁹

Representation and legitimacy

The CLC identified ‘fundamental concerns with the imposed structures and procedures of Local Boards’.⁴⁰ In particular, it was reported that communities felt their voices had been lost with the amalgamation.⁴¹ The loss of power over, and understanding of, community decision-making post-Community Councils was overwhelmingly reported as a cause of ‘hurt and anger’.⁴² Feelings of powerlessness and damage to community esteem and wellbeing were reported as stemming from:

- confusion as to who was making decisions
- the lack of financial allocation powers over priorities and resource management to facilitate the implementation of community decisions
- the widespread perception that Local Boards ‘were less representative; had less authority; had less decision-making power; and had less resolution of community issues than the previous Community Council’
- the non-delivery of projects and programs which the community had identified as priorities
- the loss of the ability to act directly and quickly in response to issues and solve problems proactively as they arise.⁴³

The CLC study also found that Local Boards were not seen as having the authority to represent the community.⁴⁴ This was for a combination of reasons.

Firstly, there was very little understanding in communities as to how people were chosen to be on the Local Board. In fact, many Local Board members were unaware as to how they were selected for the Local Board.⁴⁵ Expressions of surprise such as the following were common in interviews conducted by the CLC in four of the six communities in the study:

I didn’t know that I got picked to go into that shire, the local board. I just saw my name up on the notice board. They should let people know first.⁴⁶

38 Central Land Council, note 14.

39 Central Land Council, note 14.

40 Central Land Council, note 14, p 34.

41 Central Land Council, note 14, p 29.

42 Central Land Council, note 14, p 33.

43 Central Land Council, note 14, p 40.

44 Central Land Council, note 14, p 29.

45 Central Land Council, note 14, p 29.

46 Central Land Council, note 14, p 29.

Secondly, the roles of Local Boards do not incorporate the authority previously held by the Community Councils. As outlined above, members of Community Councils, had accepted responsibilities that were much broader than what was technically required as part of their role as Councillors. When these structures were abolished, many former Community Council members felt that they no longer had the authority to continue these functions. Because of the way in which these roles were perceived, even when former council members became members of the Local Board, the extra functions such as arranging funerals or acting as a representative of the community were no longer considered to be their responsibility.⁴⁷

Thirdly, Local Board members are unpaid. This adds to feelings of disempowerment and disrespect in communities. It has damaged the pride of community leaders, who in their paid role as Community Council members made an important contribution to their communities. While many members were once paid in their role as councillors on the Community Councils, they are now expected to fulfil a role on a Local Board for no pay.⁴⁸ In comparison, Shire staff who attend Local Board meetings receive pay for their attendance. This adds to the power imbalance and the perceptions that community knowledge and expertise is not valued or considered legitimate by Shires in determining and addressing the priority needs of the community.⁴⁹ This influences the authority and legitimacy of the Local Board members in the eyes of their communities as well as the members' understanding of their own authority and position in the community.

Fourthly, Shires are not compelled to follow or even consider Local Board advice. Local Board members have reported going to numerous Local Board meetings but rarely seeing outcomes that reflect their input. This has resulted in widespread disengagement.⁵⁰ Relationships between Shire staff and community members have been reported as less productive than relationships with the previous Community Councils.⁵¹

Culturally inappropriate conduct of Local Board meetings

The way that Local Board meetings are conducted further alienates communities. They are not run by the Local Boards, they are run by the Shires, with little regard to the ways in which communities would run their own meetings to determine the same range of issues at stake. The strict administrative nature of the meetings is not conducive to Local Board members, and therefore communities, feeling they own the process.

The CLC reports that community members expressed discomfort about the way in which Local Board meetings have been held. For example, the settings in which the meetings were held are intimidating for some people and not conducive to productive interaction and participation.⁵² The meetings were not seen as culturally safe by many participants who reported feeling:

- ashamed to speak
- like no one was listening
- that meetings were dominated by white bureaucrats speaking and delivering information and not engaging
- that meetings were not inclusive
- that the manner in which meetings were held did not facilitate community participation, especially for

47 Limerick et. al., note 28, pp 7-8.

48 Central Land Council, note 14, p 38.

49 Central Land Council, note 14, p 35.

50 Department of Housing, Local Government & Regional Services, *Assessment of Shire Councils' Local Boards* (November 2010), p 39. At <http://www.clc.org.au/publications/content/clc-review-of-shire-local-advisory-boards> (viewed 11 October 2012).

51 Central Land Council, note 14, p 31.

52 Central Land Council, note 14, p 37.

community members with lower levels of confidence speaking English.⁵³

This view was confirmed by the CLC report which made the finding that:

The high level of administration and imposed structure of local boards appears to be at odds with the advisory function of local boards. Many local board members in all communities reported feeling 'ashamed', 'embarrassed', 'uncomfortable' and 'shy' to speak at local board meetings.⁵⁴

Further, the topics discussed at Local Board meetings were often limited and did not address priority issues in the community.⁵⁵

The result of the above factors has been that many Local Board meetings have not gone ahead because of failures to reach the quorum required by legislation. Many members did not wish to remain on the boards because of the 'genuine lack of community involvement and disempowerment felt by being a member of a Local Board'.⁵⁶

The Northern Territory local government electoral system

Despite the Northern Territory Government being aware that the reforms had the potential to make communities feel disenfranchised, an electoral system for the Shire elections was used which in fact led to the disenfranchisement of some smaller communities.

The Exhaustive Preferential Voting System was used to conduct local government elections in the Northern Territory from when the Shires were established until March 2012.

Text Box 3.1 describes how the Exhaustive Preferential Voting System works to disenfranchise smaller communities.

Text Box 3.1:

The Exhaustive Preferential Voting System

The Exhaustive Preferential Voting System operates as effectively holding separate elections for each position using the initial voting and preferences.

A first candidate is elected by gaining 50% support⁵⁷ either outright or after distribution of preferences.

Once the first elected candidate is determined, counting starts again. The first elected candidate's votes are allocated according to preferences. This means that the vote which counted to elect the first elected candidate is counted again in determining the second and subsequent candidates.

The first elected candidate and subsequent elected candidates' votes are constantly re-counted which allows for similar candidates, with limited primary support, to fill the remaining positions.

The result of this system is that candidates from minority groups or smaller communities are unlikely to gain any representation.⁵⁸

53 Central Land Council, note 14, p 31.

54 Central Land Council, note 14, p 34.

55 Central Land Council, note 14, p 42.

56 Central Land Council, note 14, p 37.

57 Requirement is for 50% of the vote plus one extra vote. See, W Sanders, *Fuelling large group dominance and repeating past mistakes: A critique of the Northern Territory local government electoral system*, Desert Knowledge CRC (2009). At <http://www.desertknowledgecrc.com.au/publications/dkrc-0710> (viewed 11 October 2012).

58 Sanders, above.

When used to elect one person, such as electing a chairperson in an organisation, this system is uncomplicated and generates fair results. However, when used to elect multiple candidates, as it was in electing representatives for Shire wards, this system favours larger groups in communities and often excludes smaller groups from having any representation.⁵⁹

The potential unfairness of this system has been long-recognised in Australia – it has been scrapped in other jurisdictions for precisely this reason.⁶⁰

Effect of the voting system on Northern Territory communities

The results of the Shire elections in the Northern Territory illustrate the unfairness of the voting system. For example, in the November 2008 elections for the South Tanami Ward of the Central Desert Shire, all four councillors elected were from the largest community in the ward, Yuendumu, leaving smaller communities with no Shire representation. Approximately a third of the vote went to candidates from smaller communities of Nyirrpi and Willowra, however none of these voters gained representation by a local candidate due to the way the Exhaustive Proportional Representative System works. The candidates who were elected to the third and fourth (final) seats only received ten and seven primary votes respectively of the 362 votes cast, but received preferences from previously elected candidates.⁶¹

Before the March 2012 council elections, the voting system was changed to the Single Transferable Vote Proportional Representation System. The results reflected a fairer representation of communities. The South Tanami Ward included representation from the two smaller communities of Nyirrpi and Willowra as well as two representatives from Yuendumu.⁶² A brief explanation of the Single Transferable Vote Proportional Representation System is given in Text Box 3.2.

Text Box 3.2:

The Single Transferable Vote Proportional Representation System

Variations of the Single Transferable Vote Proportional Representation System are used to elect the Senate, various state Upper Houses and many local governments.⁶³ It does not allow for the same distortions as the Exhaustive Preferential Voting System as it does not re-count votes which have already been counted to elect a candidate. Although it is a complex system to administer, it allows for proportional and logical results, allowing fair representation in multi-member districts such as Shire wards in the Northern Territory.⁶⁴

I am pleased that the need for electoral reform has been acted upon. However, for the first years of the Shires' existence, several small communities that had operated with a fair degree of autonomy through their local Community Councils were suddenly left with no representation at the Shire level. Neighbouring communities,

59 Sanders, above.

60 Sanders, above.

61 Sanders, above.

62 Sanders, above.

63 Department of Foreign Affairs and Trade, 'Our electoral system', Australian Government (2008). At http://www.dfat.gov.au/facts/electoral_system.html (viewed 11 October 2012).

64 B Reilly, *Electoral system reform options for Northern Territory Local Government elections* (2011). At http://www.localgovernment.nt.gov.au/home/local_government_reviews/review_of_the_local_government_voting_system (viewed 11 October 2012).

with only a slightly larger population, were able to achieve strong representation, heightening the sense of injustice felt caused having an unrepresented community.

(ii) Service delivery and financial sustainability

One of the key reasons given for the amalgamation was that communities would get better delivery of services, and that service delivery would be more financially sustainable.

However, from the outset this was questioned by the Northern Territory Grants Commission:

We know that most municipal councils in the NT are stressed, and we know that is even more the case with community government councils. It follows that the new shires will inherit all of the problems, and then some, of the community governments.⁶⁵

Services are now delivered by Shires in a centralised manner and as such have responsibility for a number of core services such as local infrastructure, local environmental health, and local civic services. They have also taken on some of the extra responsibilities previously handled by Community Councils.

Financial sustainability

The amalgamation of Community Councils was supposed to allow for a better, more consistent delivery of services and cost less to operate.⁶⁶

However, several reports have now examined the financial state of the newly created Shires and found that the reforms have not resulted in the anticipated economies of scale or financial sustainability.

The Department of Housing, Local Government and Regional Services commissioned a report by Deloitte of the financial sustainability of Shire Councils.⁶⁷ The report found that none of the Shire Councils was financially sustainable with the current levels of revenue and expenditure.⁶⁸

Other reports have claimed that Shires are still inadequately resourced to provide core services despite receiving more funding than Community Councils.⁶⁹

The Deloitte findings were supported by other examinations:

- An academic review of the amalgamations found no evidence that the consolidation had resulted in cost savings driven by the scale in which they operate.⁷⁰
- The Australian Centre of Excellence for Local Government's (ACELG) review of local government service delivery to remote Indigenous communities also questioned the assumption that creating bigger councils would result in cost savings. This review rejected the basis of the reforms – that

65 Northern Territory Grants Commission, *Further Discussion Paper on Refining the NTGC Methodology* (2008), p.7.

66 McAdam, note 5.

67 Deloitte, *Review of Councils' Financial Sustainability*, Consultancy for the Department of Housing, Local Government and Regional Services (May 2012). At http://www.localgovernment.nt.gov.au/home/local_government_reviews/review_of_councils_financial_sustainability (viewed 11 October 2012).

68 It should be noted that Deloitte included the following disclaimer: 'This report is intended solely for the information and internal use of the DHLGRS in accordance with our letter of proposal of October 2011, and is not intended to be and should not be used by any other person or entity. No other person or entity is entitled to rely, in any manner, or for any purpose, on this report. We do not accept or assume responsibility to anyone other than the DHLGRS for our work, for this report, or for any reliance which may be placed on this report by any party other than the DHLGRS.' We realise that the report was released with concerns regarding the data available. The lack of robust data is itself concerning.

69 See, for example Australian Centre for Excellence in Local Government, note 13.

70 Michel, note 25, p 5.

economies of scale could be created by amalgamating Community Councils.⁷¹

The reasons for financial unsustainability include the higher costs associated with service delivery in remote areas, which cannot be changed, but also factors that can be changed such as those relating to the governance of government. For example, the Deloitte report raised concerns about the impact on sustainability of burdensome reporting requirements and the short term nature of much of the Shires' funding.⁷² These problems were also experienced by Community Councils.⁷³

Deloitte identified the following problems with grant funding processes:

- There is a lack of consultation by funding bodies with Shires regarding the levels of funding required for adequate service delivery.
- There are delays in approval processes of grants from Government and communication of this approval.
- Grants are often inadequate for their purpose but Shires are in no position to refuse them, as contracts and employment are already in place.
- A lack of certainty adds to problems with long term financial planning and damages Council's negotiating position when contracting externally, leading to financial inefficiencies.
- Gifted assets often come with no support for their maintenance and operation, leaving councils with a financial burden to be able to maintain and utilise the assets.⁷⁴

Deloitte also found that, as was the case with Community Councils, the financial stability of Shires is heavily reliant on the competence of CEOs.⁷⁵

Impact of centralised service delivery on communities

It is not clear whether service delivery has improved, suffered or is roughly the same under the new arrangements. Although Deloitte did not explicitly consider the effectiveness of Shires from a non-financial perspective, it did make findings and recommendations regarding governance capacity and service delivery. In particular, Deloitte found that in the establishment of Shires, no minimum levels of service delivery had been established and no key performance indicators had been identified by either the Department of Housing, Local Government and Regional Services or the Shires themselves.⁷⁶ This makes it difficult to evaluate the effectiveness of Shires and assess whether they are providing adequate levels of service.

What we do know is that centralisation of the control of service delivery is a capacity-diminishing step for communities. The Coordinator-General for Remote Indigenous Services found that community based jobs were replaced with outside contractors as part of centralising services⁷⁷ which has the effect of undermining community capacity. The review by the ACELG concluded that centralising the delivery of services risks 'undermining community governance capacity in remote communities and creating a sense that local communities have suffered a loss of local control'.⁷⁸

71 Michel et. al., note 17.

72 Deloitte, note 67, pp 68 and 78.

73 See for example: Michel et. al., note 27.

74 Deloitte, note 67, p 68.

75 Deloitte, note 67, p 62.

76 Deloitte, note 67, pp 60-61.

77 Coordinator-General for Remote Indigenous Services, *Six Monthly Report July – November 2009*, Australian Government (2009), p 98. At <http://www.cgris.gov.au/site/report.asp> (viewed 11 October 2012).

78 Australian Centre for Excellence in Local Government, note 13, p 21.

I also have concerns that service delivery could be compromised in the future as a result of the focus on 'upwards accountability' which has accompanied the reforms. Curiously, the Deloitte review appears to recommend that service delivery be compromised as an answer to addressing the financial issues of Shires:

Councils must enable clear identification of programs incurring deficits. In the event that sufficient program revenue cannot be raised to achieve at best a break-even position, Councils need to effectively communicate the likely withdrawal of the service to the community and the relevant funding body.⁷⁹

Rather than recommending more appropriate funding for the delivery of these services, Deloitte recommended that 'community expectations surrounding service delivery must be better managed'.⁸⁰

Even on a measure of economic efficiencies and rationalisation, the job actually needs to get done – it is not 'efficiency' to save money if critical services are not delivered. The Council of Australian Governments (COAG) National Indigenous Reform Agreement has made a commitment that:

remote Indigenous communities and remote communities with significant Indigenous populations are entitled to standards of services and infrastructure broadly comparable with that in non-Indigenous communities of similar size, location and need elsewhere in Australia.⁸¹

Suggesting that Shires scrap the provision of services which are not considered to be financially sustainable may be an appropriate accounting solution in the short term but in the long term it is not a viable solution financially or socially.

If the Deloitte recommendation was accepted and implemented it would see Governments effectively neglecting their obligations to deliver essential services to these communities. Remoteness does not excuse government from fulfilling its obligations under international human rights standards.

The focus on 'upwards accountability' rather than accountability to community is all too common in Aboriginal and Torres Strait Islander affairs. In these types of major changes government is excluding the very people whose lives are affected by them who basically become bystanders while these reforms occur. Aboriginal and Torres Strait Islander peoples have a right to participate in decision-making which affects us. In the last five years there have been many examples of major policy change in the Northern Territory which have not respected this right.

79 Deloitte, note 67, p 70.

80 Deloitte, note 67, p 70.

81 Council of Australian Governments, *National Indigenous Reform Agreement* (2008). At http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx (viewed 11 October 2012).

3.3 The Northern Territory Intervention: the Northern Territory Emergency Response and Stronger Futures

(a) Northern Territory Emergency Response

Over the last five years, the governance environment for Aboriginal communities in the Northern Territory has also been significantly impacted by the Australian Government's Intervention. As mentioned earlier, the Intervention occurred around the same time as the abolition of Community Councils. Though they were separate processes, initiated and implemented by separate governments, many communities didn't distinguish between this difference and the impact has been felt as being one single assault by government.

Like the local government reforms, the implementation of the Intervention has caused significant damage to the governance capacity of remote communities in the Northern Territory, both in itself and in combination with other changes.

Much has been written on the impact of the Intervention in terms of the disempowerment and distrust it has created. Previous Social Justice Reports have discussed in detail the damaging effects of the Intervention on the wellbeing of communities, in particular the effect of diminished governance capacity and structures.⁸²

The National Congress of Australia's First Peoples has said:

Unless more emphasis is placed on community control and empowerment, children born in the Northern Territory will spend the formative years of their life under a level of government control that does not exist in other parts of Australia, observing the disempowerment of their communities, their leaders and parents.⁸³

And the Central Land Council has said:

Together these changes have created an environment of confusion, mistrust and further disempowerment and marginalisation of Aboriginal people in Central Australia.⁸⁴

The damage done to community governance by the Intervention cannot be underestimated. The Intervention 'demoralises dedicated and successful local organisations and their staff'; and it 'overrides and by-passes existing Indigenous organisations with extensive contextual knowledge, significant local capacity and customary institutions that underpin strong cultural leadership'.⁸⁵

In an evaluation of the NTER commissioned by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), only 14% of respondents felt that always or most of the time 'local leadership and governance capability has been developed to support better engagement between government agencies and the community'.⁸⁶ This evaluation report also found that people felt 'betrayed and disempowered as a result of the NTER and the change of governance from community to Northern Territory shire-based councils'.⁸⁷

The practical reality in Northern Territory communities which have experienced the local government reform

82 See, for example T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *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 October 2012).

83 National Congress of Australia's First Peoples, *Statement to the Senate Standing Committee on Community Affairs on conditions affecting Aboriginal communities in the Northern Territory including the proposed Stronger Futures in the Northern Territory Bill (2011) and accompanying Bills* (February 2012), pp 4-5. At <http://nationalcongress.com.au/policyandadvocacy/> (viewed 11 October 2012).

84 Central Land Council, *The Central Land Council Community Development Framework* (2009), p 8.

85 J Hunt, 'Missed opportunity: The NTER and sustainable development outcomes for Aboriginal people in the Northern Territory' (2010) 45(3) *Australian Journal of Social Issues* 417, p 423.

86 Department of Families, Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response: Evaluation Report 2011* (November 2011), p 137. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/northern-territory-emergency-response-evaluation-report-2011> (viewed 11 October 2012).

87 Department of Families, Housing, Community Services and Indigenous Affairs, above, p 103.

and the Intervention is that existing structures and organisations have been dismantled by government legislative and administrative action. The governance space occupied previously by community arrangements, including service delivery responsibility in some instances, was either filled by government programs or have not been replaced leaving a significant gap in meeting the needs of the community.

An example of the disempowering nature of the Intervention is that it allowed government to have greater powers over local organisations, including the power to interfere with the staffing of local organisations and the ability to seize their assets.⁸⁸

A further example is the underutilisation of Aboriginal service delivery organisations in the implementation of the Intervention measures. Many community based organisations had the skills, staff and local knowledge to deliver services but were overlooked as external providers were given preference.⁸⁹

The Commonwealth Ombudsman has recently released reports on two aspects of the implementation of the Intervention: income management and housing reforms. I have discussed the report regarding income management in Chapter 1 but will briefly outline below the problems identified by the Ombudsman in the report regarding the housing reforms.

(b) Commonwealth Ombudsman's report on housing reforms in the Northern Territory

The Intervention changed the arrangements for community housing in the Northern Territory by enabling the Australian Government to compulsorily acquire five-year leases, in order to secure tenure for housing and infrastructure.⁹⁰ The new arrangements involved three tiers of government: FaHCSIA contracting the responsibility for management services to the Northern Territory Department of Housing, Local Government and Regional Services, who consequently sub-contracted to Shires and some Indigenous Housing Associations.

The Commonwealth Ombudsman reports that housing was the area of most common complaint from people in remote communities since the Intervention commenced.⁹¹ The Ombudsman's report identified three issues which underlie the major problems:

- poor communication
- insufficient IT systems support
- inadequate accountability and complaints procedures.⁹²

One area of the housing reforms which came under particular criticism by the Ombudsman was the establishment and operation of Housing Reference Groups (HRGs). The criticisms bear a strong resemblance to the problems with the Local Boards under the local government reforms discussed earlier: it is an imposed structure, introduced to create a vehicle for consultation, with no consideration of legitimate community governance arrangements already in place, and no real power.

88 Central Land Council, note 14, p 41.

89 Limerick et. al., note 28, pp 7-9.

90 Commonwealth Ombudsman, *Remote Housing Reforms in the Northern Territory*, Report No. 03/2012 (June 2012). At <http://www.ombudsman.gov.au/publications-and-media/> (viewed 11 October 2012).

91 Commonwealth Ombudsman, above.

92 Commonwealth Ombudsman, above.

(i) Housing Reference Groups

HRGs were established as part of the new Remote Public Housing Management Framework, introduced in conjunction with the NTER. HRGs were made up of local community members and were tasked with providing advice to the Northern Territory Department of Housing on public housing issues in their communities.

The Ombudsman's report identifies the task of HRGs as significant and onerous.⁹³ On top of providing advice on the roll out of housing reforms they 'are frequently called upon by government agencies, service providers, other organisations and visitors to provide views on a wide range of matters'.⁹⁴ Like Local Boards within Shires, HRG members are unpaid.

Depending on the community, HRGs can often be the primary avenue for government engagement with communities.⁹⁵ However, similar to Local Boards, there is confusion in communities about the role and authority of HRGs.⁹⁶

Further, poor communication has marred the operation and effectiveness of HRGs. The Ombudsman reported that members of HRGs could not understand the discussions and information conveyed in meetings. This was put down to the failure to provide interpreters or appropriate assistance and support to HRG members. As a consequence HRG members were unable to communicate decisions to the broader community.⁹⁷

Like Local Boards, a lack of legitimacy in the imposed structure and inadequate cultural competency in the administration of the meetings means there are issues with attendance and many HRG meetings have not gone ahead.⁹⁸

The Ombudsman also found that complaints mechanisms with regard to the conduct of HRGs are inadequate.⁹⁹

The housing reforms are only one element of the raft of changes imposed through the initial Intervention. Unfortunately these mismanaged and often ill-considered changes have done lasting damage to remote communities in the Northern Territory which cannot be easily repaired.

(c) Northern Territory Emergency Response amendments and Stronger Futures

The NTER redesign in 2010 and the recent Stronger Futures measures provided an opportunity to return control to communities. Despite the NTER redesign and Stronger Futures having a stated focus on improving 'governance' as one of the areas of priority, these reforms have so far had minimal impact on returning genuine community control.¹⁰⁰

In fact, many of the programs under Stronger Futures serve to sustain or increase the presence and control of Government in communities instead of facilitating a return to community control and removing barriers to empowerment.

93 Commonwealth Ombudsman, above.

94 Commonwealth Ombudsman, above, p 27.

95 Commonwealth Ombudsman, above, p 28.

96 Commonwealth Ombudsman, above, p 29.

97 Commonwealth Ombudsman, above.

98 Commonwealth Ombudsman, above.

99 Commonwealth Ombudsman, above, p 30.

100 Australian Government, *Stronger Futures in the Northern Territory: A ten year commitment to Aboriginal people in the Northern Territory* (July 2012). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory/stronger-futures-in-the-northern-territory-booklet> (viewed 11 October 2012).

However, the Stronger Futures legislation does contain mechanisms through which community control can be regained. One example is the mechanism for transitioning from blanket bans to community designed alcohol management plans. How these mechanisms are implemented will determine whether communities can be given an opportunity to take control of issues such as this, and the possibility of success for the programs. We simply cannot afford to be having the same conversation in 10 years time because of a failure to appreciate the importance of community empowerment.

The Australian Human Rights Commission's Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures Bill 2011 and two related Bills made several recommendations about governance and governments' engagement with Aboriginal communities.

We recommended that the Australian and Northern Territory Governments commit to:

- appropriately resource (including financial and technical assistance), and prioritise programs that facilitate the development of community governance structures which enable and empower those Aboriginal communities to engage with and control decision-making about their cultural, political, economic and social development goals
- develop and implement a holistic and coordinated approach to address the eight priority areas identified in the *Stronger Futures in the Northern Territory Discussion Paper and Consultations Report*.¹⁰¹

We also recommended that the Australian and Northern Territory Governments implement the Stronger Futures measures in a culturally safe and competent manner. This requires the governments to ensure:

- the mandatory use of Identified Criteria for all positions in the public service that have any involvement with the Stronger Futures measures, and the requirement for relevant officers to have the appropriate skills and cultural competency to work with Aboriginal and Torres Strait Islander peoples and communities
- the development of targeted education and training programs with accredited training providers to facilitate the development of appropriate skills and cultural competency
- increasing the capacity of Government Business Managers and Indigenous Engagement Officers to work with communities and build community engagement processes with a view to improving community engagement on the key issues facing communities.¹⁰²

If Stronger Futures is to benefit Aboriginal and Torres Strait Islander communities its implementation must facilitate community control. Further, the recommendations go to the point that to facilitate community control and therefore offer a greater chance to deliver benefits to communities, governments need to consider closely their role in this process.

The role of government is not to impose interventions; nor is it to walk away from Aboriginal and Torres Strait Islander communities. Governments' role is to enable communities to determine their own priorities and where appropriate and possible, respond to communities' requests for assistance to facilitate their sustainable development.

In the implementation of Stronger Futures, the results will largely depend on the governance of governments.

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), Recommendation 3, p 7. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/submissions.htm (viewed 11 October 2012).

102 Australian Human Rights Commission, above, Recommendation 4, p 7.

That is, results will depend on how the Australian and Northern Territory governments approach the consultation requirements in the legislation; the skill set and cultural competency of bureaucrats on the ground managing the implementation of measures; and the response of governments to the multitude of reports on the disproportionately burdensome administrative requirements imposed on Aboriginal organisations.

Late in the drafting of this report, I received information from FaHCSIA about the steps the Australian Government is taking to strengthen governance in Aboriginal communities in the Northern Territory. They are providing some funding to support Aboriginal and Torres Strait Islander people 'to increase their engagement and involvement in the decision-making process'.¹⁰³ They have also committed a significant 10 year investment for government staff in communities.

FaHCSIA's correspondence, however, revealed that their policies on Indigenous governance mainly focus on organisational governance and do not address other important elements. Government needs to understand that strengthening governance does not only involve strengthening organisational governance or adequately resourcing groups to consult with government. It also involves reflecting on and reforming the behaviours of government. This requires an examination of how Government actions affect Indigenous governance. Governments must consider what they can do to remove barriers to, as well as facilitating and enabling, effective Indigenous governance. It also involves consideration of how the governance of governments operates to influence interactions with Aboriginal and Torres Strait Islander peoples. This includes the need for cultural competency.

(i) Consultation provisions in Stronger Futures

A number of the recently introduced Stronger Futures measures have inbuilt requirements for community consultation. I listed these in Chapter 1. In our submission to the Stronger Futures Senate Community Affairs Legislation Committee Inquiry, the Commission recommended that these consultation provisions be strengthened and additional areas included. We recommended that:

- the Bills be amended to ensure the effective participation and engagement of Aboriginal and Torres Strait Islander peoples in matters affecting them
- the Bills be amended so that the definition of 'consultation' adopts the Commission's criteria for meaningful and effective consultation.¹⁰⁴

The Australian Government did not amend the Bills in this regard as they passed through Parliament. However the bulk of our recommendations on further consultation and governance are about the implementation of the legislation. The existing consultation requirements in the Stronger Futures legislation offer the potential for Aboriginal and Torres Strait Islander communities to regain some control over programs being implemented in their community and to strengthen their community governance capacity.

As I said in Chapter 1, the way government conducts future consultations in the Northern Territory will contribute to the overall effectiveness of the Stronger Futures measures. Effective and meaningful consultations will be required in order to overcome the legacy of distrust created by the Intervention and the local government reform. I again reiterate the importance of our 'features of meaningful and effective consultation' as a guide for government in undertaking consultation processes.¹⁰⁵ Further, I refer to the

103 F Pratt, Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 October 2012.

104 Australian Human Rights Commission, note 101, p 7.

105 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), Appendix 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 11 October 2012).

discussion in the *Social Justice Report 2011* on the importance of the cultural competency of government in working with Aboriginal and Torres Strait Islander communities.¹⁰⁶

The previous actions of government have created some significant challenges to getting the future consultations in Stronger Futures right.

A significant challenge in the consultation process is going to be how the Government decides who to consult with and what to accept as community consensus. This challenge is made far more difficult in many areas because of the lack of local representative structures such as Community Councils, who had the legitimacy to speak on behalf of community. For example, if a government were to consult a community about a pornography ban or the community wanted to propose an alcohol management plan, who would participate, and in what forum? Will those questions be decided by government? If so, it is unlikely to be considered legitimate or fair by communities.

A further challenge is engaging communities whose past experience has led them to feel that consultations do not matter because they do not result in meaningful change.

106 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), Chapter 4. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 11 October 2012)

3.4 Health impact of disempowerment

Disempowerment has been linked to adverse health outcomes and less functional communities. Intrusive control into the lives of Aboriginal and Torres Strait Islander people by government is said to signal an:

expected significant social determinant impact manifested as increased feelings of frustration, disempowerment, stress and anxiety and the associated incidence of chronic illness.¹⁰⁷

In Aboriginal and Torres Strait Islander communities, especially discrete remote communities, higher levels of local control and decision-making have been found to have a positive effect on the health of individuals in those communities. For example, a ten year project in the decentralised community of Utopia in the Northern Territory found surprisingly low rates of morbidity compared to the overall Indigenous population in the Northern Territory. These positive outcomes were attributed to geographic factors as well as social influences including opportunities for self-determination.¹⁰⁸

In 2007 the Commission sought expert advice as to the health impacts from disempowerment and loss of opportunities for self-determination, particularly in the context of the Intervention. Associate Professor Helen Milroy advised us that if:

measures in the NT result in further disempowerment or a sense of extreme powerlessness, then this is a re-traumatisation and will have negative consequences on:

- Mental health including possibly higher rates of depression, stress and anxiety;
- Social and emotional wellbeing through increasing anxiety and uncertainty and hence this may precipitate family and community despair and dysfunction, poor or maladaptive coping and contribute to substance use and possible violence as well as loss of trust;
- Physical health as there is a strong relationship with chronic stress and poor health outcomes including diabetes and cardiovascular disease.¹⁰⁹

The Australian Indigenous Doctors' Association (AIDA) and the Centre for Health Equity Training, Research and Evaluation (CHETRE) at the University of New South Wales undertook a Health Impact Assessment of the Intervention. Part of this assessment looked into the health consequences likely to stem from communities' loss of leadership, governance and control from communities. Consistent with other research, the report emphasised that positive health outcomes are most likely if communities are allowed to set priorities and have control over decision-making.¹¹⁰

The original NTER did not adequately utilise or acknowledge existing Aboriginal governance structures.¹¹¹ AIDA and CHETRE argued that the Intervention policies actually undermined good governance. The structures imposed upon communities lacked the legitimacy required for successful governance because existing

107 D Cooper, *Closing the gap in cultural understanding: social determinants of health in Indigenous policy in Australia*, Aboriginal Medical Services Alliance Northern Territory (2011). At http://www.amsant.org.au/index.php?option=com_content&view=article&id=61&Itemid=221 (viewed 11 October 2012).

108 K Rowley, K O'Dea, I Anderson, R McDermott, K Saraswati, R Tilmouth, I Roberts, J Fitz, Z Wang, A Jenkins, J Best, Z Wang and A Brown, 'Lower than expected morbidity and mortality for an Australian aboriginal population: 10 year follow-up in a decentralised community' (2008) 188(5) *Medical Journal of Australia* 283. At <https://www.mja.com.au/journal/2008/188/5/lower-expected-morbidity-and-mortality-australian-aboriginal-population-10-year> (viewed 11 October 2012).

109 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation* (10 August 2007). At http://www.humanrights.gov.au/legal/submissions/2007/NTNER_Measures20070810.html (viewed 11 October 2012).

110 Australian Indigenous Doctors Association (AIDA) and Centre for Health Equity Training, Research and Evaluation (CHETRE) UNSW, *Health impact assessment of the Northern Territory Emergency Response* (2010), p 18. At <http://www.aida.org.au/viewpublications.aspx?id=3> (viewed 11 October 2012).

111 AIDA and CHETRE, above, p 13.

structures were overlooked or dismantled and genuine community control was denied. They reported widespread 'shock and outrage at the loss of rights to participate in the decision-making processes of society that had been so hard-won by Aboriginal peoples in Australia.'¹¹² Further, AIDA and CHETRE found that the failure to constructively engage with Aboriginal peoples reduced the chances that the policy would have effective outcomes:

The impoverished notion of governance that the Intervention represented has profound, far reaching, and serious negative effects on the health (psychosocial, physical and cultural) of the people whose aspirations, knowledge, experience and skills were ignored; and it means that investments in housing or education of health ... are unlikely to pay off because of the lack of a capable governance system in place that can translate plans into action, priorities into concrete strategies, commitments into behaviour, and so forth.¹¹³

We can see the most stark health consequence of disempowerment in its impact on the prevalence suicide in Aboriginal and Torres Strait Islander communities.

Evidence on self-determination and suicide

Self-determination has been identified as a key factor in influencing the risk of suicide.¹¹⁴ People who are empowered and self-determining are likely to be more resilient to challenging events in their lives, while people who cannot exercise self-determination are likely to experience feelings of hopelessness and a lack of control.¹¹⁵

A study of Indigenous communities in British Columbia found that young people in communities which were self-governed had almost one sixth the rate of suicide as those living in communities which had not attained self-government.¹¹⁶ Rates were also lower in students who lived in communities with: community controlled schools; land rights; community controlled health facilities; community policing; or access to cultural facilities.¹¹⁷

The study found that:

communities which have taken active steps to preserve and rehabilitate their own cultures are also those communities in which youth suicide rates are dramatically lower.¹¹⁸

This study acknowledged that many other factors not measured would undoubtedly influence suicide vulnerability. However, it concluded that the risk of suicide is strongly associated with 'the ways in which these young persons undertake to construct and defend a sense of identity.'¹¹⁹

The result of the last five years of upheaval in remote Northern Territory Aboriginal communities has been widespread despair. It is obviously not possible to draw a direct causal link between the governance of governments and suicide in Northern Territory Aboriginal communities, but I am concerned about the statistics and I think it needs to be discussed.

112 AIDA and CHETRE, above, p 15.

113 AIDA and CHETRE, above, p 18.

114 J Bureau, G Mageau, R Vallerand, F Rousseau and J Otis, 'Self-determination: A buffer against suicide ideation' (2012) 42(4) *Suicide and Life-Threatening Behaviour* 377. At <http://onlinelibrary.wiley.com/doi/10.1111/j.1943-278X.2012.00097.x/abstract> (viewed 11 October 2012).

115 Bureau et. al., above.

116 M Chandler and C Lalonde, 'Cultural continuity as a hedge against suicide in Canada's First Nations' (1998) 35(2) *Transcultural psychiatry* 211. At <http://tps.sagepub.com/content/35/2/191.abstract> (viewed 11 October 2012).

117 Chandler et. al., above, p 211.

118 Chandler et. al., above, p 215.

119 Chandler et. al., above, p 213.

Increasing rates of suicide in the Northern Territory

Suicide rates for Aboriginal and Torres Strait Islander people in the Northern Territory are disturbingly high.¹²⁰

Australia wide, the rate of suicide for Aboriginal and Torres Strait Islander people was 21.4 per 100,000 in 2010, compared with 10.5 deaths per 100,000 for all Australians.

However these rates are worse across all sectors in the Northern Territory with Aboriginal and Torres Strait Islander suicide rates of 30.8 per 100,000 for Aboriginal and Torres Strait Islander people compared to 16.4 per 100,000 for the general population.¹²¹

Incidents of self-harm and attempted suicide reported by police across communities subject to the Intervention have increased from 57 cases in 2007 to 261 cases in 2011.¹²² One view put forward is that these figures reflect an increased police presence in communities which caused incidents to be discovered which would have previously gone unreported. I harbour serious doubts about this being the main explanation for an increase of this magnitude.

However, what is undeniable is the dramatic and confronting increase in the rates of youth suicide. Several inquiries into youth suicide have reported recently, including the report of the Northern Territory Select Committee on Youth Suicides, *Gone Too Soon* and the report of the Child Deaths Review and Prevention Committee, *Suicide of Children and Youth in the NT 2006-2010 Report*.¹²³

In the Northern Territory between 2006 and 2010, the rate of suicide for Aboriginal and Torres Strait Islander young people aged 10-17 was 30.1 per 100,000 compared to rate for non-Indigenous people in the same age bracket of 2.6 per 100,000.¹²⁴

These rates for Aboriginal and Torres Strait Islander young people have increased 160% when compared to the previous period of 2001-2005. In contrast, non-Indigenous suicide rates have reduced to about a third of the previous period's levels.¹²⁵

The rates of suicide of young Aboriginal and Torres Strait Islander females are particularly shocking. Girls make up 40% of youth suicide in the Northern Territory when the national average at this age is less than 10%.¹²⁶ The patterns of suicide, with deaths often occurring in clusters in specific regions, are particularly tragic and are devastating for communities.

We know that feelings of hopelessness and disempowerment contribute to vulnerability to suicide.¹²⁷ These types of feelings are well documented and widely acknowledged symptoms of the local government reforms

120 Select Committee on Youth Suicides in the NT, *Gone Too Soon: A Report into Youth Suicide in the Northern Territory*, Legislative Assembly of the Northern Territory (March 2012), pp 9-10. At <http://www.indigenousjustice.gov.au/db/publications/291071.html> (viewed 11 October 2012).

121 Australian Bureau of Statistics, *Suicide in Australia (2010)*, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/3309.0~2010~Chapter~Suicide+in+Australia?OpenDocument> (viewed 11 October 2012); Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Suicide Deaths (2010)*, <http://www.abs.gov.au/ausstats/abs@.nsf/Products/3309.0~2010~Chapter~Aboriginal+and+Torres+Strait+Islander+suicide+deaths?OpenDocument> (viewed 11 October 2012).

122 Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap in the Northern Territory Monitoring Report: July to December 2011, Part 2 (2012)*, p 71. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory-including-northern-territory-emergency-response> (viewed 11 October 2012).

123 Select Committee on Youth Suicides in the NT, note 120.

124 Select Committee on Youth Suicides in the NT, note 120, pp 9-10.

125 G Robinson, S Silburn and B Leckning, *Suicide of children and youth in the NT, 2006-2010: public release report for the Child Deaths Review and Prevention Committee*, (2012). At <http://www.healthinfonet.edu.edu.au/key-resources/bibliography/?lid=23326> (viewed 11 October 2012).

126 Select Committee on Youth Suicides in the NT, note 119, pp 9-10.

127 Bureau et. al., note 114.

and the Intervention.¹²⁸ The shocking suicide and attempted suicide statistics of Aboriginal and Torres Strait Islander people, particularly in the Northern Territory, are a clear message that the current approach to overcoming Aboriginal and Torres Strait Islander disadvantage is not working and should be addressed by government as a matter of urgency.

128 See, for example Department of Families, Housing, Community Services and Indigenous Affairs, note 87, p 282.

3.5 Lessons to be learnt from the Intervention and local government reform

The governance environment in which remote communities in the Northern Territory operate is incredibly challenging. Aboriginal communities have long histories of damaging government intervention which have caused ongoing hurt and distrust.

The last five years has seen constant and major changes to the governance environment in Northern Territory Aboriginal communities, including changes which required the suspension of the Racial Discrimination Act in the NTER legislation. These changes have seen a greater government presence in the lives of communities and huge strain on community governance structures. While the motivations behind the changes may be well-meaning, governments have repeatedly illustrated their lack of cultural competency and capacity to coordinate, particularly in terms of implementation. The results speak for themselves.

Over time, many communities had managed to develop governance institutions and service delivery organisations, sometimes combined, which effectively blend their particular community governance requirements with the requirements of the mainstream governance environment. For many Aboriginal communities in the Northern Territory, Community Councils represented years of work to get this balance right.

As I said earlier this year, the amalgamation of Community Councils resulted in governance structures being stripped away almost overnight.¹²⁹ Without established representative organisations, Governments' subsequent attempts to consult with communities, and the outcomes from those consultations such as in the Stronger Futures process, have struggled for legitimacy in the eyes of communities.

Despite increasing numbers of bodies set up for governments to consult with, there is widespread disengagement. These 'advisory bodies' such as the Local Boards and HRGs,¹³⁰ drain community capacity, come with no corresponding decision-making authority, and the time and expertise involved is expected to be provided free of charge. There are substantial impositions on communities without corresponding resources.

Constant changes in the broader governance environment take a toll on the capacity of Aboriginal and Torres Strait Islander organisations to adjust to those changes in their own governance environment.

Each policy change has resulted in the imposition of new structures and new requirements on communities and community organisations. After each change, communities must again adapt their community governance to respond to the requirements of government. Just as things are settling, governments move the goal posts again.

There are many lessons to learn from the failures in the governance of governments in the last five years.

Government needs to consult, but consultations need to be conducted in a culturally competent manner. As set out in the *Native Title Report 2010*, Aboriginal and Torres Strait Islander people need to be resourced sufficiently to be able to respond to consultations and communities' responses to consultations need to actually inform government policy. This necessarily involves governance capacity-building of both communities and governments.

Aboriginal communities in the Northern Territory have substantial existing capacity which governments not only ignore but also diminish through their lack of cultural competence.

129 M Gooda in, A Horn, 'Super shires condemned as worse than Intervention', *ABC News*, 31 January 2012. At <http://www.abc.net.au/news/2012-01-31/20120131-mick-gooda-on-super-shires/3802586> (viewed 11 October 2012).

130 Central Land Council, note 14, p 15.

Carmen Lawrence in her speech at the Fulbright Conference, 'Healthy People Prosperous Country' in July 11, 2008 said:

Dependency is an inevitable by-product of learned helplessness; many Indigenous people are now so accustomed to having things done to them and for them, rather than being active participants, that they have lost their sense of mastery, competence and self respect. The key elements of the intervention almost seem to have been designed to reinforce this dependency rather than to cultivate a relationship between government and Indigenous people which will enhance their social responsibility and their willingness to exercise it.¹³¹

These effects are unlikely to be modified unless serious efforts are made by government to change its approach and engage with Indigenous peoples.

The main lesson to be learned out of the governance failures in the Northern Territory is that government needs to accept a new relationship is required with Aboriginal and Torres Strait Islander peoples.

Government needs to understand the difference between facilitating the building of governance capacity in communities and increasing the presence of government in communities. A bigger government presence in communities is not the answer to addressing problems in Aboriginal and Torres Strait Islander communities. I am not suggesting that government simply leave communities in the Northern Territory. That is not what the framework of effective governance in Indigenous communities requires. What the framework of effective governance requires is for government to engage in a new way with communities.

In governments' interaction with Aboriginal and Torres Strait Islander communities, we see how important a basis of self-determination and community governance is in enabling us to meet our goals and aspirations. Where community governance is ignored in service delivery and imposed local representative structures, it leads to poorer results, diminished community capacity, and disempowerment.

131 C Lawrence, *Healthy People Prosperous Country*, (Speech delivered at Fulbright Conference, 11 July 2008).

3.6 Concluding observations

(a) Further changes

Further changes to the local governance arrangements in the Northern Territory should be made bearing in mind the impact on Aboriginal communities of constant change to the governance environment. Communities should be fully involved in any changes and any legislative framework should ensure flexibility so that local governance structures and mechanisms can respond to the needs of each community. All governments should look to strengthen existing capacity, which in many cases is substantial.

(b) Sustainability

Sustainability in local governance arrangements includes more than financial sustainability. Any measure of the efficiency of local government in the Northern Territory must accept remoteness as a key factor. Cost savings on their own do not equal efficiency – communities still have a right to services and they must still be delivered. This should be the starting point for any provisions for service delivery.

(c) Service delivery

Whether services to remote communities are delivered via Shires, Community Councils or some other structure, these services must be adequately funded. This includes accounting for the additional costs associated with remoteness. The many reports on the functioning of the Shires should be used to reassess the realistic levels of funding required for the level of service provision to which COAG has committed.

(d) Investment in community governance capacity

Government should invest significant resources in governance capacity strengthening in Aboriginal and Torres Strait Islander communities. This investment must involve structures which are not directly connected to government funding of service delivery so that they are not impacted if services are centralised. Nor should the structures be 'approved' in any way by government.

Communities should look to shore up their community governance structures. Hopefully government will work in partnership to provide funding and assistance in this regard, but it depends ultimately on communities because the knowledge of community governance is only held by our people in each community. This satisfies two aims: it allows us to be self-determining and enables us to engage effectively with mainstream governments.

(e) Consultations

Governments must engage with Aboriginal and Torres Strait Islander communities, acknowledging our contributions as key stakeholders in determining our own futures. All future consultations should be accompanied by resources for communities to be able to engage effectively.

All future consultations should be undertaken in accordance with the Features of a meaningful and effective consultation process as outlined in Appendix 4 of the *Native Title Report 2010*.

Recommendations

- 3.1 That the Australian and Northern Territory Governments invest in developing and strengthening governance structures and systems in Northern Territory Aboriginal communities to ensure they are culturally legitimate and aligned to community needs and priorities.
- 3.2 That any reforms to governance arrangements in the Northern Territory be done in genuine consultation, and where appropriate in partnership, with the Aboriginal communities affected. Consultations should be undertaken in accordance with the features of meaningful and effective consultation contained in the *Native Title Report 2010*.

Chapter 4:

Effective governance in practice in Aboriginal and Torres Strait Islander communities

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4.1 Introduction

There is no shortage of examples of effective contemporary Indigenous governance. Previous Social Justice and Native Title Reports have case-studied many examples of successful contemporary Indigenous governance – Aboriginal and Torres Strait Islander people identifying their local needs and developing the solutions to meet those needs. Every year, Reconciliation Australia runs the Indigenous Governance Awards, showcasing many examples of effective Indigenous governance in a range of different contexts.¹ The judges of the awards assess finalists against certain criteria, including self-determination, cultural relevance and legitimacy, and future planning and government resilience.²

In this chapter, more examples of successful contemporary Indigenous governance are provided. The range highlights the different communities in Aboriginal and Torres Strait Islander Australia – the national, regional and local communities – and the different circumstances in which effective Indigenous governance can empower our communities. The case studies I have chosen for this report include:

- *Mirlirtjarra Kuurl Mirrka Palyalpayi* (Making Good Food at Warburton School)
- Warlpiri Youth Development Aboriginal Corporation
- Ngroo Education
- Torres Strait governance arrangements
- National Congress of Australia's First Peoples
- National Health Leadership Forum
- AIG Institute.

The case studies provide examples of successful governance structures and successful initiatives which have stemmed from community-based and informed projects, owned and controlled by the Aboriginal and Torres Strait Islander communities which benefit from them. They demonstrate the link between empowerment and good outcomes in service delivery. They look at local community institutions and organisations balancing the need for culturally legitimate authority and decision-making with the need to be able to engage productively in the mainstream governance environment. There is also one case study which looks at the way a local non-Indigenous service-provider achieves legitimacy in the eyes of the Aboriginal and Torres Strait Islander community it serves by ensuring its model is based on the principle of self-determination and incorporates local governance and authority structures.

The case studies illustrate that a foundation of community governance is important at each level – local community initiatives, regional governance arrangements and national representative arrangements. We will see that at each level, Aboriginal and Torres Strait Islander people have sought to strengthen existing community capacity and have used unique, innovative solutions to blend the different cultural requirements necessary for working in two worlds.

Each of the case studies of community-based initiatives contains lessons for governments regarding how they can best support and facilitate communities to strengthen their capacity to address their specific challenges.

The examples of regional and national community governance arrangements also emphasise the importance

1 For further information see Reconciliation Australia, 'Governance Resources', <http://www.reconciliation.org.au/iga/governance-resources> (viewed 12 October 2012).

2 Reconciliation Australia, '2012 Indigenous Governance Awards Winners Announced', (Media release, 12 October 2012). At <http://www.reconciliation.org.au/home/latest/2012-indigenous-governance-awards-winners-announced> (viewed 12 October 2012).

of a foundation built on self-determination and community governance. They particularly highlight the need for governments to understand and accept that the appropriate and necessary role for them in Aboriginal and Torres Strait Islander communities is as a facilitator and enabler. For governments, the challenge is to change the way self-determination is viewed and to take the opportunities offered by Aboriginal and Torres Strait Islander national governance institutions to follow through on the rhetoric of partnership.

The roles of communities in both establishing, and in some cases re-establishing, our governance arrangements and ensuring our organisational structures can interact with the broader governance environment are fundamental to achieving our aims. These case studies are just a few of the examples available which show that communities are doing this and have been doing this for a long time. But communities face constant challenges from the broader governance environment, especially from government. Chapter 2 and the case studies in Chapter 3 highlight such challenges. I hope that the case studies in this chapter provide some useful practical examples of where governments get things right as well as where they go wrong in their policies and practices affecting Aboriginal and Torres Strait Islander communities.

4.2 *Mirlirtjarra Kuurl Mirrka Palyalpayi* (Making good food at Warburton School)

This first case study tells of the establishment, development and continued operation of the *Mirlirtjarra Kuurl Mirrka Palyalpayi* (Making good food at Warburton School) Program in the Warburton Ranges, Western Australia. This example highlights the significance of community governance and clearly demonstrates how the organisation has established its governance upon this solid foundation. It has sought support from governments and others to build its sustainability. Government and others have responded with appropriate assistance that works to strengthen capacity in the community.

Mirlirtjarra Kuurl Mirrka Palyalpayi is a program which started with local women in Warburton identifying the need to improve school attendance. The women considered the reasons for low attendance and decided to provide breakfasts to those attending school to help reduce absenteeism.

The story that follows in Text Box 4.1 is told in the words of the Warburton Breakfast *Minyma* (women). I thank Professor Bill Genat for alerting me to this excellent example of community governance at work, and Rosalind Beadle for coordinating the drafting of the story in collaboration with the women.³

Text Box 4.1:

Mirlirtjarra Kuurl Mirrka Palyalpayi (Making good food at Warburton School)

Early days

The *Mirlirtjarra Kuurl Mirrka Palyalpayi* (Making Good Food at Warburton School) Program commenced as a school breakfast program in November 2008. It was initiated by community concerns regarding low school attendance. With the support of the school principal, four local grandmothers commenced a daily school breakfast program with resources provided by FoodBank WA and the Warburton Community Office. As described by one of the breakfast ladies, 'kids go to school every day when they have that good healthy breakfast, so they can stay in school and be good kids'.⁴

The program rapidly expanded as the older women sought help from their younger relatives. They trained the 'young girls' (daughters, nieces and granddaughters) to work on the program and organised themselves as a 'pool' of workers to allow for pressures of family and community life which might prevent them from attending work every day. As described by one of the grandmothers, sharing the load had further benefits, 'it was good for them to have a job and we learned them how to do the *mai* (food) for the kids'.⁵

The women also use their networking skills to liaise between themselves and ensure that if they are not available on any particular day, someone can work in their place. New women are constantly recruited to the program and to date, nearly four years later, over 35 women from different generations and families have participated. Once recruited, the women train each other 'on-the-job' and within a few days there is a new Warburton Breakfast *Minyma* (woman).

At the same time as the Breakfast *Minyma* began operating, several other initiatives were also taking place, meaning school attendance was being addressed from different angles. These other

3 Professor Bill Genat of the University of Melbourne is a Senior Evaluation Consultant to the Aboriginal Community Controlled Health Organisation and an Honorary Senior Fellow at the Onemda VicHealth Koori Health Unit. Rosalind Beadle is a PhD Candidate in the Centre for Health and Society, University of Melbourne.

4 Warburton community member, *Email from R Beadle to Social Justice Team*, 10 September 2012.

5 O Lawson, Breakfast *Minyma*, *Email from R Beadle to Social Justice Team*, 10 September 2012.

simultaneous efforts included the employment of a school attendance officer (who worked alongside the women) and also various rewards attached to improving attendance.

During the early stages of the program, the women and wider school community noted an improvement in attendance and the principals have commented on the positive benefits the breakfast program had in encouraging kids to come to school and stay in class, as well as increasing community engagement in school activities.

Although attendance was the original focus of the program, as the governance capacity of the Breakfast *Minyma* strengthened, the program took on a more holistic approach.

Beyond breakfast

Despite continuing to proudly call themselves the Warburton Breakfast *Minyma*, the women soon identified other catering activities to which to apply their skills. At the school's request, the women started catering for school Open Days and Theme Days each term.

In mid-2010, the Home and Community Care (HACC) coordinator working for Ngaanyatjarra Health Service struck up conversations with the Breakfast *Minyma* about the possibility of the women providing HACC meals (meals-on-wheels) to the elderly in the community which at the time were being prepared by the Mirilirtjarra Community Store. The Breakfast *Minyma* eased their way into the service, first by doing weekly cooking sessions of healthy meals focused around stews, curries, pastas, and bakes, complemented with desserts of rice cream, custard and fruit. Initially, the meals were picked up by the HACC worker, but over time the women took this activity on themselves, mobilised by learning to drive and acquiring driving licenses and having a vehicle donated to the program by the Ngaanyatjarra Council.

Before, those meals came from the store but they wanted us to make them. We were happy, you know, and make all the old people happy, all the breakfast ladies cooking them HACC meals. So they *pukurlpa* (happy).⁶

Today, following the establishment of a memorandum of understanding with the Department of Corrections, the women cook the bulk of their meals in the commercial kitchen at the Warburton Work Camp (a low security, Department of Corrections facility) – an excellent well-appointed work space they very much enjoy having the opportunity to access.

It's a lovely big kitchen and it feel likes our own while we are there. We enjoy learning how to use all the new equipment, especially that big oven.⁷

Formally accredited training undertaken by the women assisted their access to the commercial kitchen space. Early in the history of the Breakfast *Minyma*, it became apparent that the women were keen to formalise their skills in a nationally accredited training program, a step that would assist them with further employment and create further meaning to their work. In April 2012 seven of the women completed their qualification (Certificate One in Kitchen Operations) and were presented with their certification at Polytechnic West in Perth.

At the beginning of this year, the high school teachers consulted with the Breakfast *Minyma* about the possibility of the high school girls coming to do some cooking with the women in the Family Place (a portable building with a meeting room and a small kitchen space run by the *Minyma*). Once a week the high school girls visit to make school lunches for the kids with the guidance of the Breakfast *Minyma*,

6 O Lawson, Breakfast *Minyma*, Email from R Beadle to Social Justice Team, 10 September 2012.

7 M Richards, Breakfast *Minyma*, Email from R Beadle to Social Justice Team, 10 September 2012.

another of their important contributions to the community.

When the girls come all the ladies help them, show them how to cook. Then sometimes when the ladies are cooking, like at BBQs and things, the young girls can help us, It makes us feel happy when they come in and help the workers. We teach the girls how to use knives. When we go for training we come back and then learn these other little girls, yeah, it's a really lovely way to teach them.⁸

In 2010 the women published a story book about the breakfast program that was launched by the Western Australian Minister for Education and is used as a language resource in the local Warburton school classrooms. For the last twelve months the women have used photographic and video material from their activities in the Parent and Community Engagement (PACE) program, funded by DEEWR, to tell the kids at Warburton school about what they do. On the visuals the kids proudly point out their family members working in the kitchen and marvel at the wonderful facilities their mums, aunties and grandmothers have access to:

It's good for the kids, to see the photos, watch the ladies. Like they want to learn, when they grow older, they see the family working there, they get happy the kids, and when they must finish school, get a job you know, like the ladies too.⁹

It makes them feel proud looking at the pictures of what their families are doing. The kids say, 'Oh that's my mum working'.¹⁰

External support

Since its conception the *Mirlirtjarra Kuurl Mirrka Palyalpayi* program has been supported by a diverse array of agencies both financially and in-kind. These include the Ngaanyatjarra Council, the Warburton Community Office, WA Department for Child Protection, Community Development Foundation, FoodBank WA, LinkWest, the Western Australian Government Department of Education and many more.

However, as programs develop and enterprise skills evolve, the program is becoming increasingly financially independent with income arriving from catering events, small grants, fundraisers (BBQs and discos) and earring-making. These funds are used to purchase cooking equipment, other requirements such as craft and makeup materials for the *Kungka* (Girls) Nights, a television for the Family Place, the installation of a washing machine and to partially cover the costs of training trips to Perth. The finances are managed by LinkWest (an NGO in Perth) and at the weekly meetings discussions are had about the existing finances and decisions are made about outgoing costs.

Since its inception *Mirlirtjarra Kuurl Mirrka Palyalpayi* has been supported by the Community Development Employment Project (CDEP) and the women paid CDEP wages. During larger commercial events (such as Dust Up) where the women work significantly longer hours than they are allocated by CDEP, they are paid through the profits from their work. However, during the period in which the program has been operating, CDEP has been going through changes and the Government moved some of the participants from CDEP to Newstart. Despite receiving lower payments overall, the women on Newstart continued to participate in the program. Of note, a number of women have also used their experience to successfully acquire salaried positions including Aboriginal Education Officer at the school, Community Resource Worker with the Department for Child Protection and worker for the Home and Community Care program.

8 M Holland, *Breakfast Minyma, Email from R Beadle to Social Justice Team*, 10 September 2012.

9 C Robertson, *Breakfast Minyma, Email from R Beadle to Social Justice Team*, 10 September 2012.

10 T Duncan, *Breakfast Minyma, Email from R Beadle to Social Justice Team*, 10 September 2012.

Governance processes and partnerships

Each week on Monday mornings the women have a meeting at the Family Place to evaluate the different aspects of their program, make plans for upcoming events and address current issues. The meetings usually last for 1-1.5 hours in which the women address the agenda items, raise issues, discuss them with each other and arrive at solutions. They gently guide the program in directions so that it suits their lives and the lives of their families while at the same time building capacity to enhance the wellbeing of themselves and their families. Over time as the women's confidence has risen, the chairing of the meeting has rolled from the support staff to the most senior member of the program, Olive Lawson. For the most part the meetings are conducted in language, with support staff where necessary.

Over time, the women have also played a role as consultants for visiting staff and agencies who want to know their perspective on community issues. The women too have become regular attendees at the monthly Warburton Interagency Meeting, as well as representing the Ngaanyatjarra Lands School on the Goldfields Aboriginal Education Advisory Group that meets in Kalgoorlie.

Some visitors go round there (Family Place), some big people, go round, come see us, come talk to us, stay there a bit and have a yarn. Boss people, government ladies, DCP, staff and all. They come and see us when we are working. They come and praising the workers. They just say, 'Oh, it's really wonderful job that you are doing ladies'.¹¹

The role of support workers within the program, which continues to be essential, has rapidly evolved as the women gain capacity and confidence. Support staff include a Youth and Family Support Worker from the Department for Child Protection, the Parent and Community Engagement (PACE) coordinator, and the Ngaanyatjarra Council Community Project Officer.

The women have played a major part in shaping the role of the support workers. The critical requirement is for the staff to act as a catalyst to assist the women in bridging barriers between themselves and mainstream systems in areas where they are not already competent. As autonomy and skills increase, it requires the role of support staff to shift and, in some cases, cease.

After four years of engagement in self-initiated activities, the Breakfast *Minyma* have created a program that suits the interests and agendas of themselves, their families and their community. There have been constraints along the way, but together the women have worked to overcome them. They have successfully designed an organisation upon frameworks that were not predetermined nor had any external expectations.

The program continues to evolve, governed by the Breakfast *Minyma*, and demonstrates that remote communities have the strength, power and resilience to provide their own services rather than being dependent on outside resources.

As can be seen from the story, *Mirlirtjarra Kuurl Mirrka Palyalpayi* is an example of the achievements possible when all parties understand and fulfil their roles in the framework for effective governance in Aboriginal and Torres Strait Islander communities. The Warburton women's story tells of a locally initiated and designed program which:

- is tailored to address the specific circumstances of the community

11 O Lawson, Breakfast *Minyma*, Email from R Beadle to Social Justice Team, 10 September 2012.

- builds the capacity of the community it serves
- has taken its time to develop and cement relationships
- has worked in partnership with other bodies, including government
- has had appropriate support, as requested, from those other parties
- has remained directed and controlled by the community
- has built upon its successes incrementally
- has achieved its aim of improved school attendance and continues to sustain good school attendance rates
- has built on the community's capacity and expanded to provide other services
- is increasingly becoming self-funded.

What we can see in this case study is the ability of communities to identify and address a problem and the benefits to the broader community which can stem from this.

Not only has *Mirlirtjarra Kuurl Mirrka Palyalpayi* addressed the original problem identified by increasing school attendance rates with the breakfast program, it has managed many other achievements and brought many other benefits to the community. The foundation of community governance and the maintenance of control by the community group who began the program has delivered a raft of flow-on benefits including but not limited to the following:

- Many women in the community have received formalised training and skills, including formal qualifications for some of the women running the program.
- The younger women in the community are gaining a range of life skills. Importantly, the addition of the Family Place has provided an opportunity for the younger women to spend time with the older women. Here, the young women learn not only skills such as cooking and crafts, but it also presents an opportunity for the transfer of cultural and other knowledge between the generations. This is a particularly valuable flow-on benefit for the young women and to the community generally.
- The women involved and others in the community have learnt additional, complementary skills as the program has expanded, such as video-making, presentation skills and attaining driving licences.
- On the back of the success of the *Mirlirtjarra Kuurl Mirrka Palyalpayi*, the Breakfast *Minyma* have been able to secure additional resources for the community to address other needs identified by the community, for example a car to drop off meals to the elderly people in the community, and the Family Place building.
- The women are working role models for all the children who aspire to work in their community too.

Mirlirtjarra Kuurl Mirrka Palyalpayi started with a community response to a community problem. The problem and the response were owned by the community.

The pooled workforce and the culturally appropriate way of managing who works each day has resulted in a successful program with over 35 women working to date. All of those women have gained skills as a result. Had a more strict administrative arrangement been imposed the women might have felt that it did not understand their culture and their needs. The women would have been *workers in* rather than *owners of* a program imposed by others.

Over the last four years, the *Mirlirtjarra Kuurl Mirrka Palyalpayi* structure has developed to meet the external

requirements necessary to expand the program. This has involved a degree of formalisation, but control over decision-making processes and the ultimate decision-making authority remains with the Breakfast *Minyma*.

The role of external parties in the running of *Mirlirtjarra Kuurl Mirrka Palyalpayi* has been determined by the women in direct response to their needs. An example of this is the innovative solution for the financial management of the program; an NGO manages the finances, but decision-making as to what is done with funding remains with *Mirlirtjarra Kuurl Mirrka Palyalpayi*.

External support staff have been critical to the success of the organisation while the women build their capacity. Importantly, the external support staff are passing on skills and acting to strengthen the capacity of the women and then stepping back as the women's skills develop. The support workers understand that their role continues to evolve with the evolving needs of the community.

Government has provided appropriate support to facilitate the expansion of the program. The use of the Department of Corrections kitchen facilities is a great example. The enabling role played by government in the governance of *Mirlirtjarra Kuurl Mirrka Palyalpayi* has also had positive flow-on effects for government. The shared aim of increased school attendance has been achieved. Other services are also being successfully provided by the women and government is able to use *Mirlirtjarra Kuurl Mirrka Palyalpayi* to consult with the community.

I particularly want to note that some of the women are now receiving Newstart payments. Not only have the women chosen to continue working and are not getting paid, they are working harder than ever and taking great pride in their work. In my experience, this kind of commitment to community is not unusual despite the images often portrayed in the media of remote Aboriginal communities. However, it is an example of the type of work which is done in communities, which is clearly 'real work', but which is often not properly valued by governments.

The key to the success of *Mirlirtjarra Kuurl Mirrka Palyalpayi* lies in the roles and the relationships involved in the program. Control lies with the Breakfast *Minyma* and the support roles are played by government and NGOs. The results have been so much greater than the original aim of providing school breakfasts.

4.3 Warlpiri Youth Development Aboriginal Corporation

This second case study again looks at a local community organisation. The Warlpiri Youth Development Aboriginal Corporation (WYDAC) was started by members of the Yuendumu community as the Mt Theo Program in 1993. It began as an outstation rehabilitation program designed to address the problem of petrol sniffing, and received acclaim for the successful use of country and culture to curb this community health problem. The *Social Justice Report 2009* featured the Mt Theo Program as an effective example of the use of country to run a social well-being program for young Aboriginal people engaging in risky behaviours.¹²

Over two decades, the organisation has steadily built upon the strengths and capacity of the community and has expanded its operations to become WYDAC. It is now a 'comprehensive program of youth development and leadership, diversion, respite, rehabilitation, and aftercare throughout the Warlpiri region,'¹³ servicing four Warlpiri communities.¹⁴

(a) The story of WYDAC

WYDAC has grown significantly since its establishment in 1993. It incorporated through the Office of the Registrar of Indigenous Corporations (ORIC) in 2000 as the 'Mt Theo/Yuendumu Substance Misuse Aboriginal Corporation'. In 2008 the corporation changed its name to the WYDAC to reflect its broader role in the Warlpiri community.

Its expanded program allows it to address new issues as they arise. This has meant that the focus of the program has evolved beyond its initial goal of ending petrol sniffing into broader areas of youth development and well-being. The focus of WYDAC has transitioned from a 'crisis' approach to a long term community development program.

This evolution happened gradually and involved new ways of thinking and working. Members of the community, young people, elders and WYDAC itself were involved in both formal and informal discussions over a long period to develop the way forward.

WYDAC now plays a substantial role in the community and has many other functions, including the running of the Yuendumu Community Swimming Pool and the Yuendumu Mechanic Training Workshop. Presently the WYDAC provides the following services and programs.

Yuendumu programs:

- Jaru Pirrjirdi Youth Development (incorporating Yuendumu Youth Program)
- Warra Warra Kanyi Youth Counselling and Mentoring Service
- Yuendumu Community Swimming Pool
- Yuendumu Mechanic Training Workshop

Mt Theo Outstation:

12 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Australian Human Rights Commission (2009). At http://humanrights.gov.au/social_justice/sj_report/sjreport09/index.html (viewed 12 October 2012).

13 Warlpiri Youth Development Aboriginal Corporation (WYDAC), 'About', <http://mttheo.org/home/wydac/about/> (viewed 12 October 2012).

14 Much of this section is taken from WYDAC's Application for an Indigenous Governance Award, with thanks to WYDAC and Reconciliation Australia.

- Mt Theo Outstation Cultural Respite and Rehabilitation

Outreach programs:

- Willowra Youth Development Program
- Lajamanu Youth Development Program
- Nyirripi Youth Development Program

A video presentation entitled 'Strong Organisation, Strong Communities, Strong Young People' provides an excellent overview of these programs.¹⁵

The development of WYDAC to deliver such a range of services was not easy. At several points the organisation had to deliver services without funding. For example, both the Jaru Pirjirdi Program and the Warra Warra Kanyi Counselling and Mentoring Program were initially refused government funding.¹⁶ Despite those refusals, in both cases WYDAC continued the implementation of the programs with either philanthropic support or without funding because they were addressing needs identified as important by the Warlpiri community. In both cases, after initial success, government funding was later forthcoming.¹⁷

(b) Organisational governance structure

WYDAC's governance structure and processes have developed over 20 years. It started as a small organisation run by a small group of people in the Yuendumu community. But its success at each step of its development and expansion into new programs required a more formalised structure, achieved through incorporation. Operations Manager Brett Badger said:

As the organisation has grown it has been really important to ensure good governance structures are in place. They have to work for the Warlpiri community and support the relationships which make WYDAC strong.¹⁸

Any person who has resided in Warlpiri country for over a year can become a member of WYDAC. In April 2012, WYDAC had 137 members from the Yuendumu, Lajamanu, Nyirripi and Willowra communities.

WYDAC received an exemption from ORIC to allow it to have a larger board. Ordinarily a maximum of 12 directors applies. Under the exemption, ORIC allows WYDAC to have up to 50 directors. Currently, the WYDAC board has 42 directors, 12 of whom are Traditional Owners. When Traditional Owners of the Pururlu country (the land on which the Mt Theo Outstation sits) become members of the organisation they are automatically granted the opportunity to become directors but can opt out. This recognises the importance of traditional ownership in community governance structures and ensures that traditional governance structures are included in the modern organisational structures.

Five directors are elected at the Annual General Meeting to form the executive for two year terms. As is appropriate for Warlpiri peoples, there are two chairpersons, a man and a woman.

15 WYDAC, 'Strong Organisation, Strong Communities, Strong Young People', <http://mttheo.org/home/strong-organisation-strong-communities-strong-young-people-video/> (viewed 12 October 2012).

16 WYDAC, *Application for an Indigenous Governance Award* (2012), pp 12-13; WYDAC, 'Warra-Warra Kanyi Counselling and Mentoring Service 2009-2010', (Media release, 21 September 2012). At <http://mttheo.org/home/warra-warra-kanyi-counselling-and-mentoring-service-2009-2010/> (viewed 11 October 2012).

17 WYDAC, *Annual Report 2010-2011* (2011), p 13. At <http://mttheo.org/home/media/downloads/> (viewed 11 October 2012); WYDAC, 'Warra-Warra Kanyi Counselling and Mentoring Service 2009-2010', (Media release 21 September 2012). At <http://mttheo.org/home/warra-warra-kanyi-counselling-and-mentoring-service-2009-2010/> (viewed 11 October 2012).

18 B Badger, Operations Manager, WYDAC, note 15.

Decision-making at board meetings is by consensus. In the past eight years, no issue has needed to go to a formal or informal vote. In some circumstances directors may feel they need further input into decision-making and may call a community meeting to discuss the issue at hand.

Directors' behaviour and decision-making is governed by a set of guiding principles, which are 'embedded in Warlpiri cultural values and reflect Warlpiri relationships to each other, non-Warlpiri and Warlpiri land, and have been agreed on by members.'¹⁹

WYDAC identifies the strong and close relationships between members and staff as a strength of the organisation. The staff, executive and members are accessible to each other, allowing discussion and input over the direction and operation of the programs. Directors and chairpersons visit the offices daily to 'talk story' about the program, the community, and ideas for the future.²⁰ Over half of WYDAC employees are Warlpiri and an important part of WYDAC is Warlpiri and non-Warlpiri working together.²¹

(c) Successful governance in the Warlpiri community

Praise for the Mt Theo Program and now WYDAC has been prolific and there have been significant achievements, for example the elimination of petrol sniffing in the community.²² Most recently, a Northern Territory Legislative Assembly report on youth suicide praised the WYDAC, stating that it is 'widely acknowledged as an exemplary and sustainable model of community based youth diversion'.²³

In 2012, WYDAC was chosen as one of eight finalists – from a pool of over 100 applicants – in the Reconciliation Australia-BHP Billiton Indigenous Governance Awards.

There are many lessons to draw from even a brief look at WYDAC - lessons for communities and external parties in the Indigenous governance environment, especially governance.

One of the keys to the effectiveness of WYDAC is its legitimacy in the eyes of the community. This has been achieved through strong relationships developed over time: between the organisation and its community; and between WYDAC staff, directors and members. WYDAC states:

it is these internal relationships that cement the effectiveness of blending Indigenous and non-Indigenous ways of working, and conforming to the requirements and obligations of both cultures.²⁴

The original Mt Theo Program and the expanded WYDAC has responded at each point in its development to the needs of the Warlpiri community, particularly the needs of Warlpiri young people. It has listened to the community and responded.

The community feels ownership over and pride in the organisation because its structures are seen as culturally legitimate and its goals originated from within the community. The foundations of the program, operating without government support in its early days, also contributed to community ownership:

As our history shows, we have not waited for funding to do what needs to be done. We have dealt with it by harnessing the strength of Warlpiri people and their commitment to young people.²⁵

19 WYDAC, *Application*, note 16, p 16.

20 WYDAC, *Application*, note 16, p 6.

21 WYDAC, *Application*, note 16, p 6; WYDAC, note 15.

22 WYDAC, *Application*, note 16, p 2.

23 Select Committee on Youth Suicides in the NT, *Gone Too Soon: A Report into Youth Suicide in the Northern Territory*, Legislative Assembly of the Northern Territory (March 2012), p 128. At <http://www.indigenousjustice.gov.au/db/publications/291071.html> (viewed 12 October 2012).

24 WYDAC, *Application*, note 16, p 10.

25 WYDAC, *Application*, note 16, p 12.

As WYDAC has expanded its services and programs to other Warlpiri communities, it has developed sub-committees with members from those communities to ensure culturally appropriate representation and guidance. WYDAC ensures its ongoing legitimacy through ongoing consultation and engagement with the communities it serves.

The organisational governance structure of WYDAC fulfils the requirement for both internal and external accountability. The legitimacy and hence effectiveness of WYDAC are fundamentally influenced by its prioritisation of accountability to community. However, the corporate structure and related requirements also provide them with legitimacy in the eyes of governments and other funding bodies.

The corporate structure has been specifically designed to accommodate Warlpiri community governance. In providing an exemption allowing for up to 50 directors, ORIC has played a significant role in facilitating the legitimacy of the organisational structure in both the Warlpiri community and the broader governance environment.

However, WYDAC has had to deal with many challenges in the broader governance environment. For example, it has had to operate several programs without funding either because bureaucratic processes did not initially recognise the connections between the programs required and funding criteria, or because the processes were too hard for WYDAC to navigate successfully at the time. In response to these obstacles, WYDAC harnessed the existing strengths and capacity of their community members and ran the programs anyway, eventually securing funding.

WYDAC's *Annual Report 2010-2011* lists 17 government departments and agencies and 10 independent organisations which provide program funding to WYDAC. In addition, WYDAC lists a number of private donors whose support is especially valued because it is not tied to conditions and can therefore be used to respond to community needs as they arise.²⁶

The success of WYDAC in securing external accountability as well as legitimacy in the community can be seen from the high degree of stakeholder confidence in the programs. In the last five years, WYDAC has had a 400% increase in their funding base. The Harvard Project, whose work on Indigenous governance I discussed in Chapter 2, would describe this as evidence that WYDAC has created a 'virtuous cycle' – that is, a cycle in which WYDAC demonstrates its capacity, funding is forthcoming, precipitating further capacity development and program success, engendering greater confidence of stakeholders.²⁷

WYDAC is an example of the achievements possible when communities realise that 'the best argument for sovereignty [and self-determination] is its effective exercise'.²⁸ WYDAC has a 20-year history of achievement based on the Yuendumu community building on their strengths to develop their own capacity. At various points, government has supported WYDAC and continues to do so in a number of ways. But on several occasions WYDAC has had to persist in the face of external obstacles without support. Further, the amount of bureaucracy involved in managing 17 different government funding agencies inevitably drains resources from the organisation. WYDAC's story should give governments cause to reflect on the points at which they could better facilitate and enable effective Indigenous governance and apply these lessons to WYDAC as well as to other community initiatives in the future.

26 WYDAC, *Annual Report*, note 17, p 24.

27 See, S Cornell, C Curtis and M Jorgensen, *The Concept of Governance and its Implications for First Nations*, The Harvard Project on American Indian Economic Development and the Native Nations Institute Joint Occasional Paper on Native Affairs No. 2004-02 (2004), p 16. At http://www.jopna.net/pubs/jopna_2004-02_Governance.pdf (viewed 12 October 2012).

28 Cornell et. al., above, p 16.

4.4 Ngroo

Ngroo is a non-Indigenous service provider which aims to ensure access for Aboriginal and Torres Strait Islander families to inclusive, culturally appropriate early childhood education.²⁹

Ngroo offers a training and mentoring program which provides the management and staff of preschools with the knowledge and skills to effectively engage Aboriginal and Torres Strait Islander families. It focuses on ensuring a culturally safe environment by creating a culturally competent workforce which meaningfully engages with the local community that it serves.³⁰ This model intrinsically recognises the importance of community governance in developing successful early childhood education services for Aboriginal and Torres Strait Islander children.

Ngroo is an example of a non-Indigenous service provider that understands the role it has in the framework of effective governance in Aboriginal and Torres Strait Islander communities. That is, its role is to engage and empower the Aboriginal and Torres Strait Islander community it hopes to serve, and to create genuine partnerships to enable us to achieve our aims.

(a) The story of Ngroo

(i) Beginnings at Tregear Presbyterian Preschool

Ngroo began in a single preschool in Western Sydney, Tregear Presbyterian Preschool (Tregear). The then Director of Tregear, Jan Wright – an experienced, non-Indigenous early childhood teacher – was well aware that a preschool education significantly increases the likelihood that a person will go on to achieve well in future education and more generally. Jan was also aware that the large Aboriginal and Torres Strait Islander population in the local area did not send their children to Tregear.

Jan asked a local Aboriginal woman, Sheryn Turvey, who came to enrol her child at the preschool, why Aboriginal families did not come to Tregear. The answers represent the barriers to Aboriginal and Torres Strait Islander participation in early childhood education and are in Text Box 4.2 below.

Text Box 4.2:

Barriers to Aboriginal and Torres Strait Islander access to preschools

- High cost
- Lack of transport to service
- Lack of Aboriginal staff
- No connections with the local Aboriginal community

29 See Ngroo's website, <http://www.ngroo.org.au/index.html>. Much of this case study has been drawn from a draft paper prepared by Ngroo, *Walking together – a model of social inclusion that engages Aboriginal families and shows how listening to their voices increases Aboriginal access to preschools* (September 2012).

30 For a detailed discussion on cultural safety, cultural security and cultural competency, see M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011), Chapter 4. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 12 October 2012).

- Culturally uneducated staff
- Limited cultural cues in the environment
- Lack of Aboriginal resources and culturally appropriate content
- Feelings of disconnectedness, social isolation, bias and feeling unwelcome.³¹

Jan heard that many Aboriginal and Torres Strait Islander people or their families had in the past had negative experiences with the education system and as a result were not inclined to send their children any earlier than they had to. The past experiences sometimes led to a feeling of shame associated with educational institutions.³² Jan said:

You could pay Aboriginal people to send their children to pre-school and it still wouldn't work if families don't feel a place is culturally safe.³³

Jan and Sheryn found that the barriers they identified reflected the broader evidence base. The research about 'what works' to deliver improved service delivery outcomes is consistent and has been available for a decade. As discussed in detail in Chapter 2, the evidence shows that what works is community involvement and engagement from the beginning, respect for language and culture in the services and programs, and genuine partnership with Aboriginal and Torres Strait Islander peoples. What does not work are interventions with external decision-making, without local community control or culturally appropriate adaptations.³⁴

Accordingly, in 2008, Jan and the staff at Tregear Preschool set about removing the barriers. They undertook a range of changes to improve accessibility to Aboriginal and Torres Strait Islander peoples:

- They reduced the cost to a maximum of \$10 per day for Aboriginal families by identifying the full range of government entitlements available.
- They provided a bus to transport children to and from the preschool.
- They identified Elders in the area and got them involved. Initially, this involved Sheryn making contact

31 Ngroo, *Walking together – a model of social inclusion that engages Aboriginal families and shows how listening to their voices increases Aboriginal access to preschools* (September 2012).

32 J Wright, *Meeting with the Social Justice Commissioner*, Tregear, 26 April 2012.

33 Wright, above.

34 See for example, V-A Ware, *Improving access to urban and regional early childhood services*, Resource Sheet No. 17 Closing the Gap Clearinghouse, Australian Government (August 2012). At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs17.pdf (viewed 12 October 2012); S Flaxman, K Muir, I Oprea, *Indigenous families and children: coordination and provision of services*, Occasional Paper No 23, National Evaluation Consortium (2009). At http://www.sprc.unsw.edu.au/media/File/OccPaper_23.pdf (viewed 12 October 2012); Secretariat of National Aboriginal and Islander Child Care Inc., *Indigenous Parenting Project: Main report* (July 2004). At http://www.aihw.gov.au/closingthegap/resources/item.cfm?item_id=8727&group_type=BB&group_id=1&q=&start=1432 (viewed 12 October 2012); Secretariat of National Aboriginal and Islander Child Care Inc., *Increasing Aboriginal and Torres Strait Islander access and engagement with child and family services*, Policy Paper 3 (2011). At http://www.snaicc.asn.au/_uploads/rsfil/02743.pdf (viewed 12 October 2012); Secretariat of National Aboriginal and Islander Child Care Inc., *Improved Outcomes for Aboriginal and Torres Strait Islander Children and Families in Early Childhood Education and Care Services: Learning from Good Practice* (April 2012). At http://www.snaicc.asn.au/_uploads/rsfil/02811.pdf (viewed 12 October 2012); Secretariat of National Aboriginal and Islander Child Care Inc., *Opening Doors Through Partnerships: practical approaches to developing genuine partnerships that address Aboriginal and Torres Strait Islander community needs* (April 2012). At http://www.snaicc.asn.au/_uploads/rsfil/02804.pdf (viewed 12 October 2012); M Sims, S Saggars, T Hutchins, A Guilfoyle, A Targowska, S Jackiewicz, 'Indigenous child carers leading the way' (2008) 33(1) *Australian Journal of Early Childhood* 4. At http://www.earlychildhoodaustralia.org.au/australian_journal_of_early_childhood/ajec_index_abstracts/indigenous_child_care_leading_the_way.html (viewed 12 October 2012).

with the Elders she knew in the area surrounding Tregear. From there, the network grew.

- They worked with the Elders group to guide their journey and make connections in the community.
- The Elders worked with staff to improve their cultural awareness so that they felt comfortable and confident in their interactions with Aboriginal and Torres Strait Islander people.
- Staff reviewed their policies and practices with the Aboriginal community to ensure they were respectful and reflected Aboriginal views.
- As Director of Tregear, Jan employed Aboriginal staff to work with the children.³⁵

Once the Elders felt that the barriers had been removed and the environment was culturally safe, they encouraged Aboriginal families to enrol their children at Tregear. This initially resulted in a small number of enrolments. But once word spread that the preschool was 'Aboriginal friendly' Aboriginal and Torres Strait Islander enrolments grew rapidly. Aboriginal and Torres Strait Islander enrolments at Tregear are now at record levels, up from nine children in 2008 to 50 children in 2012.³⁶

In the early days, there were occasions when enrolled children did not attend on their enrolled days. On those occasions, the Elders would go out to the home of the child's family and find out what the problem was. The Elders emphasised to the parents the importance of the children attending on their enrolled days. This personal approach by the Elders was immediately successful in tackling the small degree of non-attendance.³⁷

The curriculum at Tregear now includes Aboriginal music, art, dance and stories told by members of the local community.

The model used at Tregear emphasises the importance of staff development. This involves a focus on cultural competency for non-Indigenous staff as well as formal training:

Developing our staff, both Aboriginal and non-Indigenous is really important. It benefits the staff themselves, the children at Tregear, and families of the children who are engaged with the preschool. Most importantly it raises the confidence of the staff as a team towards achieving excellence.³⁸

(ii) To the Ngroo Pilot Program

The positive outcomes from the approach at Tregear resulted in the establishment of the Ngroo Pilot Program for the Blacktown Local Government Area. Blacktown is home to the highest number of Aboriginal and Torres Strait Islander families in NSW.³⁹ The Ngroo Pilot Program ran from March to July 2011 and involved 11 preschools. It received a modest grant of \$8 000 from the New South Wales (NSW) Department of Human Services (formerly Department of Community Services).

The Ngroo Pilot Program used the same model as that used at Tregear: prioritising the knowledge and contacts of local Elders; making contacts within and engaging the broader Aboriginal and Torres Strait Islander communities; and identifying barriers relevant to each preschool and removing them. In particular, they focused on creating a culturally competent workforce and culturally safe environment.

The trial involved Ngroo staff and elders from Tregear brokering connections between the preschools and their local Aboriginal communities. It involved one workshop with the preschools and two mentoring sessions, as

35 Ngroo, note 31.

36 Ngroo, note 31.

37 J Wright, *Telephone conversation with Social Justice Team*, 16 October 2012.

38 Wright, above.

39 Blacktown City Council, 'Statistics: Demographic Overview of the Blacktown LGA', http://www.blacktown.nsw.gov.au/our-city/statistics/statistics_home.cfm (viewed 12 October 2012).

well as ongoing mentoring as needed.

The 11 preschools involved in the trial are all at different stages of their development. There has been dramatic success at some of the preschools and smaller improvements at others.

This pilot program allowed Ngroo to assess its model and learn additional lessons to those which were learnt at Tregear.

The preschools which were successful were the ones which removed the barriers identified and had strong connections with the local Elders. Ngroo found that for each preschool, some barriers are harder to remove than others. There were two factors in particular which led to less success in the trial preschools:

- The less successful preschools were run by large organisations. This meant they had additional overheads that were not negotiable and as a result they were unable to reduce their costs for Aboriginal and Torres Strait Islander people to a maximum of \$10 per day.⁴⁰ In particular, where there were multiple layers to the management structure, money was required to be distributed up those tiers.⁴¹
- Some service providers did not have the Aboriginal and Torres Strait Islander population in the local area.⁴²

Another critical lesson from the pilot program was that transformation like that which took place at Tregear did not happen overnight. It took four years to develop the solid, sustainable partnerships and the trust which exists today at Tregear. Ngroo's involvement with the preschools was just the beginning of a process:

Ours is a model for sustainable change – what makes Ngroo a successful model is our focus on building trust, respect and genuine partnership between the service, the staff and the community. Given the history of negative experiences with education that many Aboriginal parents have had, it is not surprising that it might take some time to build that trust.⁴³

The partnership with local Elders has resulted in a growing trust in Ngroo within the Aboriginal community in NSW:

Due to the past history, Aboriginal people find it hard to trust. To leave their child with a person they don't know makes it even harder. To have Aboriginal staff and Elders visiting the early childhood services is a great way to role model to families that this service is a culturally friendly one and can be trusted. Local Elders are contacted by Ngroo's Elders connections before we go into community and are invited to sit alongside each other at the workshop.⁴⁴

As confidence has grown within the community, and the outcomes have reflected that, confidence amongst the broader community has also grown in Ngroo. Ngroo secured a substantial philanthropic donation which enabled it to carry on after the Pilot Program. This private benefactor gave very generously and in giving said:

I can see that early childhood is where we need to invest. All I ask of you in giving this money is that you approach government to match my donation.⁴⁵

Ngroo has been refused funding by the NSW Government and has not yet been granted funding by the

40 Ngroo, note 31.

41 Wright, note 37.

42 Wright, note 37.

43 Wright, note 32.

44 M Silleri, Training Coordinator, Ngroo, to J Wright, *Telephone conversation with Social Justice Team*, 16 October 2012.

45 Private benefactor of Ngroo to J Wright, 2011, *Telephone conversation with Social Justice Team*, 16 October 2012.

Australian Government.⁴⁶

(iii) Now - Ngroo Education Incorporated

After the success of the model at Tregear and in the Pilot Program, and with the support of private funding, Jan established Ngroo Education Incorporated (Ngroo Education). Ngroo Education had been operating for just over a year at the time of writing and was incorporated under the *Associations Incorporation Act 2009* (NSW) on 3 March 2011. In June 2012, Ngroo was granted Deductible Gift Recipient (DGR) status by the Australian Taxation Office after the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) entered it on the Register of Harm Prevention Charitable Institutions. This means that further private donations are tax deductible.

Ngroo Education aims to share its successful model with other preschools across NSW. It does this through a program of workshops and mentoring where preschools receive one workshop and then two follow-up visits and additional mentoring as much as is needed (as in the trial).

The program teaches staff from State Government-funded preschools how to effectively engage with the Aboriginal and Torres Strait Islander community so that Aboriginal and Torres Strait Islander families will feel comfortable sending their children there. Ngroo advocates that for the best outcomes, preschools should build ongoing relationships and partnerships with local Aboriginal and Torres Strait Islander communities.

The involvement of Aboriginal Elders in the workshops and mentoring program is central. Ngroo Education makes connections with local Elders of each preschool community to make sure they are involved in the process from the beginning.

The workshop is a six hour intensive training day. The workshops teach management and staff about the Aboriginal and Torres Strait Islander connection to land/country, and takes them through the history behind why Aboriginal and Torres Strait Islander people do not access early childhood services. It teaches staff about the current barriers to access, how to identify them at their preschool and in their local area, and the role that the preschool (and individuals working in the preschool) can play in removing the barriers and creating an inclusive, accessible service.

The workshops prioritise creating a culturally competent workforce to create a culturally safe environment. Ngroo Education gives preschool staff the following advice:

- cultural competence develops cultural security
- do not stereotype
- act as a partner, not an expert
- don't try to fix us as we are not broken
- listen to our stories
- recognise it takes time to connect
- openly discuss issues as they arise
- staying culturally connected is an ongoing effort
- understand a respectful silence

46 Wright, note 37.

- develop a powerful sense of what is socially just
- ‘as a non-Aboriginal person it is important to look at why you think the way you do’.⁴⁷

The training also focuses the mind on some practical problems which might face Aboriginal and Torres Strait Islander children. For example, Aboriginal and Torres Strait Islander children have a high rate of Otitis Media, or Glue Ear, leading to hearing problems. This can badly affect a child’s capacity to learn, and therefore staff should look out for signs of Glue Ear.

The mentoring program is the ongoing link between Ngroo Education and the preschools they work within. The mentoring sessions explore the barriers further with staff as they attempt to remove them. Ngroo Education staff provide ongoing support with resources, transport, fee reduction, staffing, advice and ongoing engagement.⁴⁸

The local Elders have an ongoing relationship with the preschool, guiding the preschool in how it can make local Aboriginal and Torres Strait Islander families most welcome.⁴⁹ Their ongoing role in providing community links and supports varies as do the many communities with whom Ngroo has built relationships.

The mentoring occurs in a variety of ways to suit the differences between localities and communities, so can take place by phone, internet, or face to face.

Ngroo Education also has an employment and training strategy ‘which facilitates Aboriginal participation’.⁵⁰ Currently, 14 local Elders are cultural advisors to Ngroo Education and six Aboriginal trainees have been placed in services and mentored by the local Elders and Ngroo Education staff. This team of Aboriginal trainees, staff and Elders is critical to keeping the relationships going between preschool staff and the Aboriginal families in the community.

Ngroo credits the success of its model to the recognition of the diversity in communities and the creation of networks of Aboriginal and non-Indigenous people: ‘Ngroo recognises that this is step one in a far longer process of engagement and two-way learning.’⁵¹

Staff in services have provided feedback anecdotally that they feel more comfortable in building networks and relationships with their local Aboriginal community. Enrolments have increased. They are able to identify and address negative attitudes that arise in their team. They are thinking outside the square to remove barriers. They are more involved in community activities. They require ongoing training to provide culturally strong programs. They value the challenges of reflecting on their practices with communities in order to be more inclusive.⁵²

Barriers have persisted in some services, mainly to do with costs. As mentioned earlier, some services have additional overheads which mean that they cannot reduce costs. Some organisations have tried to provide reduced fees by granting scholarships from donations provided by benefactors or staff, but ‘often this is made so public that families feel shame or obligated to the service.’⁵³ So there are ongoing challenges.

Ngroo hopes that its approach takes hold and that it can build a national movement towards prioritising inclusivity in all our preschools: ‘Our desire is to foster an increasingly successful, ever widening cooperative movement among mainstream preschools.’⁵⁴

47 Ngroo, *Workshop workbook* (March 2012).

48 Ngroo, ‘Vision and Mission’, <http://www.ngroo.org.au/vision.html> (viewed 12 October 2012).

49 Ngroo, note 31.

50 Ngroo, note 31.

51 D Mann, Research and Development Manager, Ngroo, *Telephone conversation with Social Justice Team* 16 October 2012).

52 Mann, above.

53 Ngroo, note 31.

54 Ngroo, ‘Mentoring’, <http://www.ngroo.org.au/mentoring.html> (viewed 12 October 2012).

(b) Lessons from Ngroo

There are many lessons to draw from Ngroo for non-Indigenous service providers, including governments.

The key to Ngroo's success is the focus it places on relationships between the preschools and the local Aboriginal and Torres Strait Islander communities. Ngroo's organisational structure incorporates standard good corporate governance principles to engender the confidence of external funders and governments. But through its operational model, it also incorporates a basis of community governance.

Ngroo advocates a community-based approach to getting Aboriginal and Torres Strait Islander children to preschool. Ngroo's model recognises that each Aboriginal and Torres Strait Islander community is different. It is based on listening to each community's needs and concerns, and respecting and including each community's own authority structures. This means the Ngroo model has the inbuilt flexibility to respond appropriately to the needs of different communities. It teaches preschools not to presume anything.

Also important is the cultural competence training for management and staff and the focus on employing Aboriginal and Torres Strait Islander staff from the local area in the preschools. Ngroo's training program aims to increase comfort levels and advise staff of practical ways in which they can make Aboriginal and Torres Strait Islander families feel welcome, included and valued, and has resulted in Aboriginal and Torres Strait Islander families having confidence in Ngroo-trained preschools as culturally safe environments for their children.

Ngroo's emphasis on partnerships and cultural competence is based on the evidence of 'what works' to improve Aboriginal and Torres Strait Islander participation in education. Those partnerships empower Aboriginal and Torres Strait Islander families and communities as they engage with mainstream preschools.

This is the next important lesson – Ngroo creates empowered communities and leaves strengthened capacity behind. Ngroo's approach is to build the capacity of everyone involved in the early childhood education of Aboriginal and Torres Strait Islander children – the families, communities and preschools.

Ngroo aims to strengthen capacity in the local Aboriginal and Torres Strait Islander communities in which Ngroo-trained preschools operate. Ngroo's model is based on including Aboriginal and Torres Strait Islander people front and centre of every step of the process – the design of the program, the identification of barriers in each preschool, the removal of the barriers, and the care and education of the children. The training for preschools is explicitly to build their capacity in both cultural competence and corporate governance. For example, an important part of the training is about the capacity of preschools to be able to engage effectively in the government funding framework and reduce their overheads so as to enable reduced costs for Aboriginal and Torres Strait Islander children.

Ngroo highlights the importance of external actors understanding their role in the Indigenous governance environment. Their role is to enable and support Aboriginal and Torres Strait Islander peoples to achieve our aims and to partner with us to deliver the best outcomes.

Ngroo has been overwhelmed by hearing and seeing the changes in mainstream staff and programs. Hearing non-aboriginal educators' enthusiasm and excitement at feeling able to tackle any challenges, hearing the stories where individuals have been proactive in providing structural ways to change existing barriers in policy and procedures from the ground up. The increased demand from the broader early childhood sector in these early stages reinforces Ngroo's resolve to keep on going and keep true to the principles of respect, relationship and social equity.⁵⁵

The example of Ngroo proves that where the role of non-Indigenous parties in engaging with Aboriginal

55 D Mann, note 51.

and Torres Strait Islander communities is performed appropriately and well, it achieves not only discrete service delivery outcomes, such as improved education, but it also takes us all further along our journey of reconciliation.

4.5 Governance in the Torres Strait

(a) Background

As I have discussed in Chapter 2, the components of effective governance in Aboriginal and Torres Strait Islander communities ultimately highlight the need for a new relationship between Aboriginal and Torres Strait Islander peoples and governments. Achieving our aims can only come through empowerment. Ultimately, this depends on governments being prepared to devolve power to Aboriginal and Torres Strait Islander peoples to manage our own affairs.

The following case study illustrates that devolving power is not unusual. There are myriad options for power-sharing arrangements. Many Australians would not realise the degree of power-sharing which already exists in Australia today. Australia is a federation with power shared between states, territories and the Commonwealth under the Constitution and Australia's federal model has changed constantly throughout its history and is certainly not a fixed arrangement.⁵⁶ Further, Australia has several territories, including the self-governing territory of Norfolk Island and the non-self-governing territory of Christmas Island.⁵⁷

The Torres Strait is a unique geographical region of Australia and has been moving steadily towards greater autonomy for many years.⁵⁸

(b) The Torres Strait region

The Torres Strait is the 40 000 square kilometre area between the Cape York Peninsula and the southwest coast of Papua New Guinea (PNG). It is 90 per cent ocean, but includes 18 island communities and two mainland communities.⁵⁹ On instructions from London, Queensland annexed the Torres Strait Islands without the consent of the traditional inhabitants between 1872 and 1879.⁶⁰ The Torres Strait remains part of the State of Queensland today. Around 9 000 people, 7 000 of whom are Torres Strait Islander and/or Aboriginal, live in the Torres Strait.⁶¹ The Torres Strait is the only part of Australia with an active international border (with

56 A Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403.

57 See 'The Legislative Assembly of Norfolk Island', <http://www.norfolkislandgovernment.com/> (viewed 12 October 2012); Commonwealth of Australia, Department of Regional Australia, Local Government Arts and Sport, 'Christmas Island', <http://www.regional.gov.au/territories/christmas/index.aspx> (viewed 12 October 2012).

58 See, for example W Sanders, *Torres Strait governance structures and the Centenary of Australian Federation: a missed opportunity?* Centre for Aboriginal Economic Policy Research (CAEPR) Issues Paper No. 184/1999 (July 1999). At <https://digitalcollections.anu.edu.au/handle/1885/40169> (viewed 12 October 2012); W Sanders and B Arthur, *Autonomy rights in Torres Strait: From whom, for whom, for or over what?* CAEPR Discussion Paper No 215 (2001). At <http://caepr.anu.edu.au/Publications/DP/2001DP215.php> (viewed 12 October 2012); E Macdonald, 'The Torres Strait Regional Authority: is it the answer to regional governance for Indigenous peoples?' (2007) 11(3) *Australian Indigenous Law Review* 43. At http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/E_MacDonald_TSRA.pdf (viewed 12 October 2012); House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *A Report on Greater Autonomy for Torres Strait Islanders: A New Deal* (1997); S Elks, 'Anna Bligh supports Torres Strait Islands secession', *The Australian*, 12 October 2011. At <http://www.theaustralian.com.au/national-affairs/state-politics/anna-bligh-supports-torres-strait-islands-secession/story-e6frgczx-1226164349650> (viewed 12 October 2012).

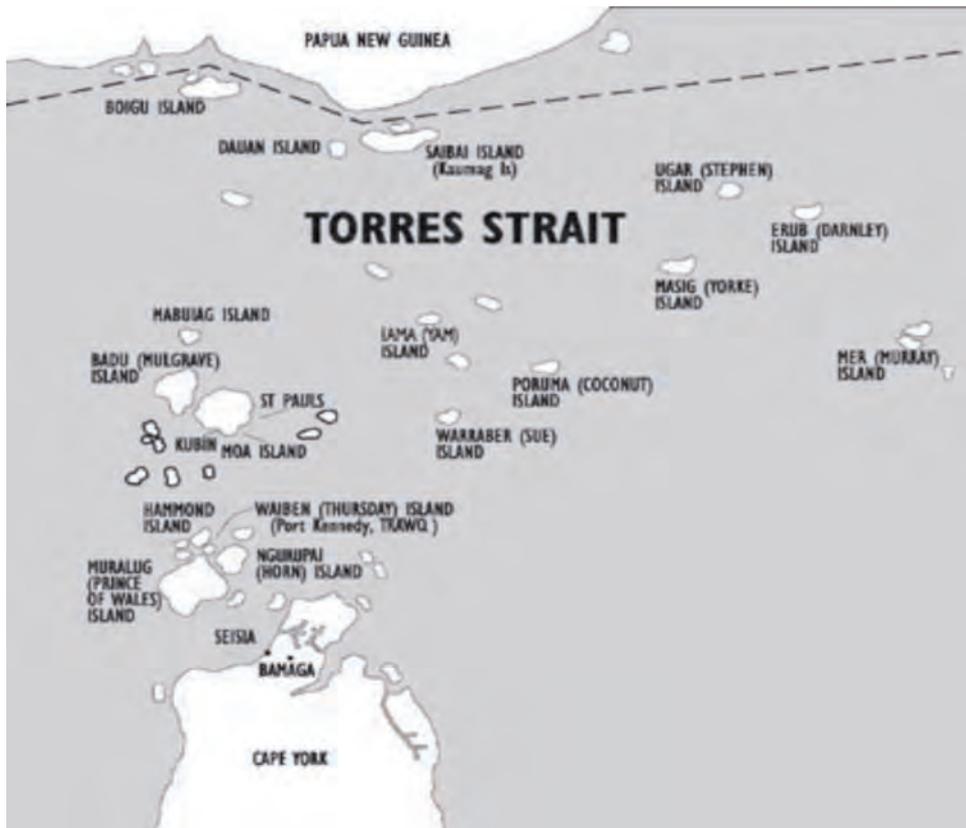
59 House of Representatives Committee, above. *Torres Strait Regional Authority, 2005-2006 Annual Report* (2006), p 30. At <http://www.tsra.gov.au/publications/e-publications/annual-reports.aspx> (viewed 12 October 2012). The 18 island communities are the communities of Boigu, Dauan, Saibai, Badu, Mabuag, Kubin (on Moa Island), St Pauls (on Moa Island), Iama (Yam Island), Masig (Yorke Island), Poruma (Coconut Island), Warraber (Sue Island), Mer (Murray Island), Ugar (Stephen Island), Erub (Darnley Island), Hammond Island, Muralug (Prince of Wales Island), Ngurupai (Horn Island) and Thursday Island (Waiben). The two Torres Strait communities on the mainland northern peninsula are Bamaga and Seisa.

60 J Burton, Anthropologist, Torres Strait Regional Authority, <http://www.tsra.gov.au/the-torres-strait/general-history.aspx> (viewed 12 October 2012).

61 In 2006, 8 590 people lived in the Torres Strait Region and 6 958 of those people were Torres Strait Islander and/or Aboriginal. See ABS, 'Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006', <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4705.0> (viewed 12 October 2012).

PNG). The Australian Government manages the national policy areas of customs, quarantine, immigration and defence from Waiben (Thursday Island), the main administrative centre. Waiben also serves as the main administrative centre for State and local government authorities. An international treaty creates the Torres Strait as a Special Territory protecting traditional inhabitants' rights of free movement, and maintains traditional cultural and trade ties in the border region in between the Treaty Villages of Western Province in PNG and the outer islands of the Torres Strait. A map of the region is at Image 4.1.

Image 4.1:
The Torres Strait regional map⁶²



62 Torres Strait Regional Authority, 'Regional Map', <http://www.tsra.gov.au/the-torres-strait/regional-map.aspx> (viewed 12 October 2012).

(c) Governance arrangements in the Torres Strait

The governance arrangements of the Torres Strait are unique, corresponding to its unique geography and demography. The arrangements are complex and still evolving. For many years there have been conversations amongst Torres Strait Islanders and between Torres Strait Islanders and the Queensland and Australian Governments about secession from Queensland, but there is already a degree of autonomy achieved through the current local government arrangements. The Torres Strait Regional Council became the Torres Strait Regional Authority (TSRA) in 1994 and was the only regional structure to survive the abolition of ATSIC.

The governance arrangements in the Torres Strait have involved several representative levels in recent times. Until 2008 there was the Torres Shire Council, first established as Town Council in 1903;⁶³ seventeen Island Councils, created in 1985;⁶⁴ the Island Coordinating Council (ICC);⁶⁵ and the TSRA.⁶⁶ These arrangements had evolved to ensure that each unique island community was represented appropriately.

In 2008 the Queensland Government implemented state-wide local government reforms and amalgamated the Island Councils to form the new Torres Strait Island Regional Council (TSIRC). The TSIRC is now one of three local government councils found in the Torres Strait region, along with the Torres Shire Council and the Northern Peninsula Area Regional Council (NPARC).

(i) Torres Shire Council

The Torres Shire Council municipality was first established in 1903 as a Torres Town Council and subsequently became the Torres Shire in 1991. It services the communities of Waiben (Thursday Island), Ngurupai (Horn Island) and Murulag (Prince of Wales Island), although its jurisdiction covers all the uninhabited islands of the Torres Strait from the PNG border to as far south as the Jardine River in the Cape York Peninsula. However the Torres Shire Council's administrative control does not include areas covered by the TSIRC (previously the Island Councils), or the NPARC communities. The Torres Shire Council's jurisdiction as a local government includes a local law-making role and an executive role in relation to the adoption and implementation of policy, administration of local government, and the enforcement of those local laws. The Council receives revenue from rates, utility charges, fees and charges, grants, subsidies, contributions and donations. The elected members of the Torres Shire Council include the Mayor and four councillors.

All people living within the Shire can vote and stand for election in the Torres Shire Council, but people enrolled to vote in a TSIRC election cannot vote in a Torres Shire Council election.

The Torres Shire Council has a long standing Memorandum of Understanding with the TSRA which documents the principles of collaboration and cooperation between the two organisations.

(ii) Torres Strait Island Regional Council

The TSIRC is divided into fifteen wards representing the 'outer' island communities of Badu, Boigu, Dauan, Erub (Darnley), Hammond, Iama (Yam), Kubin, Mabuiag, Masig (Yorke), Mer (Murray), Poruma (Coconut), Saibai, St Pauls, Ugar (Stephen) and Warraber (Sue). The population of the region is around 5 000 people.⁶⁷

Each of the previous Island Councils in these communities comprised of three councillors, including a

63 *Local Government Act 1993* (Qld).

64 *Community Services (Torres Strait) Act 1984* (Qld).

65 *Community Services (Torres Strait) Act 1984* (Qld), s 139.

66 *Aboriginal and Torres Strait Islander Act 2005* (Cth), Part 3A.

67 Queensland Treasury and Trade, Office of Economic and Statistical Research, *Population and Dwelling Profile, Torres Strait Island Regional Council* (April 2012).

chairperson; except the Saibai Island Council which had seven councillors representing the seven clans and two tribal groups, in the area.

Now, the TSIRC consists of a Mayor who is elected by the whole council region and 15 councillors who are elected by their respective communities. Each community has a community forum made up of a Councillor and elected members of the public who advise the Council on service delivery, culture and planning. When there are land matters to discuss, a community forum convenes as a Land Panel. The role of the Land Panel is to make recommendations to Council regarding proposed Deed of Grant in Trust (DOGIT) land decisions.⁶⁸

Some of the functions of the TSIRC include: water and sewerage, waste, childcare, planning, environmental health, economic development, libraries, roads, parks and gardens, ports and airports, community radio.⁶⁹

Meetings of the TSIRC were being held on a different island each month but the cost of transporting all the councillors every month was reported to be prohibitive.⁷⁰

The TSIRC is currently negotiating a Memorandum of Agreement with the TSRA to document their principles of collaboration and cooperation between the two organisations.

(iii) Northern Peninsula Area Regional Council

The third local government in the region is the NPARC which is based in Bamaga. NPARC provides local government services to the five communities of Bamaga, Seisia, Umagico, New Mapoon and Injinoo. NPARC has a Mayor and five Councillors.

NPARC has entered into a Memorandum of Understanding with the TSRA which documents the principles of collaboration and cooperation between the two organisations.

(iv) Torres Strait Regional Authority

The TSRA was established in 1994 to deliver Commonwealth programs to Torres Strait Islanders and Aboriginal people living in the Torres Strait Islands.⁷¹ It grew out of the Torres Strait Regional Council, which was a regional council under ATSIC.

The TSRA consists of 20 elected members, one from each of the TSRA electoral wards. The wards correspond to the local government regions. There are fifteen elected members from the outer islands, three members from the inner island cluster and two members from the Northern Peninsula Area. The Chairperson of the TSRA is elected by the Members at the first board meeting following the TSRA election. Prior to 2012, seventeen of the TSRA members were appointed following the local government elections for TSIRC (15) and NPARC (2). The remaining three were elected under Division 5 of the *Aboriginal and Torres Strait Islander Act 2005 (ATS/ Act) Act 2005* to represent the areas of Ngurupai (Horn Island), Muralug (Prince of Wales Island) and Port Kennedy on Thursday Island. Following a review of governance arrangements in the Torres Strait commissioned by the TSRA Board in 2010, the TSRA Board determined that independent elections (that is elections that were separate from the local government election process) would provide a better governance structure for the region.

68 Torres Strait Island Regional Council, 'About Council', <http://www.tsirc.qld.gov.au/about-council> (viewed 11 October 2012).

69 Torres Strait Island Regional Council, above.

70 See for example D Hurst, 'Council meetings cost remote communities \$50,000 a pop', *BrisbaneTimes.com.au*, 15 September 2010. At <http://www.brisbanetimes.com.au/queensland/council-meetings-cost-remote-communities-50000-a-pop-20100914-15as2.html> (viewed 11 October 2012).

71 *Aboriginal and Torres Strait Islander Act 2005* (Cth), Part 3A.

The TSRA is mainly funded through federal Parliament appropriations.⁷² The TSRA provides grant funding to organisations that can demonstrate capacity to deliver against the outcomes and benefits contained in the Torres Strait and Northern Peninsula Area Regional Plan (2009 -2029) and the Torres Strait Development Plan (currently 2009 – 2013).⁷³ Organisations include the three local governments in the regions, Prescribed Bodies Corporate and a wide range of Indigenous corporations in the region.

The TSRA has the responsibility to:

- formulate, coordinate and implement programs for Torres Strait Islander and Aboriginal people living within the region, including the Business Funding Scheme, the Community Development Employment Projects, infrastructure programs, health partnerships, culture and heritage programs, land and sea management programs, governance and leadership programs, and native title services
- monitor the effectiveness of these programs, including programs conducted by other bodies
- advise the Minister for Indigenous Affairs on matters relating to Torres Strait Islander and Aboriginal Affairs in the Torres Strait
- recognise and maintain the special and unique *Ailan Kastom* (culture) of the Torres Strait Islander people living in the Torres Strait Region
- undertake activities necessary to perform its function as defined by the ATSI Act 2005.

The TSRA administers programs to help improve the health and well-being of Torres Strait Islander people. To achieve this aim, the TSRA says it works to:

- gain recognition of our rights, customs and identity as indigenous peoples
- achieve a better quality of life for all people living in the Torres Strait region
- develop a sustainable economic base
- achieve better health and community services
- ensure protection of our environment
- assert our native title over the lands and waters of the Torres Strait region.⁷⁴

(d) Towards greater autonomy

As mentioned already, the governance and representative structures in the Torres Strait have been under review, and greater autonomy has been proposed and recommended on several occasions in the last few decades. It was intended that the TSRA would eventually merge into a new assembly, as discussed by the House of Representatives Committee in 1997⁷⁵ and later addressed in the Bamaga Accord.⁷⁶

There is ongoing discussion among the Torres Strait communities about the appropriate model for autonomy. However the region's leaders have not yet determined what kind of autonomous model would work best for the region.

⁷² *Aboriginal and Torres Strait Islander Act 2005* (Cth), s 144TA.

⁷³ TSRA, *Email to Social Justice Team*, 17 October 2012.

⁷⁴ TSRA, 'The TSRA', <http://www.tsra.gov.au/the-tsra.aspx> (viewed 12 October 2012).

⁷⁵ House of Representatives Committee, note 58.

⁷⁶ P Stephen, Mayor, Torres Shire Council, *Email to Social Justice Team*, 19 October 2012.

(e) Lessons from the Torres Strait governance arrangements

The Torres Strait provides an example of one regional community working towards the development of a power-sharing arrangement in Australia. These governance arrangements are evolving in response to the desire and capacity of the Torres Strait Islander people for greater autonomy and the recognition by governments of the uniqueness of the region.

Although the Torres Strait is not yet autonomous from the Queensland Government, there are a number of aspects to the relationship between the TSRA and the Australian and Queensland governments which indicate a different kind of relationship with government and a greater degree of power-sharing than in other local government arrangements. For example, the Torres Strait Treaty between Australia and PNG was negotiated between the governments of the two nations as well as the Queensland Government and the leadership of the Torres Strait.

The TSRA Board is a key advisory body, providing input across a broad range of cross border issues. Members of the Board participate in an annual cycle of bilateral consultative meetings with both PNG traditional inhabitants and other officials, at the National, State and Provincial level. The TSRA continues to work closely with the Australian Department of Foreign Affairs and Trade to ensure Torres Strait participation continues at meetings of Traditional Inhabitants, Treaty Liaison, the Environmental Management Committee and the Joint Advisory Council.⁷⁷

There is recognition that further autonomy in internal affairs is likely in due course. Negotiations in this regard have been ongoing for many years.

Any new arrangements are likely to involve close relationships with the Queensland and Australian governments. Former Queensland Premier Anna Bligh reportedly suggested a combination of the Christmas Island and Norfolk Island self-governance arrangements might be considered.⁷⁸ Any new self-governance arrangements in the Torres Strait, like all other effective Indigenous governance arrangements in modern Australia, require a fine balance of community governance arrangements. This balance has been achieved by the Torres Strait region for many years now, including in the face of regular government-imposed changes to governance arrangements.

There are few communities in Australia which share enough characteristics with regions such as the Torres Strait to make this type of model directly transferrable to other areas. But there certainly are other Aboriginal and Torres Strait Islander communities with equally distinct governance cultures and traditions. Self-determination already extends to these kinds of self-governance arrangements in Australia, among others. There is no principled reason why other communities cannot design tailored solutions for their own autonomy, if that is what self-determination means for them.

The Torres Strait has managed to secure legitimacy in its governance arrangements by tailoring the representative arrangements to the specific needs of the people, whilst navigating and manoeuvring around government policies and requirements. The arrangements ensure strong local representation at the regional level, including representation of small communities.⁷⁹ Further, the Torres Strait has ensured community participation in and management of the processes of governance development. These participative processes have been ongoing for many years. They are seen as having played an important role in preventing inappropriate structures and they continue to be an important part of getting any new self-governance

77 TSRA, 'Governance and Leadership', <http://www.tsra.gov.au/the-tsra/governance-and-leadership.aspx> (viewed 12 October 2012).

78 See Elks, note 58.

79 Evidence to the Senate Select Committee on the Administration of Indigenous Affairs, Parliament of Australia, Thursday Island, 26 August 2004, p 11 (Margaret Mau).

arrangement right.⁸⁰

The governance arrangements involve a number of layers of government, in part necessitated by the needs of the people of the Torres Strait, but also because of the relationship with the Queensland and Australian Governments and the way the governance arrangements have evolved. Some of these layers might in time be removed. However currently, the arrangements work because of several factors:

- The arrangements incorporate the principles of self-management and self-determination.⁸¹
- There is a clear delineation of roles and responsibilities.
- There is good coordination and partnerships across all levels of government.
- There is direct funding from the Department of Finance and Administration in the form of a single line budget.⁸²

The requirements of legitimacy and participation are prioritised in these arrangements and in the development of any new arrangements. But also prioritised is the need for the local and regional representative organisations to be able to engage in the broader governance environment. This broader governance environment is a huge challenge, particularly in the context of the overarching aim of greater independence from the Queensland state. The main hindrance to achieving autonomy is logistical and financial arrangements. But there are many positive indications that the relationship between government and the Torres Strait is evolving into one of partnership, based on respect for the people of Torres Strait's right to self-determination.

80 Stephen, note 76.

81 Stephen, note 76.

82 Torres Strait Regional Authority, *Submission to the Senate Select Committee on the Administration of Indigenous Affairs* (July 2004), pp 7-8.

4.6 Congress – national representation for Aboriginal and Torres Strait Islander peoples

(a) Background

The National Congress of Australia's First Peoples (Congress) is the national representative body for Aboriginal and Torres Strait Islander peoples. Congress was developed after the Government abolished the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2005, and was incorporated in 2010.

Congress is still in the early stages of its development. However, an independent evaluation of Congress has found that Congress has effective governance, accountability and probity standards, which operate well and align with Congress' purpose and operating environment,⁸³ and it has realised its key objectives for the first two years of operation.⁸⁴ Although Congress is a young organisation, the process of creating Congress' unique structure, as well as its early achievements, is illustrative of the different aspects of effective governance for and by Aboriginal and Torres Strait Islander peoples.

In this case study I will discuss Congress' role and structure in the context of the framework for effective governance in Aboriginal and Torres Strait Islander communities. I will consider the three components of effective governance discussed in Chapter 2.

In developing the model for Congress, it was acknowledged that community governance had to underpin and form the foundations of both organisational governance and the relationship with government. However, it is the confluence of all of the three aspects of governance, so consciously brought together, which stands Congress in good stead to achieve its aims and objectives.

(b) Community governance foundations

Perhaps the most important factor in Congress' community governance foundations is that its design responded to what Aboriginal and Torres Strait Islander peoples said they wanted from a national representative body.

(i) Consultations

In July 2008, my predecessor Dr Calma released a comprehensive issues paper informed by research commissioned from the National Centre for Indigenous Studies at the Australian National University.⁸⁵ In this paper, Dr Calma identified the following 'foundational principles to consider for a new Indigenous representative body':

- Having **legitimacy** and **credibility** with both government and Indigenous peoples.
- **'Two way' accountability** – to government and to Indigenous peoples and communities.
- Being **transparent** and accountable in its operations; in the mechanisms for determining membership or election; in policy making processes; and financial processes.
- Truly **representative** of a diverse Indigenous polity (ensuring participation of different groups of Indigenous people including stolen generations, traditional owners, Torres Strait Islanders, youth and

83 P Cranko, A Redman, E Ferrer, Sphere Company, *Organisation Evaluation Report, National Congress of Australia's First Peoples (Congress Evaluation Report)* (August 2012), pp 2-3.

84 *Congress Evaluation Report*, above, p 3.

85 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *A National Indigenous Representative Body – (Issues for consideration)*, Human Rights and Equal Opportunity Commission (2008). At http://www.humanrights.gov.au/social_justice/rebody/paper.html (viewed 12 October 2012).

women for example).

- A **consistent** and **'connected' structure**, so that there is a clear relationship between the national body and Indigenous peak bodies, service delivery organisations and other representative mechanisms that may exist at the State, Territory or regional level.
- **Independent** and robust in its advocacy and analysis – policy advice and advocacy are not restricted to the confines of the government policies of the day, but extend to sustainable funding options for the organisation.⁸⁶

Consultations with Aboriginal and Torres Strait Islander peoples on the establishment and development of the new representative body took place in three stages:

1. July – December 2008 – FaHCSIA conducted the initial public consultation process on the establishment of an Indigenous representative body. This involved 80 public meetings covering all States and Territories, a mail-out to 2,300 organisations on the ORIC mailing list, initial consultations with State and Territory Governments and 105 written submissions.
2. December 2008 – March 2009 – The Minister for Families, Community Services and Indigenous Affairs invited Dr Calma to convene an independent Steering Committee whose task was to develop a preferred model for a new national Indigenous representative body.⁸⁷ The Steering Committee led a second round of consultations, including a workshop of 100 Aboriginal and Torres Strait Islander peoples in Adelaide in March 2009, all participants having been selected through a merit-based process.
3. May – June 2009 – The Steering Committee convened focus groups nationally and conducted an online survey, consultations, workshops and meetings, and written submissions were invited.

In August 2009, the Australian Human Rights Commission published the Steering Committee's report *Our future in our hands: creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*.⁸⁸ The Steering Committee proposed the model to which Congress has largely followed.

What the consultations revealed

The consultations revealed that Aboriginal and Torres Strait Islander people wanted our representative body to:

- enable and support self-determination
- promote community-building and sustainable development
- ensure independent operation, free from government influence/control
- align with the highest standards of ethical and moral conduct
- exhibit a strong performance-based culture
- be open, transparent and accountable to Aboriginal and Torres Strait Islander peoples

86 Calma, *Issues for Consideration*, above, p 64.

87 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 (Our future in our hands)*, Australian Human Rights Commission (August 2009). At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html#2 (viewed 12 October 2012).

88 Steering Committee, *Our future in our hands*, above.

- ensure equal participation of men and women
- promote inter-generational dialogue and participation
- ensure the participation of particularly vulnerable and marginalised groups
- emphasise the importance of long term, inter-generational vision.⁸⁹

Two key tensions emerged from the consultation process, highlighting the balancing act required of the new representative body – they are outlined in Text Box 4.3 below.⁹⁰

Text Box 4.3:

Tensions regarding the balancing act of the new representative body

Tension 1 – Legitimate, representative and expert

The first key tension raised in the consultations was how the new body ‘obtains political legitimacy with Aboriginal and Torres Strait Islanders while also being streamlined, cohesive and expert in its operations’.

But what does ‘legitimacy and credibility’ mean in this context? Do ‘representative’ and ‘expert’ necessarily present a tension?

Actually, in the case of our national representative body, legitimacy and credibility encompass ‘expert’, as well as a number of the other foundational principles. We know this because to be legitimate and have credibility, our representative body must be what our people want, and our communities told us what they wanted in the consultations:

- The body must be accountable to our communities.
- The body must be connected to our communities in a way we can agree represents our diversity.
- The individuals representing us in the organisation must be some of our best.

The challenge was that the melding of these features could not be found in any existing structure, or in any combination of existing structures.

Tension 2 – Independent and influential

The second key tension which emerged from the consultation process was regarding the relationship the new body should have with government.

The tension between independence from government and influence in policy development is going to be an ongoing tension and will turn largely on the relationships developed between governments and Congress.

89 Steering Committee, *Our future in our hands*, above, pp 22-23.

90 Steering Committee, *Our future in our hands*, above, p 19.

These two tensions were critical in determining Congress' structure and functions – its non-statutory status, its funding plans and its non-service delivery role.

There were several considerations which fed into the final decision not to have the new body fulfil a service delivery role. These included the experiences of past bodies which illustrate some of the disadvantages of undertaking too many functions with the potential to conflict.⁹¹ One of the main problems with ATSIC was that its roles were not clearly defined and conflicted in part, and it had insufficient funding and authority.⁹² Further, research conducted in preparing the *Issues for consideration* paper found that other comparable countries' Indigenous representative bodies (the United States, Canada, Sweden and New Zealand) did not have a service delivery role.⁹³

There was almost unanimous support during consultations for the new body to prioritise larger strategic national issues over service delivery or allocation of government funds. Accordingly, the Steering Committee proposed that the new body should focus on the following roles:

1. Formulating policy and advice, providing an Aboriginal and Torres Strait Islander perspective on issues across government.
2. Advocacy and lobbying between Aboriginal and Torres Strait Islander peoples and the government, corporate and non-government sectors, ensuring the best interests of Aboriginal and Torres Straits Islander peoples are upheld.
3. Monitoring government service delivery and performance, ensuring the presence and adequacy of accountability mechanisms.

Congress' functions and aims have been developed in line with these proposals.

(ii) Congress' principles

Congress' policy and advocacy platform is guided by its Statement of Principles, which are set out at Text Box 4.4 below.

91 Calma, *Issues for consideration*, note 85, pp 20-22.

92 Calma, *Issues for consideration*, note 85, pp 20-22.

93 Calma, *Issues for consideration*, note 85, section 3.

Text Box 4.4:

Congress' Statement of Principles⁹⁴

Rights

As Aboriginal and Torres Strait Islander Australians we are proud to be the First Peoples of this land. In this, we assert our rights to self-determination under the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration is the foundation and guide for Congress to uphold and strengthen our collective and individual rights.

Unity

Congress respects the diversity of Aboriginal and Torres Strait Islander peoples, clans, tribes and nations. At the same time we value the strength that comes from unity. As unified peoples we can draw on our collective strengths to secure a strong economic, social, cultural and political future for current and future generations.

Culture

At the heart of our work is the culture, spirituality, connection to land and sea, and identity as Aboriginal and Torres Strait Islander peoples. Congress recognises that stories and knowledge passed on by our ancestors and Elders through our ancient and continuing traditions and kinship ties are the essence of maintaining connection to culture and country.

Empowerment

Congress will complement the work of existing First Peoples organisations and supports local community control and governance that seeks to empower our Members, their families and communities in developing their political, economic and social systems or institutions.

Leadership

Congress acknowledges and pays respect to the strength and resilience of our heroes who have fought for the rights we enjoy today and have overcome adversity to contribute to the development of the Australian nation. Their strong, courageous leadership is our inspiration. We will strive to build on what has been achieved for justice and equality, and in doing so support new generations of leaders.

Inclusiveness

Congress recognises our responsibility to reflect the views of our Members and Delegates and the overall interests of all Aboriginal and Torres Strait Islander peoples. We commit to effective and meaningful engagement, ensuring participation at all levels with peoples from across the country and working to empower all First Peoples to achieve positive change.

94 National Congress of Australia's First Peoples, 'Statement of Principles'. At <http://nationalcongress.com.au/wp-content/uploads/2012/02/CongressPrinciples1.pdf> (viewed 12 October 2012).

Knowledge

Congress will harness both traditional and contemporary forms of knowledge to inform our decisions and actions.

Our work is evidence-based and draws on the highest standards of research that is ethical, informed, up to date and respectful of Aboriginal and Torres Strait Islander cultures, peoples and their communities.

Innovation

Congress strives to produce work that is innovative, creative and effective.

Partnerships

Congress recognises the importance of meaningful, equitable and respectful partnerships for its success and for securing positive change.

Sustainability

Congress is focused on long term change rather than a short term fix. Our policies and strategies must effect sustainable change that outlasts the changing tides of government and legislation.

Congress describes these guiding principles in the following way:

These principles emphasise self-determination and empowerment, the United Nations Declaration on the Rights of Indigenous Peoples and courageous leadership.

They commit Congress to meaningful engagement with Members and Delegates, innovation, high standards of research and sustainable solutions. They ask that we honour the culture, diversity and unity of our peoples.⁹⁵

As demonstrated in the discussion below, we can see that these principles underpin the decisions made about Congress' roles and functions as well as how the priorities of Congress are determined.

(iii) Congress' roles and functions

The 'vision' of Congress is to be a national leader and advocate for recognising the status of Aboriginal and Torres Strait Islander peoples as First Nations peoples:

Congress is here to give our mob a say on issues that are important to us and to be a national voice for all First Nations peoples.

The expertise and passion of our Delegates and Members, backed by the authority and leadership of the elected National Board, gives us the power to represent the views of First Peoples to government, advocate for change, and uphold the rights of our peoples.⁹⁶

The Preamble of Congress' Constitution describes Congress' role as 'an independent national voice, a leader, an advocate, and a source of advice and expertise for First Peoples and the wider community. Drawing strength from culture and history, Congress will endeavour to bring equality, freedom, opportunity and empowerment to all First Peoples.' Congress' Constitution sets out its purposes at clause 2(a): see Text Box 4.5.

95 National Congress of Australia's First Peoples, 'Policy and Advocacy', <http://nationalcongress.com.au/policyandadvocacy/> (viewed 12 October 2012).

96 National Congress of Australia's First Peoples, above.

Text Box 4.5:

Purposes of Congress – section 2(a)⁹⁷

2(a) The company is established for the public charitable purposes of:

1. providing national leadership and recognition of the status and of the rights of Aboriginal and Torres Strait Islander people as first nations peoples;
2. protecting and advancing the wellbeing and rights of Aboriginal and Torres Strait Islander peoples and communities;
3. providing a representative voice of, and a conduit for communication with and between, Aboriginal and Torres Strait Islander peoples;
4. securing economic, political, social, cultural and environmental futures for Aboriginal and Torres Strait Islander peoples and communities by working with governments, service providers, communities and other stakeholders;
5. building strong relationships with government, industry and among Aboriginal and Torres Strait Islander peoples and communities, based on mutual respect and equality; identifying issues, researching solutions and educating government, service providers and Aboriginal and Torres Strait Islander peoples and communities to achieve the above purposes.

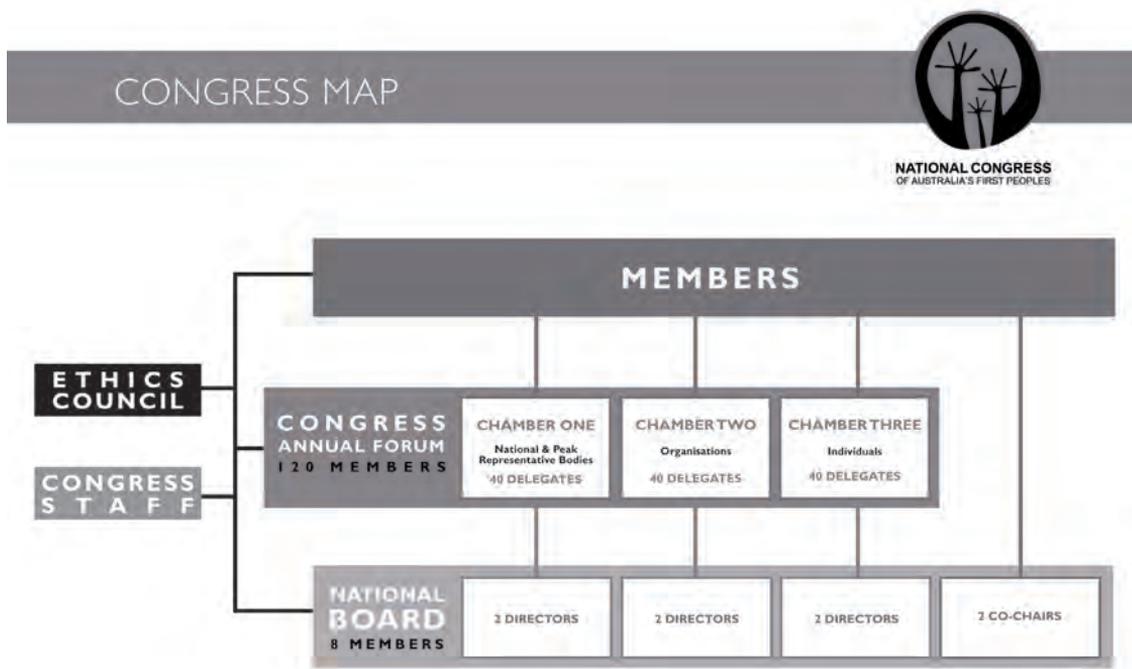
These roles reflect the needs and concerns of Aboriginal and Torres Strait Islander peoples identified through the consultations.

(c) Organisational governance – structure of Congress

Congress' structure is complex and unique. It has been designed specifically to accommodate the priorities, needs and concerns of Aboriginal and Torres Strait Islander communities, as determined by Aboriginal and Torres Strait Islander people. Image 4.2 contains a diagram of the organisational structure of Congress, which I explain further below.

⁹⁷ Constitution of the National Congress of Australia's First Peoples (Congress' Constitution), adopted on 15 April 2010. At <http://natiotu.customers.ilisys.com.au/wp-content/uploads/2010/12/101201-National-Congress-Constitution-Amended.pdf> (viewed 12 October 2012).

Image 4.2:
Congress Map



The following are the key features of Congress' structure.

1. Congress is a company limited by guarantee, not a statutory body.
2. Congress Board of Directors is supported by an Ethics Council.
3. Congress also conducts an annual meeting – the National Congress – of 120 delegates from the three 'chambers'.
4. Congress has policy and administrative staff supporting its functions.

(i) Congress - the company

As a public company, Congress has a Constitution which sets out in detail its structure, functions and powers.⁹⁸

The National Congress of Australia's First Peoples Limited is made up of four parts.

⁹⁸ Congress' Constitution, above.

1. National Board of Directors

A National Board of Directors with two elected Co-Chairs – one male and one female – and six Directors. Two Directors are elected from each of the three Chambers (discussed below).

The Co-Chairs are directly elected by Congress members from an Ethics Council-approved shortlist. The six Directors (three male and three female) are elected by the National Congress. Candidates for these six positions are drawn from the delegates in the three Chambers who have all been through a vetting process by the Ethics Council. Candidates are either nominated or nominate themselves.

All members of the National Executive are elected for four-year terms although initially three directors serve two year terms. All subsequent terms are for four years on a staggered election cycle every two years.

As the governance and operational arm of the organisation, the National Board:

- formulates, advocates and implements policies and priorities consistent with the direction of the National Congress
- develops the strategic and business plans
- organises and leads engagement strategies with Aboriginal and Torres Strait Islander people
- directs the work of the Administrative/Executive support team
- communicates Congress' views and policies.

2. Ethics Council

The Board is supported by an Ethics Council, which comprises a body of experts 'with the highest integrity' who provide independent advice on standards and guidelines.⁹⁹ The Ethics Council reviews policy decisions, assists with legal and reporting requirements, investigates breaches or complaints by members, reviews and advises on eligibility for membership and reviews chamber delegates' eligibility. The Ethics Council is discussed in more detail below.

3. Secretariat/staff

The Board and Ethics Council are supported by the Secretariat of Congress, a small team of staff (currently 20) headed by the Chief Executive Officer. The Secretariat provides policy and operational advice and support, and deals with membership, organisational governance and compliance.

4. Members

Congress has individual and organisational members. Any Aboriginal or Torres Strait Islander person over 18 can join Congress, as can any Aboriginal or Torres Strait Islander organisation.¹⁰⁰ Members are divided into three Chambers which are described in the section below on the annual 'National Congress'.

⁹⁹ The Ethics Council is required by clause 17 of Congress' Constitution, above.

¹⁰⁰ Defined as organisations in which 51% of members are Aboriginal and/or Torres Strait Islanders; at least 51% of the Board/ Committee/ Council members are Aboriginal and Torres Strait Islander; the purpose and activity of the organisation relates specifically to Aboriginal and Torres Strait Islanders; and for national organisations, they need to have a significant number of members throughout Australia, in at least five or more states and territories. See National Congress of Australia's First Peoples, 'Congress Fact Sheet'. At <http://nationalcongress.com.au/wp-content/uploads/2011/09/CongressFact-Sheet.pdf> (viewed 11 October 2012).

(ii) Annual meeting of Delegates – the ‘National Congress’

The requirement to hold an annual meeting of the ‘National Congress’ is included in the Constitution.¹⁰¹ The Constitution provides that the annual National Congress ‘review the performance of and assist the company in carrying out its purposes in accordance with its values.’¹⁰² This is the primary mechanism through which Congress is accountable to Aboriginal and Torres Strait Islander peoples.

The National Congress involves 120 delegates from three Chambers – 40 delegates from each Chamber – plus the two Co-Chairs of the National Board (the six Directors are already Chamber members). The Chambers are constituted as follows:

- **Chamber 1** is for Aboriginal and Torres Strait Islander peak bodies and national organisations.
- **Chamber 2** is for other Aboriginal and Torres Strait Islander organisations which do not qualify for Chamber 1.
- **Chamber 3** is for individual Aboriginal and Torres Strait Islander people.

Chambers 1 and 2 hold elections for their 40 delegates prior to the National Congress. Organisations that are members of those Chambers have the right to vote for these delegates. From Chamber 1, a maximum of two people (one male and one female) from one organisation can be delegates to National Congress; for Chamber 2, a maximum of one person from one organisation can be a delegate to National Congress.

Individuals that nominate to be in Chamber 3 are assessed against criteria by both the Ethics Council and the National Board. Gender parity and adequate representation of the membership are included as part of the process to select the 40 members for this Chamber.

The 120 delegates nominate every two years to be Chamber members and attend the National Congress every year. The Board are exceptions to this process as they hold four year terms.

(iii) Organisational governance features

Aboriginal and Torres Strait Islander peoples clearly stated the need for the new body to be ‘beyond reproach’ in terms of its corporate governance structure and accountability:

There has been a perceived need to ‘bulletproof’ Congress from allegations of impropriety levelled sometimes fairly but often unfairly against ATSIC’s board. It was clearly the view of Aboriginal and Torres Strait Islander peoples that we needed and in fact wanted to hold ourselves to a higher standard than is required of other companies and representative bodies.¹⁰³

Aboriginal and Torres Strait Islander organisations come under particularly close scrutiny – closer than other organisations without a doubt.¹⁰⁴

Our future in our hands identified a series of corporate governance and behavioural standards which would apply to the new representative body.¹⁰⁵ These included the ‘The Essential Corporate Governance Principles’ by the Australian Stock Exchange’s Corporate Governance Council¹⁰⁶ and the Nolan Committee Principles on

101 Congress’ Constitution, note 97, clauses 1.2(b) and 6.

102 Congress’ Constitution, note 97, clause 14(b).

103 L Coombes, Chief Executive Officer, Congress, *Meeting with Social Justice Team*, 7 August 2012.

104 J Broun, Co-Chair, Congress, *Meeting with Social Justice Team*, 7 August 2012.

105 *Our future in our hands*, note 87, pp 53-54.

106 *Our future in our hands* attached ‘The Essential Corporate Governance Principles’ by the Australian Stock Exchange’s Corporate Governance Council as part of the Corporate governance and behavioural standards for the new National Representative Body. See note 87, p 54.

public life.¹⁰⁷

In addition, standard accountability mechanisms for corporations apply to Congress because it is a company limited by guarantee and incorporated under the *Corporations Act 2001* (Cth). Importantly, Congress has supplemented its structure with additional accountability mechanisms which are unique to Congress, for example the Ethics Council and the annual National Congress meeting of the Chambers.

The Ethics Council

The Ethics Council is a constitutionally entrenched feature of Congress' accountability framework.¹⁰⁸

The Steering Committee recommended that the Ethics Council should be a small body with roles to:

- apply a merit based process in order to shortlist candidates for election as the members of the National Executive
- develop and maintain the ethical standards of the organisation, including investigating breaches of the ethical standards by members of the National Congress and National Executive.¹⁰⁹

Congress' Constitution sets out the purposes of the Ethics Council which include:

- advising the Board on membership including the expulsion of a member
- advising the Board on ethics
- mediating
- ensuring Congress' policies and practices are of the highest ethical standards
- investigating potential breaches of ethical standards.¹¹⁰

The first Ethics Council was nominated by the Steering Committee for a term of two years and developed criteria for determining how future Ethics Council members should be appointed. Following expressions of interest, the Ethics Council makes recommendations to the National Board that then appoints new members.¹¹¹ The membership of the Ethics Council should reflect the diversity of the Aboriginal and Torres Strait Islander population, and include gender balance and young Aboriginal and Torres Strait Islanders with suitable qualifications.¹¹²

When vetting applications, the Ethics Council applies a 'fit and proper' test, which considers criteria such as whether applicants have a criminal record or past governance-related issues.

While Aboriginal and Torres Strait Islander people said we wanted our body to be beyond reproach, some have criticised the strictness of the 'fit and proper' test as 'elitist.' The Congress Evaluation found that the Ethics Council is a 'beacon for good practice in respect of accountability'¹¹³ and that there could be an

107 The *Seven Principles of Public Life* in the First Report of the Committee on Standards in Public Life (UK) (1995) p 14. At <http://www.archive.official-documents.co.uk/document/parliament/nolan/nolan.htm> (viewed 11 October 2012). The Nolan Committee Principles will apply to all who are employed by the national Indigenous representative body. Note the Steering Committee added an 8th principle. See *Our future in our hands*, note 87, p 54.

108 Congress' Constitution, note 97, section 17.

109 *Our future our hands*, note 87, p 27.

110 Congress' Constitution, note 97, section 17.

111 National Congress of Australia's First Peoples, *Policy for filling vacancies on the ethics council*, Policy Document, 8 February 2012.

112 *Our future our hands*, note 87, p 28.

113 *Congress Evaluation Report*, note 83, p 3.

expanded role for the Ethics Council within Congress.¹¹⁴

It is therefore an ongoing challenge for Congress to strike the right balance between requiring a very high level of integrity as an organisation and representing all Aboriginal and Torres Strait Islander people:

Currently, the balance between requiring a very high level of integrity of our representatives and not unfairly or unduly excluding potential candidates is being struck but it is a fine balance and we will listen to our members on this like everything else.¹¹⁵

The Chamber structure and annual meeting of the National Congress

The Chamber structure of National Congress and its yearly meetings are important accountability mechanisms through which community can hold the National Board accountable.

The chamber structure of the National Congress is not necessarily an intuitive model but it is an innovation intended to address some of the unique requirements of a national Aboriginal and Torres Strait Islander representative body. It is designed to address the need to:

- create a structure for engaging with existing representative bodies and sectoral bodies
- build on our existing strengths – our peak bodies and organisations have significant expertise in a number of areas, such as health
- represent all Aboriginal and Torres Strait Islander peoples.

The seemingly complex overall structure of National Congress is not like other representative bodies such as land councils. In addition to ensuring representational coverage, formalising relationships between existing bodies and including expertise, this structure:

- specifically requires a gender balance
- incorporates the requirements of merit-based selection to ensure people with the right skills are involved in the organisation.

Congress is a positive example of the way in which community governance and organisational governance can be intertwined: its corporate structure has been determined by its purposes, identified in consultations with community, and its operation continues to be guided by those principles.

(d) Relationship with Government

Looking at the way Aboriginal and Torres Strait Islander peoples have been represented at the national level over the last century, we can see that the mechanisms and structures have been largely short-lived and subject to the whim of the Australian Government. The intention behind Congress is for it to be a permanent, independent and representative body in the control of Aboriginal and Torres Strait Islander peoples.

There is a tension between Congress being independent of Government while also forming a close working relationship with Government in order to effectively influence decisions affecting Aboriginal and Torres Strait Islander peoples. These issues were explored through a consideration of options – a statutory versus a non-statutory body; and government funding versus private funding.¹¹⁶

¹¹⁴ *Congress Evaluation Report*, note 83, p 19.

¹¹⁵ Coombes, note 103.

¹¹⁶ *Issues for consideration*, note 85, pp 97-104.

A decision was made that Congress should not be a statutory authority to ensure that Parliament cannot abolish Congress. This means that Congress:

- is not dependent on the goodwill of Parliament and the government of the day
- can be flexible in its structure - its Constitution can be altered when necessary and in accordance with the needs and aspirations of its members
- is more likely to attract corporate and philanthropic support for its operations.

However, Congress is currently dependent on government for its funding and is likely to be in this position for at least a few more years. The funding of Congress is possibly the most critical factor in establishing its independence from Government.

(i) Funding

In November 2009, the Government announced funding of \$29.2 million for the establishment and operation of Congress until December 2013.

Our future in our hands made a three-pronged proposal regarding funding of Congress:

1. That Government provide a recurrent funding base for the first 5 years of Congress' life. The Steering Committee anticipated that Government would also need to provide funding on a declining basis for years 6-10 of the life of Congress.
2. At the same time as providing recurrent funding, an Establishment Investment Fund should be created with funds allocated over ten years in order to provide a capital base for the National Representative Body. The Fund will need to reach approximately \$200 million after ten years to provide sufficient and sustainable recurrent expenditure for the organisation.
3. The Australian Government should expeditiously provide the National Representative Body with Deductible Gift Recipient status to minimise its costs and attract private investors.¹¹⁷

The Congress Evaluation has emphasised the importance of the Establishment Investment Fund to the ongoing existence of Congress and to Congress' independence from Government.¹¹⁸

Critically, the Government has not yet committed to funding an Establishment Investment Fund.

The Establishment Investment Fund is essential to securing the sustainability and independence of Congress into the future. Without it, Congress is vulnerable to subsequent governments withdrawing funding, especially in its early years when it has not completely established itself. Providing an Establishment Investment Fund is a key way in which Government can support and enable Congress and thereby support and enable effective Indigenous governance.

(ii) Working in partnership

Going forward, the relationship between Government and Congress is critical.

For its part, Government needs to work with Congress in good faith. The Steering Committee particularly noted the 'new and richer' partnership necessary between Congress and Government.¹¹⁹

117 *Our future in our hands*, note 87, p 31.

118 *Congress Evaluation Report*, note 83, pp 39-41.

119 *Our future in our hands*, note 87, p 30.

Congress for its part has prioritised developing a good working relationship with Government. Congress has engaged extensively with Ministers, Members of Parliament and government officials and is increasingly approached for advice by government agencies that recognise they must work differently.¹²⁰ On 5 September 2012, Congress and the Australian Government finalised an 'Engagement Framework' outlining how the two parties will work together to achieve outcomes for Aboriginal and Torres Strait Islander peoples.

(e) Looking forward

Congress is still in the early phases of securing its place, building its membership and talking to communities about how to work with them. Congress has a number of priorities in terms of both the substance of its work and its sustainability as a representative organisation.

(i) Congress' priorities

Congress identified a number of priorities for the short term, including:

- reaching a formal agreement with Government – the Engagement Framework
- building membership and working on a process for member engagement in policy development
- building a network of partnerships and alliances across all sectors
- determining priority policy areas using the Declaration as guidance and members priority policy areas, identified so far as health, education, justice, country and sovereignty (including constitutional reform)¹²¹
- contributing to international policy development regarding Indigenous peoples
- securing financial sustainability and building resources and capacity of the secretariat.¹²²

In order to progress the priority policy areas, Congress has commenced working with organisations experienced in these areas and is committed to further developing those working relationships.¹²³

Of particular note is the health sector, with which Congress has formed a unique and highly functional arrangement. Congress has engaged proactively with the Close the Gap Steering Committee and the Indigenous leadership of the Steering Committee has established the National Health Leadership Forum (NHLF).

NHLF is based within Congress and Jody Broun, Co-Chair of Congress, also co-chairs the NHLF. The organisations that make up the NHLF have seized the initiative and established themselves as the national representative body for Aboriginal and Torres Strait Islander health. This is the only sector where Aboriginal and Torres Strait Islander peak organisations have come together to coordinate activities as a collective and work in a truly unified manner with Congress. A full case study on the NHLF is set out later in this Chapter.

Congress plans to establish forums similar to the NHLF in other policy areas.

120 National Congress of Australia's First Peoples, *Achievements 2011-12* (September 2012), p 11. At <http://nationalcongress.com.au/wp-content/uploads/2012/09/Congress-Achievements.pdf> (viewed 11 October 2012).

121 National Congress of Australia's First Peoples, 'Policy and advocacy', <http://nationalcongress.com.au/policyandadvocacy/> (viewed 11 October 2012).

122 National Congress of Australia's First Peoples, *National Congress Report 2011* (September 2012), p 5. At <http://nationalcongress.com.au/wp-content/uploads/2011/08/ReportPart1.pdf> (viewed 11 October 2012).

123 National Congress of Australia's First Peoples, above, p 13.

Congress has also contributed significantly in the international policy sphere. Congress' Co-Chairs, Directors and members are highly experienced in the international advocacy arena, including United Nations human rights mechanisms. This has enabled Congress to attend and actively engage in core United Nations meetings concerning the rights of Indigenous peoples including:

- the United Nations Permanent Forum on Indigenous Issues (UNPFII)
- the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)
- the World Intellectual Property Organisation (WIPO).

Congress is actively engaged in the Indigenous Peoples' Organisations' (IPO) Network of Australia and the newly developed Aboriginal and Torres Strait Islander Strategic Dialogue Group.¹²⁴ Through consultation with members of the IPO Network, Congress has developed an International Rights and Advocacy Framework which describes the role and strategy of Congress in this regard over the next two years.¹²⁵

(ii) Sustainability

One of the principles and key priorities of Congress is sustainability.

Funding

As discussed above, it is critical that an Establishment Investment Fund is created so that Congress' independence and financial future is secured. Guaranteeing the sustainability of Congress is difficult if funding arrangements are left to short term funding.

Congress needs to secure further funding from the end of 2013. This process is resource-intensive for the organisation and is time and money which could be used on getting outcomes for Aboriginal and Torres Strait Islander peoples. It is the same story I have heard over and over again from Aboriginal and Torres Strait Islander organisations, as I discussed in Chapter 2 in the governance of governments section.

Representativeness, credibility and flexibility

Another important aspect of sustainability is ensuring that Congress continues to represent its members and through its Chambers, all Aboriginal and Torres Strait Islander peoples. Although Congress has built mechanisms into its structure that ensure the views of the community determine the direction and priorities of organisation, these structures need to be given time to develop and evolve.

A lot of expertise and thought and care went into the structure of Congress. It needs to be given the opportunity to establish itself. As we move forward we are constantly finding issues to deal with, but they need to be considered with perspective. We need to have faith in the basic structure, which was so carefully developed. The flexibility is there to respond to concerns but we should tweak carefully and incrementally rather than instigate any dramatic changes. At this stage it is important to maintain the integrity of the model.¹²⁶

124 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Indigenous Media Strengthens Identity', (Media release, 9 August 2012). At http://humanrights.gov.au/about/media/media_releases/2012/61_12.html (viewed 12 October 2012).

125 National Congress of Australia's First Peoples, note 122, p 11.

126 L Coombes, *Meeting with Social Justice Team*, 21 September 2012.

(f) Conclusion

Congress is not a 'traditional' structure in either an Indigenous or non-Indigenous sense. Its credibility comes from how it was developed in response to factors considered most important by our communities today. It is a legitimate structure designed to genuinely represent the intersection of Indigenous and non-Indigenous ways that Congress needs to be able to productively navigate. It is an example of innovative 'contemporary Indigenous governance'.

Congress' design and early development embodies the principles of good Indigenous governance. Its organisational governance is designed specifically to support community needs and aspirations. Its relationship with Government is also considered. Underpinning its design and operation in all respects is community governance and ultimately self-determination. What remains to be seen is how supportive Government will be and on whose terms – will Congress be the beginning of a new relationship between Aboriginal and Torres Strait Islander peoples and Government?

4.7 National Health Leadership Forum: the emergence of an Aboriginal and Torres Strait Islander national health governance structure

The National Health Leadership Forum (NHLF) provides an interesting case study which charts the organic emergence of an Aboriginal and Torres Strait Islander organisational governance structure at the national level. The NHLF emerged through a process for a specific purpose – the need for an interface for government to partner with Aboriginal and Torres Strait Islander peoples and their organisations in the development and implementation of health policy affecting us.

The Aboriginal and Torres Strait Islander health sector has a long legacy of advocacy and political engagement. Organisations like National Aboriginal Community Controlled Health Organisation (NACCHO) have been strong voices championing our right to the highest attainable standard of health.

This advocacy became focused and coordinated by the formation of the Close the Gap Campaign for Indigenous Health Equality (Close the Gap Campaign) in 2007. The Campaign is comprised of Aboriginal and Torres Strait Islander health bodies and non-Indigenous health and human rights organisations. These organisations had been working collaboratively as a Steering Committee for the Campaign for over five years.

The establishment of the National Congress of Australia's First Peoples (Congress) in 2010 saw it enter into this sector as the national representative body - engaging with Aboriginal and Torres Strait Islander health organisations and the Close the Gap Campaign. Health has subsequently become one of the focal points of Congress' work. In 2011 Congress surveyed its members to seek their views on what its priorities should be – health was ranked number one.¹²⁷

The developments to coordinate Aboriginal and Torres Strait Islander health leadership culminated in the establishment of the NHLF in late 2011. The NHLF is comprised of 12 national peak representative organisations for Aboriginal and Torres Strait Islander health. All 12 are members of the Close the Gap Campaign from which the NHLF emerged. They are also member organisations of Chamber 1 of Congress. Because of this membership the organisations forming the NHLF decided it was most appropriate to base the structure of NHLF within this Chamber. In practice it operates like a working group of Congress' Chamber 1. Locating the NHLF within Congress was also a strategic decision, the Congress structure provides a coordination point for these organisations and it reflects the role of Congress as the national representative body on issues affecting Aboriginal and Torres Strait Islander peoples.

A number of key points can be drawn from looking at the NHLF that reflect the framework for effective governance in Aboriginal and Torres Strait Islander communities, discussed in Chapter 2. These include the following points:

- The purpose of the NHLF has determined its form – the body responds directly to a community need (to provide one voice and a vehicle to partner with government).
- The NHLF has utilised and built on existing governance structures and expertise (existing peak bodies, Close the Gap Steering Committee and Congress).
- The NHLF combines a foundation of self-determination and community control - by elevating the Aboriginal and Torres Strait Islander bodies to the leadership role as it became clear that was needed - with sound organisational governance including the expertise necessary to enable it to fulfil its aims.
- The NHLF was built over time, allowing relationships and trust to build with the establishment of the body.

¹²⁷ See T Solonec, Congress Director – Chamber Three, *Achieving Health Equality for Aboriginal and Torres Strait Islander People through Unity* (Speech delivered at the Catholic Health Conference, Perth, 22 August 2012).

The NHLF is structured in such a manner to provide a holistic and authoritative perspective on Aboriginal and Torres Strait Islander health policy. As argued by Jody Broun:

When done effectively governance structures like the NHLF can provide a foundation for empowerment. The NHLF is empowering our people by creating a national voice in the development and implementation of health policy. It is also a mechanism to improve our relationships with government – we now have a structure in place to enable us to work in partnership with governments.¹²⁸

(a) Background – The Close the Gap Campaign

The NHLF developed organically from existing relationships forged through the Close the Gap Campaign. The unity that the Campaign has fostered was an essential precondition to the formation of the NHLF. The NHLF continues to play an active leadership role in the Campaign through membership on the Steering Committee.

In the *Social Justice Report 2005*, Dr Calma, the then Social Justice Commissioner, called for a national effort to close the gap between the health and life expectancy of Indigenous and non-Indigenous Australians within a generation.¹²⁹ The Report acted as a catalyst to bring Indigenous and non-Indigenous health peak bodies as well as human rights bodies to the ‘same table’ for the first time to discuss Aboriginal and Torres Strait Islander health equality. In time this group would form the Close the Gap Campaign Steering Committee. The aims of bringing these organisations together were to:

- achieve a common understanding of a strategy to achieve health equality for Indigenous Australians
- commit to working together to achieve this health equality within 25 years.¹³⁰

(b) Aboriginal and Torres Strait Islander Leadership Group

From day one, under the leadership of Dr Calma, the Campaign embraced the principle of Aboriginal and Torres Strait Islander leadership. As relationships were built, an Indigenous leadership group emerged. The understanding of and respect for the different roles necessary to achieve the Campaign’s purpose has been critical to the Steering Committee’s functioning.

Non-Indigenous bodies have a critical role in facilitating and enabling Aboriginal and Torres Strait Islander leadership. Andrew Meehan, Oxfam’s Lead for Indigenous Rights Advocacy, outlines the supporting role that the non-Indigenous organisations have to play:

For Oxfam, working within a rights based framework means supporting Aboriginal and Torres Strait Islander representatives to be actively involved in developing and determining health programs affecting them. This includes real participation in the design, delivery and monitoring of such programs. In the Close the Gap Campaign, what Oxfam could do in campaigning, supporting advocacy, and building public awareness is to help create the political space for this to happen. This has involved sharing our resources and campaigning approaches with partners to increase access for Aboriginal representatives to decision-makers. Respecting and working within the principle of Indigenous leadership is central to our approach to the campaign and has

128 J Broun, Co-Chair, CTG, NHLF, and Congress, *Email to Social Justice Team*, 24 October 2012.

129 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005), Chapter 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport05/index.html (viewed 11 October 2012).

130 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), Chapter 5. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 11 October 2012); Close the Gap Campaign Steering Committee, *Close the Gap Campaign Evaluation Report* (2011).

enabled relationships based on trust, mutual respect and good faith to develop. For Oxfam, rights-based approaches are no less 'practical' than other approaches - those affected by policies know what's best for them and what's most likely to work.¹³¹

To progress the aims of the Campaign it was recognised that the Aboriginal and Torres Strait Islander Leadership Group needed to take steps to formalise as a partnership interface to work with governments.

Strong internal relationships were a necessary precursor to these conversations. The Campaign and its protocols provided a mechanism for the relationships between the Aboriginal and Torres Strait Islander organisations of the Campaign to develop. Over time a collegiality has formed through adherence to a common goal and a broadly agreed path to get there. As the Campaign progressed, the organisations became increasingly comfortable speaking with one voice. Co-Chair of the NHLF, Justin Mohamed, outlines how this developed:

We are in a position where there are a number of players in the Aboriginal and Torres Strait Islander health space and it was critical that we utilised this to our advantage. We agreed that certain members were best placed to talk to particular issues. For example, the Australian Indigenous Doctors' Association has prime interest in the training of Aboriginal and Torres Strait Islander doctors, and NACCHO's prime interest was representing Aboriginal Community Controlled Health Services and comprehensive primary health. However there is an ethos that members do not behave in a 'territorial' fashion. With outcomes at the forefront we moved forward on the understanding that we all had an important stake in achieving health equality for our peoples. This required us to cooperate and work together.¹³²

With a strong focus on outcomes, the organisations were able to agree on what is needed to achieve them. Once the good relationships within the Steering Committee solidified, the Aboriginal and Torres Strait Islander leadership then moved to the next level – engaging with government in a new way.

In late 2010 the Campaign received a request from the Ministers for Health and Indigenous Health to work across the health space and provide advice to progress a national plan for health equality, and a partnership. The Steering Committee's response was to form the Aboriginal and Torres Strait Islander Leadership Group. It was the precursor to the NHLF.

The Leadership Group met many times over the first half of 2011. In December 2010, a position paper by the Leadership Group was issued in which these bodies pledged to work together to lead a partnership for health planning. The Aboriginal and Torres Strait Islander side of the partnership was well and truly in place and ready for government to firm up its side of the partnership, in line with the Statement of Intent.

(c) The National Congress of Australia's First Peoples

These developments were occurring against the backdrop of the establishment of Congress. In many ways the establishment of Congress can be seen as a galvanising moment. Many members of the Campaign's Aboriginal and Torres Strait Islander Leadership Group joined Chamber 1, recognising Congress' potential to add value to their work.

In late 2010, Congress' Interim Co-Chairs began meeting with the Leadership Group to forge common positions with all national and peak Aboriginal and Torres Strait Islander health bodies – not all of whom were active on the Close the Gap Steering Committee at that time. Congress subsequently became a member of the Campaign and Leadership Group. This engagement provided an opportunity to further focus discussions in relation to the development of a partnership interface.

131 A Meehan, Oxfam, *Email to Social Justice Team*, 16 September 2012.

132 J Mohamed, Co-Chair, NHLF and Chair, NACCHO, *Email to Social Justice Team*, 24 October 2012.

At this stage, the issue of Congress' involvement was raised. After many discussions, the Leadership Group unanimously agreed that engagement with Congress was essential. There were several reasons for this view.

- First, it was made clear by Government that Congress was to be main engagement mechanism between Aboriginal and Torres Strait Islander peoples and Government.
- Secondly, there was a commitment to the new national peak body.
- Thirdly, the Aboriginal and Torres Strait Islander health sector felt that it could provide leadership in the establishment of Congress by showing how its expertise could be harnessed with this new 'mechanism' to the benefit of our people.
- Finally, by bringing all of these parties to the one table, it signalled to Government that the Aboriginal and Torres Strait Islander health sector in combination with the new representative body in the form of Congress were united and spoke with one voice.

(d) The National Health Leadership Forum: a unique structure

The next step on from the Aboriginal and Torres Strait Islander Leadership Group was the formalisation of governance arrangements. On 15 August 2011 this was achieved with the NHLF establishing itself and agreeing to a membership criteria and terms of reference. These are provided below in Text Box 4.6.

Text Box 4.6:

NHLF criteria for membership and terms of reference

Members of the NHLF must satisfy two membership criteria:

1. Recognition as a national peak body whose core business is Aboriginal and Torres Strait Islander health.
2. Membership of Chamber 1 of Congress.

The current list of members is provided below. Note the Torres Strait Regional Authority is deemed a member of the Chamber 1 of Congress for the purposes of NHLF membership.¹³³

Terms of reference

The National Health Leadership Forum is the national representative body for Aboriginal and Torres Strait Islander peak bodies whose core business is the health of Aboriginal and Torres Strait Islander peoples, operating within the National Congress of Australia's First Peoples.

The National Health Leadership Forum will:

- Advise the National Congress of Australia's First Peoples in matters relating to health and the social and cultural determinants of health.
- Lead the Close the Gap Campaign for Indigenous Health Equality and the Close the Gap Campaign Steering Committee.

133 As a statutory authority the Torres Strait Regional Authority is unable to become a member of Congress.

- Partner with the Australian governments in the developing and implementing of national health policy impacting on Aboriginal and Torres Strait Islander peoples. This includes, but is not limited to, the development and implementation of a comprehensive national plan to achieve health equality within a generation.
- Partner with other bodies in relation to matters impacting on the health of Aboriginal and Torres Strait Islander peoples.
- Enable Aboriginal and Torres Strait Islander stakeholders to work collectively in matters relating to the health of Aboriginal and Torres Strait Islander peoples.

In its work, the National Health Leadership Forum will be guided by the Close the Gap Statement of Intent and the Position Paper.

The Congress Board endorsed the NHLF structure on 21 August, agreeing for it to become a focal point for Chamber 1 of Congress in relation to health matters. The Minister for Indigenous Health has also recognised the role of the NHLF as the Congress' partnership vehicle on health matters.¹³⁴

Every major Aboriginal or Torres Strait Islander national health organisation is represented in the NHLF. It is the only sector where various Aboriginal and Torres Strait Islander peaks have come together to coordinate activities as a collective and work in a truly unified manner. The members are:

- Aboriginal and Torres Strait Islander Healing Foundation
- Australian Indigenous Doctors' Association
- Australian Indigenous Psychologists' Association
- Congress
- Congress of Aboriginal and Torres Strait Islander Nurses
- Indigenous Allied Health Australia
- Indigenous Dentists' Association of Australia
- The Lowitja Institute
- National Aboriginal and Torres Strait Islander Health Workers' Association
- NACCHO
- National Association of Aboriginal and Torres Strait Islander Physiotherapists
- Torres Strait Regional Authority.

The NHLF is Co-Chaired by Justin Mohamed, Chair of NACCHO and Jody Broun, Co-Chair of Congress. It has its own Secretariat funded by members and the Department of Health and Ageing.

The NHLF functions independently from the Close the Gap Campaign. However the two groups remain linked through a common purpose, Co-Chair (Jody Broun) and the secretariat. And the NHLF continues to lead the

¹³⁴ See The Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012: On Australian governments' progress towards closing the gap in life expectancy between Indigenous and non-Indigenous Australians* (2012), p 12.

Campaign as the Leadership Group had done so previously. The Close the Gap Campaign retains its distinct but related advocacy and public awareness raising role, whereas the purpose of the NHLF is to partner with governments.

The NHLF is not separate from Congress. What has been achieved through the formalisation of the NHLF is the fusion of Aboriginal and Torres Strait Islander health leadership and Congress to maximise existing governance mechanisms and structures; as well as existing capacity and expertise. These existing strengths were developed over a long period of time though the Campaign's Steering Committee.

The NHLF can draw on the expertise of other bodies and individuals within the Congress (and even outside when necessary) to inform the Congress Board on health matters. And this is what is happening – Congress has established a health working group of members from Chambers 2 and 3 to provide a different perspective on health that will inform NHLF and Congress policy positions.

The NHLF will also draw on the Congress structure to facilitate engagement and consultation with Aboriginal and Torres Strait Islander people, families and communities in relation to health matters. In this way the NHLF and Congress are well placed to develop holistic perspectives on health that reflect the entire gamut of health system engagement: peaks and representative bodies, service providers, health professionals and individual consumers.

(e) Looking forward

The NHLF is the culmination of an organisational development process driven to achieve health equality. Although it is still at a formative stage the NHLF has a solid foundation for success. It has emerged, over time, as a result of outcomes oriented collaboration. It has developed from the principles of self-determination, empowerment and partnership being put into action through the Close the Gap Campaign. It is a blended organisational structure which retains a community governance focus whilst incorporating necessary expertise. In the NHLF, Aboriginal and Torres Strait Islander governance is in place in relation to national health policy.

Through the governance development process both Aboriginal and Torres Strait Islander and non-Indigenous organisations have stepped up – all playing their roles. The Aboriginal and Torres Strait Islander organisations have demonstrated leadership and coordination. The non-Indigenous organisations of the Close the Gap Campaign have played a distinct role in stepping back and supporting Aboriginal and Torres Strait Islander leadership and the emergence of the NHLF. NHLF representatives continue play an active role as the leadership group of the Close the Gap Campaign. For its part the Campaign continues to support and complement the work of the NHLF.

Government now needs to play its role too. The challenge is for politicians, bureaucrats and other health stakeholders to work as genuine partners with the NHLF. The NHLF provides a structure for governments to engage with as genuine partners and most importantly listen to Aboriginal and Torres Strait Islander people in our efforts to improve health outcomes.

Although early days, there are positive signs that the Australian Government is prepared to play its part. The Government, through the Department of Health and Ageing, has committed financial support for the NHLF's Secretariat. This is a welcome contribution to supporting Aboriginal and Torres Strait Islander governance at the national level.

Further, the formation of the NHLF could not have happened at a better time. On 3 November 2011, one month after the formation of the NHLF, the Australian Government announced the process for the development of the National Aboriginal and Torres Strait Islander Health Plan (Health Plan).

The NHLF is working in partnership with the Government to develop this Health Plan. Without the genuine and active involvement of Aboriginal and Torres Strait Islander people every step of the way in our efforts to close the gap, we risk making only minuscule progress. A business as usual approach will not deliver what we are all seeking.

4.8 AIG Institute

As discussed in Chapter 2, there has been a lot of research conducted both internationally and in Australia on the importance of getting governance right in order to achieve the goals of Indigenous peoples. Chapter 3 highlighted the importance of governance by illustrating the practical results of getting governance wrong – particularly of government failures in their own governance and interactions in the Indigenous governance environment. The previous case studies in this chapter have highlighted the practical benefits of getting governance right.

This case study in Text Box 4.7 below introduces the new Australian Indigenous Governance. The AIG Institute has been created to fill a gap in the Indigenous governance environment in Australia, acknowledging that despite all the work and the excellent examples, the broader governance environment has not changed.

Text Box 4.7:

A new Indigenous governance institute in Australia – the AIG Institute¹³⁵

The Australian Indigenous Governance Institute Limited (AIG Institute) is a centre of knowledge and excellence in governance. It will connect Indigenous groups, communities and organisations to world class best-practice expertise and knowledge with a focus on building *sustainable*, effective and legitimate governance on the ground.

The AIG Institute was incorporated in May 2012 after extensive consultation and several years in the planning. It builds on the findings of the Indigenous Community Governance Research Project¹³⁶ and the huge evidence base in Australia and internationally that reaffirms the relationship between effective governance and sustainable outcomes.¹³⁷

The AIG Institute is Indigenous led and owned in all respects.

Importantly, the AIG Institute takes a ‘hands on’ approach to its work with Directors comprising both academics and practitioners, with many Directors having worked over many years on the BHP Billiton-Reconciliation Australia Indigenous Governance Awards.¹³⁸ The AIG has a continuing close partnership with Reconciliation Australia around advancing the governance agenda in Australia. It is also connected globally to emerging developments in governance with international organisational affiliations, including the appointment of Professor Stephen Cornell (Native National Institute and Harvard Project) as an International Research Fellow.

135 This case study was prepared for this Report by the AIG Institute.

136 The Indigenous Community Governance Project (2004-2008) was a partnership between the CAEPR and Reconciliation Australia. Research from the ICGP is referred to in Chapter 2.

137 The AIG Institute’s own research recognises the high demands on Indigenous Australians given that approximately *one in every eleven Aboriginal persons* would be required to be on a board of management position or equivalent to fill every position on the estimated number of Indigenous organisations. See J Sizer, *Australian Indigenous Governance Institute Business Case*, (December 2010), p 9. The importance of quality governance resources and capacity in light of these demands cannot be underestimated.

138 Indigenous directors Professor Mick Dodson (Director, ANU National Centre for Indigenous Studies and ANU College of Law), Jason Glanville (Chief Executive of National Centre for Indigenous Excellence), Jodie Sizer (Director, Ingenuity Australia) and Tanya Hosch (Deputy Campaign Director of You, Me Unity Campaign) have been involved in both the design of the Indigenous Governance Awards but have also been involved in supporting Indigenous governance development through the awards and on the ground over many years.

In Australia today, research and case studies from the Indigenous Governance Awards illustrate the existence of robust models of governance in Australian Indigenous organisations. Yet despite the enormous efforts of governments and other training providers the scope of existing training is often limited in its influence, and the findings and experiences of the most successful communities are often not shared and remain isolated.¹³⁹

To address this gap on impact the AIG Institute will:

- **Knowledge Base:** identify what works, maintain a knowledge base and share best practice models
- **Develop Toolkits:** develop toolkits and resources
- **Collaborative training networks:** work in a collaborative network of governance trainers and stakeholders
- **Research and Policy:** conduct research and provide advice informing continuous improvement in governance practice.

The AIG Institute's approach recognises that effective governance needs more than compliance based training: it requires practical and on the ground support to develop decision-making processes across a board, the organisation and stakeholders, influencing behaviours and reflecting cultural values. This can only happen with a long term approach to governance rebuilding which in turn will lead to self-determined, diverse and vibrant Indigenous communities all across Australia.

The creation of the AIG Institute represents an important development in the discussion on what is needed to enable effective Indigenous governance in the Australian context. I look forward to seeing the work of the AIG Institute in the coming years.

139 Sizer, note 137.

4.9 Conclusion

Aboriginal and Torres Strait Islander communities at all levels – local, regional and national – repeatedly demonstrate their strong community and organisational governance capacity. I am constantly impressed by the creativeness and commitment of our communities and groups within communities to finding solutions to the range of complex challenges we face.

Aboriginal and Torres Strait Islander people are working at every level to strengthen our governance capacity. The Breakfast *Minyma* and WYDAC are illustrations of local community members responding to their community's needs and the reasons behind those needs.

Ngroo shows what outcomes can come from a service delivery model based on what community actually wants and needs; genuine partnerships with community governance and community knowledge at the centre enable, support and empower Aboriginal and Torres Strait Islander peoples to achieve our goals.

At the regional level we see the Torres Strait creating governance arrangements to reflect that region's unique culture and all its communities. The Torres Strait is working within the confines of the broader governance environment and has combined service delivery with regional representation, whilst pursuing arrangements for further autonomy.

The national community has developed a new representative body – Congress. The health peak bodies across Australia, in collaboration with Congress have developed a new body – NHLF – to partner with government to close the gap.

The AIG Institute is filling the gap between the research on governance in the Indigenous governance environment and getting that knowledge put into action.

Aboriginal and Torres Strait Islander communities achieve these success stories all the time, often in the face of obstacles and barriers. Not least of the challenges communities face are the governance challenges posed by the need to balance legitimacy within community and legitimacy within the broader governance environment. This is a balance that is foreign to organisations which function within their own culture and the requirements it involves would overwhelm many otherwise functional organisations. It is particularly destructive to have the task made harder by government action which diminishes the capacity of our organisations and divides our communities.

But some of these case studies show that there are also examples of where external parties, including governments, come to the table in good faith, listen to what communities need and deliver appropriate support. The results when this happens speak for themselves.

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Appendix 1

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Minister for Education, Energy and Indigenous Affairs

Western Australian Government

Office of Glen Elmes MP

Minister for Aboriginal and Torres Strait Islander and Multicultural Affairs

Queensland Government

Office of Cassy O'Connor MP

Minister for Aboriginal Affairs
Tasmanian Government

Office of Jeanette Powell MP

Minister for Aboriginal Affairs
Victorian Government

Appendix 2

Chronology of events and developments relating to the administration of Indigenous affairs

1 July 2011 – 30 June 2012

Date & event	Summary of event
June-August 2011 <i>Stronger Futures consultations</i>	Australian Government consultations were conducted on the Stronger Futures Discussion Paper in communities in the Northern Territory. ¹
1 July 2011 <i>National Campaign on Ear Health</i>	An Australian Government campaign was launched to improve Aboriginal and Torres Strait Islander ear and hearing health of Indigenous people, especially in rural communities, which can lead to severe disadvantage. ²
1 July 2011 <i>Australian Employment Covenant reaches pledge target</i>	The Australian Employment Covenant has set a target of creating 50 000 jobs for Indigenous Australians. Progress towards the target has moved a step closer with 50 000 jobs now pledged by businesses. At the time of this announcement 4 000 of the 50 000 pledged jobs had been filled. ³
3-10 July 2011 <i>NAIDOC Week</i>	<p>NAIDOC Week celebrates Aboriginal and Torres Strait Islander culture and the contributions of individuals in various fields. The 2011 theme was <i>Change, the next step is ours</i>.⁴</p> <p>The NAIDOC awards were presented at the NAIDOC Ball on 8 July 2011. Winners included Ned Cheedy who received the Lifetime Achievement Award and Terri Janke who was awarded Person of the Year.⁵</p>
3 July 2011 <i>Ashleigh Barty wins Wimbledon Junior Girls Title</i>	Ashleigh Barty, a 15 year old tennis player became the first Indigenous Australian to win a title at Wimbledon since Evonne Goolagang Cawley in 1974. ⁶

- 1 Australian Government, *Stronger Futures in the Northern Territory: report on consultations* (October 2011). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory/stronger-futures-in-the-northern-territory-report-on-consultations> (viewed 23 October 2012).
- 2 The Hon W Snowden MP, Minister for Indigenous Health, '\$9.6M Campaign to Tackle Indigenous Hearing Health', (Media release, 1 July 2011). At [http://www.warrensnowdon.com/media/\\$9-6m-campaign-to-tackle-indigenous-hearing-health/](http://www.warrensnowdon.com/media/$9-6m-campaign-to-tackle-indigenous-hearing-health/) (viewed 11 October 2012).
- 3 'Jobs pledge reaches 50,000: Twiggy', *ABC News*, 1 July 2012. At <http://www.abc.net.au/news/2011-07-01/jobs-pledge-reaches-50000-twiggy/2778916> (viewed 11 October 2012).
- 4 National Aboriginal and Islander Day Organising Committee, '2011 National NAIDOC Theme announced', <http://www.naidoc.org.au/840/2011-national-naidoc-theme-announced/> (viewed 11 October 2012).
- 5 National Aboriginal and Islander Day Organising Committee, 'Winners profiles', <http://www.naidoc.org.au/naidoc-awards/winners-profiles/> (viewed 11 October 2012).
- 6 G Tan, 'Barty completes historic Wimbledon double', *The Sydney Morning Herald*, 3 July 2011. At <http://www.smh.com.au/sport/tennis/barty-completes-historic-wimbledon-double-20110703-1gxmb.html> (viewed 11 October 2012).

Date & event	Summary of event
<p>7 July 2011</p> <p><i>'People I can call on' report on chronic illness</i></p>	<p>The Menzies Centre for Health Policy released the 'People I can count on' report. The report is aimed at building understanding of chronic illness suffered by Aboriginal and Torres Strait Islander people. It places an emphasis on the importance of culturally appropriate care environments.⁷</p>
<p>11 July 2011</p> <p><i>Special Rapporteur's extractive industries report</i></p>	<p>The Special Rapporteur on the rights of Indigenous peoples, James Anaya, released a report titled <i>Extractive industries operating within or near Indigenous territories</i>. The report explored the effect on Indigenous peoples of extractive industries ; operating on or near Indigenous territories.⁸</p>
<p>15 July 2011</p> <p><i>Human Rights Council's Expert Mechanism report</i></p>	<p>The Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples released its study on Indigenous peoples and the right to participate in decision making.⁹</p>
<p>4 August 2011</p> <p><i>National Aboriginal and Islander Children's Day</i></p>	<p>The celebrations for National Aboriginal and Islander Children's Day centered on the theme <i>From small to big: growing stronger every day</i>. The day aimed to raise awareness of the importance of providing a safe, nurturing and healthy environment for Aboriginal and Torres Strait Islander children.¹⁰</p>
<p>5 August 2011</p> <p><i>13th annual Garma Festival</i></p>	<p>Garma is an annual event at Gulkula in North East Arnhem Land. It is a celebration of Aboriginal culture and brings together Aboriginal people from around the world. The 2011 festival centred on a theme of <i>Academic Excellence and Cultural Integrity</i>.¹¹</p>
<p>8 August</p> <p><i>Finance Department's review of Indigenous expenditure released</i></p>	<p>The Finance Department's report of Australian Government spending on Aboriginal and Torres Strait Islander programs was released after a freedom of information request.¹²</p>

7 The Hon W Snowdon MP, Minister for Indigenous Health, 'Sharing stories to improve Indigenous health care', (Media release, 7 July 2011). At <http://www.warrensnowdon.com/media/sharing-stories-to-improve-indigenous-health-care/> (viewed 11 October 2012).

8 J Anaya, Special Rapporteur on the rights of indigenous peoples, *Report to the Human Rights Council (Summary of activities. Progress report on study on extractive industries)*, A/HRC/21/47 (2011). At <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-21-47-6-july-2012> (viewed 11 October 2012).

9 Expert Mechanism on the Rights of Indigenous Peoples, *Final report of the study on indigenous peoples and the right to participate in decision-making*, Human Rights Council, A/HRC/21/47 (2011). At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/18/42> (viewed 11 October 2012).

10 Secretariat of National Aboriginal and Islander Child Care, 'National Aboriginal and Islander Children's Day', <http://www.snaicc.asn.au/news-events/dsp-default.cfm?loadref=5> (viewed 11 October 2012).

11 Garma Festival, 'About the Garma Festival', <http://www.garmafestival.com.au/aboutgarma.htm> (viewed 11 October 2012).

12 Australian Human Rights Commission, 'Change for the better is going to take time', (Media release, 8 August 2011). At http://humanrights.gov.au/about/media/media_releases/2011/65_11.html (viewed 23 October 2012).

Date & event	Summary of event
<p>9 August 2011 <i>International Day of the World's Indigenous Peoples</i></p>	<p>The theme of the International Day of the World's Indigenous Peoples was <i>Indigenous designs: celebrating stories and cultures, crafting our own future</i>.¹³</p>
<p>12 August 2011 <i>Prison transport company fined over death of Mr Ward</i></p>	<p>Prison transport company G4S was fined \$285,000 for its involvement in the death of Mr Ward. The magistrate said that G4S could have implemented simple safety changes that would probably have prevented Mr Ward's death. Mr Ward, a Western Australian Aboriginal man, died in custody in 2008 after being transported 360km to court in a steel pod without any windows, ventilation or effective means of communicating with the driver.¹⁴</p>
<p>23 August 2011 <i>Strong corporations, strong stores, strong communities report</i></p>	<p>The Office of the Registrar of Indigenous Corporations released a report, <i>Strong corporations, strong stores, strong communities</i>. It revealed an increase in the percentage of community stores trading profitably and an overall growth in average income and gross profits.¹⁵</p>
<p>25 August 2011 <i>Overcoming Indigenous Disadvantage report</i></p>	<p>The Productivity Commission released the <i>Overcoming Indigenous Disadvantage: Key Indicators 2011</i> report.¹⁶</p>
<p>26 August 2011 <i>45th anniversary of the Wave Hill walk-off</i></p>	<p>The 45th anniversary of the Wave Hill walk-off was commemorated with a re-enactment in Kalkarindji in the Northern Territory as part of four days of reflections. The Wave Hill walk off was remembered as a cornerstone event of the sovereignty and land rights movement in Australia.¹⁷</p>

13 Australian Human Rights Commission, 'Indigenous designs, stories and culture are valuable sources of knowledge', (Media release, 9 August 2011). At http://humanrights.gov.au/about/media/media_releases/2011/66_11.html (viewed 23 October 2012).

14 'Prison transporter fined over death of Mr. Ward', *ABC News*, 12 August 2011. At <http://www.abc.net.au/news/2011-08-12/g4s-in-court-over-ward-death/2836968> (viewed 11 October 2012).

15 Office of the Registrar of Indigenous Corporations, *Strong corporations, strong stores, strong communities: financial analysis of stores registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006* (2011). At <http://www.oric.gov.au/content.aspx?content=publications/otherReports.htm&menu=publications&class=publications&selected=Otherreports> (viewed 11 October 2012).

16 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Australian Government (2011). At <http://www.pc.gov.au/gsp/indigenous/key-indicators-2011> (viewed 11 October 2012).

17 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, '45th anniversary of the Wave Hill walk-off', (Media release, 26 August 2011). At <http://jennymacklin.fahcsia.gov.au/node/1216> (viewed 23 October 2012).

Date & event	Summary of event
<p>21 September 2011 <i>Oxfam Straight Talk Summit</i></p>	<p>The Oxfam Straight Talk Summit provided an opportunity for Aboriginal and Torres Strait Islander women to learn how to use the Australian political system to bring positive change to their communities.¹⁸</p>
<p>27 September 2011 <i>The 17th annual Deadly Awards</i></p>	<p>The Deadly Awards recognised the contribution of Aboriginal and Torres Strait Islander peoples to their communities and Australian society. Basketballers Patrick Mills and Rohanee Cox were awarded sportsman and sportswoman of the year respectively. Evonne Goolagong Cawley and Col Hardy received lifetime achievement awards in their fields.¹⁹</p>
<p>28 September 2011 <i>Andrew Bolt found to have breached the Racial Discrimination Act</i></p>	<p>The Federal Court found Andrew Bolt breached the <i>Racial Discrimination Act</i> after News Limited published two columns in 2009. The action against Bolt and his employer was brought by nine Aboriginal people after he implied that light-skinned Aboriginal people identified as such for personal gain. The Court found the articles contained factual errors and were written in bad faith.²⁰</p>
<p>17 October 2011 <i>Mail service begins in Alice Springs town camps</i></p>	<p>A regular mail delivery service commenced for the first time in Alice Springs town camps.²¹</p>
<p>18 October 2011 <i>Stronger Futures consultation report</i></p>	<p>The Australian Government released its report on the Stronger Futures consultations.²² The report highlighted many of the concerns raised by Aboriginal and Torres Strait Islander people in the Northern Territory.</p>

18 Oxfam Australia, 'Straight Talk', <http://www.oxfam.org.au/explore/indigenous-australia/straight-talk> (viewed 11 October 2012).

19 Deadly vibe group, '2011 Deadly winners list', http://www.vibe.com.au/index.php?option=com_flexicontent&view=items&id=4812 (viewed 11 October 2012).

20 'Bolt breached discrimination act, judge rules', *ABC News*, 29 September 2011, <http://www.abc.net.au/news/2011-09-28/bolt-found-guilty-of-breaching-discrimination-act/3025918> (viewed 11 October 2012).

21 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'First regular mail service commences in Alice Springs town camps', (Media release, 17 October 2011). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/Pages/jm_m_alice_mail_17october2011.aspx (viewed 11 October 2012).

22 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'Aboriginal people clear about their priorities for building stronger futures in the Northern Territory', (Media release, 18 October 2011). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2011/Pages/stronger_futures_18oct11.aspx (viewed 11 October 2012).

Date & event	Summary of event
<p>19 October 2011 <i>Launch of the Indigenous Economic Development Strategy</i></p>	<p>The Australian Government unveiled the Indigenous Economic Development Strategy. The strategy highlights the measures the Australian Government is taking to support Indigenous economic development and establishes five priorities. It also sets out guidelines and aspirations of how the public service can influence Indigenous economic development.²³</p>
<p>24 October 2011 <i>2011 Eddie Koiki Mabo lecture</i></p>	<p>Social Justice Commissioner Mick Gooda delivered the 2011 Eddie Koiki Mabo lecture at James Cook University in Cairns. His speech, titled <i>Strengthening our relationships over land, territories and resources: the United Nations Declaration on the Rights of Indigenous Peoples</i> focused on lateral violence and the damage it causes to Aboriginal and Torres Strait Islander communities.²⁴</p>
<p>27 October 2011 <i>Cape York welfare trial extended</i></p>	<p>The Queensland Government announced that the Cape York welfare reform trial will continue for another 12 months.²⁵</p>
<p>31 October – 4 November 2011 <i>Convention on Biological Diversity working group on Article 8(j) and related provisions</i></p>	<p>Article 8(j) of the <i>Convention on Biological Diversity</i> relates to Traditional Knowledge, Innovations and Practices. The working group recommended the development of 'best-practice guidelines that would facilitate enhancement of the existing repatriation of Indigenous and traditional knowledge relevant to the conservation and sustainable use of biological diversity'.²⁶</p>
<p>3 November 2011 <i>National Health Leadership Forum established</i></p>	<p>The National Health Leadership Forum (NHLF) was established as the national representative voice to the Australian Government on Aboriginal and Torres Strait Islander Health. The NHLF emerged from the Close the Gap Campaign and is made up of 12 national peak representative organisations for Aboriginal and Torres Strait Islander health. This body works with government in genuine partnership to confront the challenges faced in Indigenous health.²⁷</p>

23 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, the Hon C Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, the Hon M Arbib, Minister for Indigenous Employment and Economic Development, 'Indigenous Economic Development Strategy', (Media release, 19 October 2011). At <http://jennymacklin.fahcsia.gov.au/node/1282> (viewed 11 October 2012).

24 Australian Human Rights Commission, 'Real progress will only come from strong and respectful relationships', (Media release, 24 October 2011). At http://www.humanrights.gov.au/about/media/media_releases/2011/94_11.html (viewed 11 October 2012).

25 M Howells, 'Welfare trial extended on Cape York', *ABC News*, 27 October 2011, At <http://www.abc.net.au/news/2011-10-27/welfare-trial-extended-on-cape-york/3602954> (viewed 11 October 2012).

26 Secretariat of the Convention on Biological Diversity, *Year in Review 2011: The Convention of Biological Diversity* (2011). At <http://www.cbd.int/information/library.shtml> (viewed 11 October 2012).

27 Australian Human Rights Commission, 'National voice and national plan marks new day for Indigenous health equality', (Media release, 3 November 2011). At http://www.humanrights.gov.au/about/media/media_releases/2011/98_11.html (viewed 11 October 2012).

Date & event	Summary of event
<p>10 November 2011</p> <p><i>Independent Evaluation of the Northern Territory Emergency Response</i></p>	<p>The report of the Australian Government-commissioned Independent Evaluation of the Northern Territory Emergency Response was released. The evaluation found little improvement in school attendance and employment. It did reveal, however, that perceptions of community safety had improved.²⁸</p>
<p>16 November 2011</p> <p><i>Robyn Layton awarded South Australian of the Year</i></p>	<p>Former Supreme Court Judge and current co-chair of Reconciliation South Australia, Robyn Layton was awarded South Australian of the Year, acknowledging her lifelong commitment to campaigning for the rights and welfare of Aboriginal people.²⁹</p>
<p>23 November 2011</p> <p><i>Social Justice and Native Title Reports tabled in Parliament</i></p>	<p>The 2011 Social Justice and Native Title Reports were tabled in Parliament. The reports, produced by the Aboriginal and Torres Strait Islander Social Justice Commissioner, focused on the issue of lateral violence within Aboriginal and Torres Strait Islander Communities.³⁰</p>
<p>23 November 2011</p> <p><i>Introduction of Stronger Futures Bills</i></p>	<p>The Australian Government introduced the Stronger Futures legislative package (Stronger Futures Bills) into the House of Representatives.³¹</p>
<p>25 November 2011</p> <p><i>Stronger Futures Bills referred to Senate Committee</i></p>	<p>The Stronger Futures Bills were referred to the Senate's Community Affairs Legislation Committee for Inquiry.³²</p>
<p>28 November 2011</p> <p><i>Passing of Human Rights legislation</i></p>	<p>The passage of <i>Human Rights (Parliamentary Scrutiny) Bill 2010</i> and the <i>Human Rights (Parliamentary Scrutiny)(Consequential Provisions) Bill</i> creates the new Parliamentary Joint Committee on Human Rights and requires a statement of compatibility to accompany every piece of legislation introduced into the Federal Parliament.³³</p>

28 Department of Families and Housing, Community Services and Indigenous Affairs, *Northern Territory Emergency Response: Evaluation Report 2011* (November 2011). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/northern-territory-emergency-response-evaluation-report-2011> (viewed 11 October 2012).

29 Australian of the Year Awards 2012, 'Award Recipients: Robyn Layton', <http://www.australianoftheyear.org.au/recipients/?m=robyn-layton-2012> (viewed 11 October 2012).

30 Australian Human Rights Commission, 'Bullying and violence within Indigenous communities come under the spotlight in 2011 Social Justice and Native Title reports' (Media release, 24 November 2012). At http://www.humanrights.gov.au/about/media/media_releases/2011/113_11.html (viewed 11 October 2012).

31 Stronger Futures in the Northern Territory Bill 2011; Social Security Legislation Amendment Bill 2011; Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011.

32 Parliament of Australia, 'Stronger Futures in the Northern Territory Bill 2011 and two related bills: Information about the Inquiry'. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/strong_future_nt_11/info.htm (viewed 11 October 2012).

Date & event	Summary of event
28 November 2011 <i>Walkley Award for Papunya story</i>	Journalist Russell Skelton of <i>The Age</i> newspaper was presented a Walkley Award for his book on the degradation of the Indigenous community of Papunya. ³⁴
8 December 2011 <i>Carbon Farming Initiative begins</i>	The Carbon Farming Initiative commenced which included an Indigenous Carbon Farming Fund set to commence in July 2012. The Indigenous Carbon Farming Fund includes Research and Development and Capacity Building and Business Support streams. ³⁵
9 December 2011 <i>Human Rights Awards</i>	The Australian Human Rights Commission's annual Human Rights Awards were held in Sydney. Ron Merkel QC was announced as winner of the 2011 Human Rights Medal for his 40 year career advocating for the marginalised and disadvantaged.
9 December 2011 <i>Launch of Human Rights Websites</i>	The Australian Human Rights Commission launched an innovative online initiative, including a microsite tellsomethingidontknow.gov.au and an interactive website somethingincommon.gov.au . 'Something in common' contains a number of engagement features for users to add their own stories and contribute reviews, respond to polls and commit to taking a number of online and offline actions. ³⁶
16 December 2011 <i>New Aboriginal Land Commissioner appointed for the Northern Territory</i>	The Hon Justice John Mansfield AM QC was appointed as the Aboriginal Land Commissioner for the Northern Territory. The Aboriginal Land Commissioner is responsible for several functions, including conducting formal inquiries into Aboriginal land claims. ³⁷
8 January 2012 <i>Marlon Noble released from jail</i>	After being jailed for ten years without conviction, Marlon Noble, a man with a cognitive impairment, was released under strict conditions. This led to calls for reforms to the criminal justice and mental health systems. ³⁸

33 Australian Human Rights Commission, 'Stronger human rights laws will ensure more scrutiny of law-making', (Media release, 28 November 2011). At http://humanrights.gov.au/about/media/media_releases/2011/116_11.html (viewed 11 October 2012).

34 The Walkley Foundation, 'Walkley Book Award', <http://www.walkleys.com/non-fiction-book-award> (viewed 11 October 2012).

35 Department of Climate Change and Energy Efficiency, 'Indigenous Carbon Farming Fund', Australian Government. At <http://www.climatechange.gov.au/government/initiatives/indigenous-carbon-farming-fund.aspx> (viewed 11 October 2012).

36 Something in common, 'About this site', <http://somethingincommon.gov.au/about> (viewed 11 October 2012).

37 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'New Aboriginal Land Commissioner for the Northern Territory', (Media release, 16 December 2011). At <http://jennymacklin.fahcsia.gov.au/node/1464> (viewed 23 October 2012).

38 Australian Human Rights Commission, 'Marlon Noble will only be truly free when his name is cleared', (Media release, 9 January 2012). At http://humanrights.gov.au/about/media/media_releases/2012/1_12.html (viewed 11 October 2012).

Date & event	Summary of event
<p>19 January 2012</p> <p><i>Expert Panel report on constitutional recognition</i></p>	<p>The Expert Panel released its report after extensive consultation and consideration. The Expert Panel's report made several recommendations regarding appropriate recognition for Aboriginal and Torres Strait Islander people in the Australian Constitution and the process through which this could be achieved.</p>
<p>26 January 2012</p> <p><i>40th anniversary of the establishment of the tent embassy</i></p>	<p>This marks the day on which the tent embassy was established in Canberra 40 years ago.³⁹</p>
<p>8-12 February 2012</p> <p><i>Melbourne Indigenous Arts Festival</i></p>	<p>The inaugural Melbourne Indigenous Arts Festival was held. The Festival included a series of talks and live events celebrating 'the rich traditions and new visions in Indigenous art and culture'.⁴⁰</p>
<p>10 February 2012</p> <p><i>First Indigenous magistrate appointed to the Federal Magistrates Court</i></p>	<p>Matthew Meyers was appointed to the Federal Magistrates Court. Mr Meyers is to be based at the Newcastle registry.⁴¹</p>
<p>13 February 2012</p> <p><i>Stolen Generations' Testimonies website launched</i></p>	<p>The Stolen Generations' Testimonies Foundation launched the Stolen Generations' Testimonies website, commemorating the fourth anniversary of the national apology to the Stolen Generations. The website has recorded the lives and experiences of more than 30 stolen generation members.⁴²</p>
<p>14 February 2012</p> <p><i>Three former children's homes placed on heritage list</i></p>	<p>The Cootamundra, Bomederry and Kinchela former Aboriginal children's homes were placed on the New South Wales Heritage Register. The homes operated as part of the Government controlled assimilation practices in NSW.⁴³</p>

39 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Aims of Tent Embassy remain as relevant today as they were 40 years ago', (Media release, 25 January 2012). At http://humanrights.gov.au/about/media/media_releases/2012/4_12.html (viewed 11 October 2012).

40 Australian Centre for the Moving Image, 'Melbourne Indigenous Arts Festival', <http://www.acmi.net.au/melb-indigenous-arts-fest.aspx> (viewed 11 October 2012).

41 The Hon N Roxon MP, Attorney-General and The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'Australia's first Indigenous federal magistrate welcomed', (Media release, 10 February 2012). At <http://jennymacklin.fahcsia.gov.au/node/1736> (viewed 23 October 2012).

42 Stolen Generations' Testimonies, 'About stolen generations', http://stolengenerationstestimonies.com/index.php/about_stolen_generations.html (viewed 11 October 2012).

43 'Cootamundra girls home heritage listed', *ABC News*, 14 February 2012. At <http://www.abc.net.au/news/2012-02-14/cootamundra-girls-home-heritage-listed/3829122> (viewed 11 October 2012).

Date & event	Summary of event
<p>15 February 2012 <i>Release of Closing the Gap report</i></p>	<p>The Prime Minister released the Australian Government's annual report on closing the gap on Indigenous disadvantage.⁴⁴ The Close the Gap Campaign releases a Shadow Report to coincide with the Prime Ministers report. The focus of the Shadow Report 2012 was partnership and the development of the National Aboriginal and Torres Strait Islander Health Plan.⁴⁵</p>
<p>15 February 2012 <i>Reconciliation Australia funded to build public awareness and community support for constitutional recognition</i></p>	<p>The Australian Government announced \$10 million funding from July 2012 for Reconciliation Australia to build public awareness and community support for constitutional recognition of Aboriginal and Torres Strait Islander people. Reconciliation Australia will lead the work, supported by a reference group, the Australian Human Rights Commission, the National Congress of Australia's First People and former members of the Expert Panel.⁴⁶</p>
<p>17 February 2012 <i>Victorian Indigenous Honour Roll Established</i></p>	<p>The Victorian Government established the Victorian Indigenous Honour Roll, recognising 20 Aboriginal and Torres Strait Islanders in the inaugural intake. The inductees were chosen for having made significant contributions in various fields including health, education, sport and the Arts. Celebrated figures such as Lionel Rose and Sir Douglas Nicholls were inducted along with health worker Joan Vickery and education figure Melva Johnson.⁴⁷</p>
<p>20-24 February 2012 <i>Senate Committee consultations in the Northern Territory</i></p>	<p>The Senate Standing Committees on Community Affairs held hearings in the Northern Territory as part of the inquiry into the Stronger Futures Bills. The Committee visited communities in Hermannsburg, Alice Springs, Maningrida and Darwin.⁴⁸</p>
<p>26 February 2012 <i>Karen Kime the first female Aboriginal Archdeacon</i></p>	<p>Karen Kime was ordained the first Aboriginal Archdeacon in the Anglican Church in Australia. She was made Archdeacon in St Saviours Cathedral in Goulburn and will take on the role of Archdeacon for Indigenous Ministry in Canberra and Goulburn.⁴⁹</p>

44 FaHCSIA, *Closing the Gap Prime Minister's Report 2012*. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap/closing-the-gap-prime-ministers-report-2012> (viewed 11 October 2012).

45 Close the Gap Campaign Steering Committee, *Close the Gap Shadow Report 2012: On Australian governments' progress towards closing the gap in life expectancy between Indigenous and non-Indigenous Australians* (2012), p 12.

46 Reconciliation Australia, 'Reconciliation Australia welcomes support for constitutional recognition', (Media release, 15 February 2012). At <http://www.reconciliation.org.au/home/news/media-releases> (viewed 11 October 2012).

47 Victorian Government, 'Victorian Indigenous Honour Roll', (Media release, 18 February 2012). At <http://www.dpcd.vic.gov.au/indigenous/news-and-events/news/the-victorian-indigenous-honour-roll-an-australian-first> (viewed 11 October 2012).

48 Parliament of Australia, 'Senate Committees: Public hearings', http://aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/strong_future_nt_11/hearings/index.htm (viewed 11 October 2012).

49 G Downie, 'Kime appointed archdeacon', *The Canberra Times*, 26 February 2012. At <http://www.canberratimes.com.au/act-news/kime-appointed-archdeacon-20120225-1tvdf.html> (viewed 11 October 2012).

Date & event	Summary of event
<p>29 February 2012</p> <p><i>'The State of Western Australia's Children and Young People' and 'Building blocks' reports released</i></p>	<p>The Western Australian Commissioner for Children and Young People released the final two reports in a series of three which complete the Commissioner's Wellbeing Monitoring Framework. The <i>State of Western Australia's Children and Young People</i> report uses 33 key measures to assess the wellbeing of young people in the state. The <i>Building Blocks: best practice programs that improve the wellbeing of children and young people</i> report identifies 82 programs considered 'best practice' or 'promising' programs which improve the wellbeing of children and young people.⁵⁰</p>
<p>29 February 2012</p> <p><i>High Court Wotton Decision</i></p>	<p>The High Court handed down its decision in <i>Wotton v Queensland</i>. Lex Wotton was imprisoned for his involvement in the Palm Island riots after the death in custody of Mulrunji Doomadgee. Mr Wotton appealed against the constitutionality of the laws allowing the parole conditions that placed a ban on him speaking at any public events or interacting with the media without approval.⁵¹ The appeal was dismissed.</p>
<p>3 March 2012</p> <p><i>Dreamtime Racing's first race</i></p>	<p>The Mildura Aboriginal Corporation with support from Kelly Racing and in partnership with corporate Australia has launched the motorsport team "Dreamtime Racing", which will race in the V8 Supercar Development Series. The team took part in their first race on the Adelaide street circuit as part of the Clipsal 500. The team will provide training, apprenticeships and road safety programs for Aboriginal and Torres Strait Islander youth.⁵²</p>
<p>6 March 2012</p> <p><i>Stolen wages compensation in Western Australia</i></p>	<p>The Western Australian Government has announced ex-gratia payments of up to two-thousand dollars to Aboriginal and Torres Strait Islander people whose wages were withheld by successive state governments between 1905 and 1972.⁵³ The offer was described as 'cruel and heartless' by the Aboriginal Legal Service.⁵⁴</p>

50 Commissioner for Children and Young People Western Australia, 'Wellbeing Monitoring Framework', <http://www.ccyp.wa.gov.au/content.aspx?CID=545> (viewed 11 October 2012).

51 *Wotton v Queensland* [2012] HCA 2. At http://www.austlii.edu.au/au/cases/cth/high_ct/2012/2.html (viewed 11 October 2012).

52 S Canning, 'Indigenous designs on V8 team hit top gear', *The Australian*, 28 February 2012. At <http://www.theaustralian.com.au/news/sport/indigenous-designs-on-v8-team-reach-top-gear/story-e6frg7mf-1226283295444> (viewed 11 October 2012).

53 'Ex-gratia payments announced for stolen wages', *ABC News*, 6 March 2012. At <http://www.abc.net.au/news/2012-03-06/government-announces-ex-gratia-payments-for-stolen-wages/3871816> (viewed 11 October 2012).

54 'WA government to make 'stolen wages' reparations', *Perth Now*, 6 March 2012. At <http://www.abc.net.au/news/2012-03-06/government-announces-ex-gratia-payments-for-stolen-wages/3871816> (viewed 11 October 2012).

Date & event	Summary of event
<p>7 March 2012</p> <p><i>Alick Tipoti artwork included in Sydney Biennale</i></p>	<p>Torres Strait artist Alick Tipoti's large scale linocut <i>Girelal</i> was the first piece from a Torres Strait Islander artist to be included in the Sydney Biennale in the events 29 year history. The work said to be the world's largest linoprint printed from one block on a single sheet. Six other Indigenous artists also had works selected for display.⁵⁵</p>
<p>14 March 2012</p> <p><i>Senate Inquiry into Stronger Futures Bills report released</i></p>	<p>The Senate Standing Committee on Community Affairs reported on their inquiry into the Stronger Futures Bills. The report made 11 recommendations but gave general support to the Bills. Australian Greens Senator Rachel Siewert prepared a dissenting report which opposed the passing of the bills and recommended many amendments.</p>
<p>15 March 2012</p> <p><i>Wyndham woman wins award</i></p>	<p>Julie Woods of the Ngowar Aerwah Aboriginal Corporation was presented with the 'Aboriginal Alcohol and Other Drug Worker of the Year' award. The award recognised her decade long service at Wyndham working to address drug, alcohol and mental health issues in the community.⁵⁶</p>
<p>19 March 2012</p> <p><i>Retirement of Marion Scrymgour</i></p>	<p>Labour government Deputy Chief Minister Marion Scrymgour has resigned from Northern Territory Parliament. She was the first Aboriginal or Torres Strait Islander woman to hold a cabinet ministry in an Australian government.⁵⁷</p>
<p>22 March 2012</p> <p><i>National Close the Gap Day</i></p>	<p>On National Close the Gap Day, a record number of more than 830 community events were held across Australia to express support for the goals of the Close the Gap campaign.⁵⁸</p>
<p>28 March 2012</p> <p><i>3rd Annual Indigenous Health Awards</i></p>	<p>The 3rd Annual Indigenous Health Awards were held in Sydney to recognise outstanding achievements and initiatives in Aboriginal and Torres Strait Islander health. Orbest Regional Health was recognised for outstanding delivery in child and maternal health; Vibe Australia was the winner in the Environmental Health Initiative category; and the Aboriginal Health Council of South Australia received the award for Improving Access to Primary Health Care.⁵⁹</p>

55 'Big year for 'rising star'', *The Koori Mail*, 7 March 2012.

56 'Award recognises drug workers efforts', *ABC News*, 15 March 2012. At <http://www.abc.net.au/news/2012-03-15/award-recognises-drug-worker-efforts/3891852> (viewed 11 October 2012).

57 R Hind, 'Scrymgour to pull the plug on politics', *ABC News*, 19 March 2012. At <http://www.abc.net.au/news/2012-03-19/scrymgour-to-call-time-on-political-career/3898274> (viewed 11 October 2012).

58 Oxfam Australia, 'Thousands take part in National Close the Gap Day', (Media release, 22 March 2012). At <https://www.oxfam.org.au/media/2012/03/thousands-take-part-in-national-close-the-gap-day-2/> (viewed 11 October 2012).

59 3rd Annual Excellence in Indigenous Health Awards 2012, '2012 Award Results', <http://www.indigenoushealthawards.com/index.html> (viewed 11 October 2012).

Date & event	Summary of event
<p>29 March 2012 <i>Northern Territory funding announcements</i></p>	<p>The Australian Government made several announcements as part of its Stronger Futures policy, committing funds for homelands and outstations for 10 years.⁶⁰ Accompanying commitments were also made to funding for community safety, education and health.⁶¹</p>
<p>30 March 2012 <i>First Peoples Disability Network (Australia) launched</i></p>	<p>The First Peoples Disability Network (Australia) was launched to provide advocacy and liaise with government on challenges faced by Aboriginal and Torres Strait Islander people with a disability.⁶²</p>
<p>30 March 2012 <i>Journalist wins award</i></p>	<p>The World Indigenous Journalism Award was won by National Indigenous Television Australia video journalist Ramah Allam. His piece, the Kimberly Gas Hub Series, won praise from the World Indigenous Televisions Broadcasters Network.⁶³</p>
<p>16-17 April 2012 <i>Australia and New Zealand Race Roundtable</i></p>	<p>The Race Relations Roundtable was held in Alice Springs. Commissioners from the New Zealand and Australian Human Rights Commissions and Australian state and territory human rights agencies attended. The Roundtable focused on systemic discrimination and racism and provided an opportunity to discuss racial equality matters of mutual interest and concern to both countries.⁶⁴</p>
<p>17 April 2012 <i>You Me Unity Campaign Director appointed</i></p>	<p>Tim Gartrell was appointed by Reconciliation Australia to lead the nation-wide education campaign about recognising Aboriginal and Torres Strait Islander peoples in the Constitution.⁶⁵</p>

60 M Coggan, 'Don't mention the intervention but cash keeps flowing', *ABC News*, 29 March 2009. At <http://www.abc.net.au/news/2012-03-28/macklin-on-more-moen-for-intervention-lite/3917806> (viewed 11 October 2012).

61 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, '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 23 October 2012).

62 J McLucas, Parliamentary Secretary for Disabilities and Carers 'Ensuring Aboriginal and Torres Strait Islander people with a disability have their say', (Media release, 30 March 2012). At <http://janmclucas.fahcsia.gov.au/node/187> (viewed 11 October 2012).

63 Sapmi12, 'WIJA Finalists Announced', <http://www.nrk.no/witbc2012/1.8055731> (viewed 23 October 2012).

64 Australian Human Rights Commission, 'Australian and New Zealand Race Relations Roundtable', (Media release, 18 April 2012). At http://humanrights.gov.au/about/media/media_releases/2012/25_12.html (viewed 11 October 2012).

65 Reconciliation Australia, 'Tim Gartrell to lead Constitutional recognition team', (Media release, 17 April 2012). At <http://www.youmeunity.org.au/blog/view/tim-gartrell-to-lead-constitutional-recognition-team> (viewed 11 October 2012).

Date & event	Summary of event
<p>25 April 2012</p> <p><i>Traditional ceremony for Private Frank Archibald at the Bomana war cemetery</i></p>	<p>70 years after his death on the Kokoda track, Aboriginal soldier Private Frank Archibald was laid to rest in a traditional cemetery at the Bomana war cemetery in Papua New Guinea. The traditional ceremony was reported to be the first carried out for an Aboriginal soldier buried overseas.⁶⁶</p>
<p>26 April 2012</p> <p><i>Single provider job plan announced</i></p>	<p>The Minister for Families, Community Services and Indigenous Affairs, Jenny Macklin, announced a new \$1.5 billion Remote Jobs and Communities Program. The new program will combine employment and participation services to a single provider for people in remote areas. The program will begin 1 July 2013.⁶⁷</p>
<p>30 April 2012</p> <p><i>New National Children's Commissioner announced</i></p>	<p>The Australian Government announced that a National Children's Commissioner will join the Australian Human Rights Commission before the end of 2012. The Children's Commissioner will be an important advocate for the protection and promotion of the rights of Aboriginal and Torres Strait Islander children and young people.⁶⁸</p>
<p>2 May 2012</p> <p><i>Warlukurlangu Artists work showcased at Sydney Fashion Week</i></p>	<p>Warlukurlangu Artists from Yuendumu partnered with Roopa Pemmaraju, a designer from India. The designs were showcased at Sydney Fashion Week. The connection with the designer provided an alternative and viable income stream for the community as well as giving their work greater exposure.⁶⁹</p>
<p>3 May 2012</p> <p><i>Soccer Indigenous Talent strategy launched</i></p>	<p>The Football Federation Australia, with the support of Indigenous Football Ambassadors Warren Mundine and John Moriarty, launched the federation's first Indigenous Football Development Strategy. The Strategy will attempt to increase the involvement of Aboriginal and Torres Strait Islander people in all aspects of soccer.⁷⁰</p>

66 'Traditional ceremony for Aboriginal soldier buried in PNG', *ABC News*, 24 April 2012. At <http://www.abc.net.au/news/2012-04-24/indigenous-soldier/3969198> (viewed 11 October 2012).

67 P Karvelas, 'Jenny Macklin's \$1.5bn single-provider plan to help young, remote Aborigines get jobs', *The Australian*, 26 April 2012. At <http://www.theaustralian.com.au/national-affairs/indigenous/jenny-macklins-15bn-single-provider-plan-to-help-remote-aborigines-get-jobs/story-fn9hm1pm-1226338627205> (viewed 11 October 2012).

68 Australian Human Rights Commission, 'New National Children's Commissioner announcement welcomed', (Media release, 30 April 2012). At http://humanrights.gov.au/about/media/media_releases/2012/26_12.html (viewed 23 October 2012).

69 G Liston, 'Indigenous artists' designs hit catwalk', *ABC News*, 2 May 2012. At <http://www.abc.net.au/news/2012-05-02/indigenous-artists-designs-hit-catwalk/3985420> (viewed 23 October 2012).

70 Football Federation Australia, 'FFA launch Indigenous Football Strategy', (Media release, 3 April 2012). At <http://www.footballaustralia.com.au/news-display/ffa-launch-indigenous-football-strategy/46665> (viewed 11 October 2012).

Date & event	Summary of event
<p>3 May 2012</p> <p><i>State memorial service held for Jimmy Little</i></p>	<p>The life and achievements of Jimmy Little were celebrated at a state memorial service at the Sydney Opera House. The memorial celebrated through word and song his success as a musician, the first Aboriginal performer to have a number one hit, and his tireless work to address injustice and inequality.⁷¹</p>
<p>5 May 2012</p> <p><i>Federal Budget tabled</i></p>	<p>The Federal Budget was tabled with no increased funding for Aboriginal and Torres Strait Islander programs but a commitment to several measures over 10 years mostly associated with the Stronger Futures legislation.</p>
<p>9 May 2012</p> <p><i>Indigenous TV to be launched by SBS</i></p>	<p>The Australian Government announced funding for the Special Broadcasting Service, Australia's multicultural public broadcaster, to operate a national digital free to air channel dedicated to Aboriginal and Torres Strait Islander content.⁷²</p>
<p>16 May 2012</p> <p><i>Traditional cookbook launched to address chronic disease</i></p>	<p>The Barma Recipe Book aims to help close the gap in Aboriginal and Torres Strait Islander health by embracing traditional ingredients and techniques and return to unprocessed, readily available, local foods.⁷³</p>
<p>3-16 May 2012</p> <p><i>United Nations Permanent Forum on Indigenous Issues</i></p>	<p>The Eleventh Session of the United Nations Permanent Forum on Indigenous Issues was held in New York. The special theme of the forum was the 'The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests'.</p>
<p>17 May 2012</p> <p><i>The Sapphires screened at the Cannes Film Festival</i></p>	<p><i>The Sapphires</i> is based on a true story of a group of girls from a Yorta Yorta Aboriginal community who were chosen to sing for troops in Vietnam. The film screening, attended by stars Jessica Mauboy, Deborah Mailman, Shari Sebbens and Miranda Tapsell received a 10 minute standing ovation.⁷⁴</p>

71 K McCabe, 'Legendary singer Jimmy Little farewelled with state memorial service at Opera House today', *The Daily Telegraph*, 3 May 2012. At <http://www.dailytelegraph.com.au/news/national/legendary-singer-jimmy-little-farewelled-with-state-memorial-service-at-opera-house-today/story-e6frg996-1226345518862> (viewed 11 October 2012).

72 M Bodey, 'SBS to launch Indigenous TV', *The Australian*, 9 May 2012. At <http://www.theaustralian.com.au/media/sbs-to-launch-indigenous-tv-channel/story-e6frg996-1226350745351> (viewed 11 October 2012).

73 L Day, 'New cookbook a recipe for better indigenous health', *ABC News*, 15 May 2012. At <http://www.abc.net.au/news/2012-05-15/new-cookbook-a-recipe-for-better-indigenous-health/4011756> (viewed 11 October 2012).

74 AAP, 'Cannes gives ovation to Sapphires', *The Australian*, May 20 2012. At <http://www.theaustralian.com.au/arts/film/standing-cannes-ovation-for-sapphires/story-e6frg8pf-1226361429624> (viewed 11 October 2012).

Date & event	Summary of event
23 May 2012 <i>First National Indigenous Youth Parliament</i>	The first National Indigenous Youth Parliament run by the Australian Electoral Commission was held in Canberra. 48 Aboriginal and Torres Strait Islander young people were chosen to participate. ⁷⁵
25 May 2012 <i>Close the Gap commitments made</i>	The <i>Close the Gap Statement of Intent</i> was re-signed by the Victorian Government, as well as the CEOs of 20 hospitals and health services. ⁷⁶
25 May 2012 <i>Aboriginal and Torres Strait Islander Health Audit Report released</i>	The Australian Medical Association (AMA) released the Aboriginal and Torres Strait Islander Health Audit Report. Key findings include the need for increased funding to address the disproportionate rates of Aboriginal and Torres Strait Islander incarceration and provide greater support for communities to develop effective solutions to local health problems. ⁷⁷
25 May 2012 <i>ATM fees abolished in remote communities</i>	In an agreement between the Australian Banking Industry, two independent ATM companies and the Australian Government, free transactions are now provided for 76 ATMs in very remote communities. This initiative reduces the large amount of money spent on ATM fees where ATMs are the only way to access funds in the community. ⁷⁸
26 May 2012 <i>National Sorry Day</i>	Events were held around Australia for National Sorry Day to commemorate the anniversary of the <i>Bringing them home report</i> . The day recognises the ongoing impacts of the forcible removal of Aboriginal and Torres Strait Islander children from their families. ⁷⁹

75 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, the Hon P Garret, Minister for School Education, Early Childhood and Youth, Special Minister of State, 'Future Indigenous leaders in first ever National Indigenous Youth Parliament', (Media release, 24 May 2012). At <http://ministers.deewr.gov.au/macklin/future-indigenous-leaders-first-ever-national-indigenous-youth-parliament> (viewed 11 October 2012).

76 Close the Gap, 'Major health bodies sign on to improve Indigenous health outcomes', (Media release, 25 May 2012). At http://humanrights.gov.au/about/media/media_releases/2012/29_12.html (viewed 11 October 2012).

77 Australian Medical Association, *Aboriginal and Torres Strait Islander Health Audit Report 2012: Progress to date and challenges that remain*, (May 2012). At <http://ama.com.au/aboriginal-reportcards/auditreport-2012> (viewed 11 October 2012).

78 M Coggan, 'Remote Communities get relief from ATM fees', *ABC News*, 25 May 2012. At <http://www.abc.net.au/news/2012-05-25/remote-aboriginal-atm-fees-to-be-abolished/4033108> (viewed 11 October 2012).

79 National Sorry Day Committee Inc, 'National Sorry Day 2012', (Media release, 24 May 2012). At http://www.nsd.org.au/index.php?option=com_content&view=article&id=331&Itemid=99 (viewed 11 October 2012).

Date & event	Summary of event
<p>27 May – June 3 2012 <i>National Reconciliation Week</i></p>	<p>National Reconciliation Week celebrates two significant dates in Australian history, the anniversary of the successful 1967 referendum and the <i>Mabo</i> decision. The theme for 2012, 'Let's Talk Recognition', focussed on the recognition of 'the contributions, cultures and histories of Aboriginal and Torres Strait Islander peoples'.⁸⁰</p>
<p>29 May 2012 <i>Australian Indigenous Surfing Championships</i></p>	<p>The Championships were held at Bells Beach in Victoria. It was the first time in 16 years the event had been held. Russel Molony, from the NSW central coast, took out the championship.⁸¹</p>
<p>30 May 2012 <i>Charlie Perkins Scholarships</i></p>	<p>Aboriginal students Lilly Brown, Krystal Lockwood and Kyle Turner received scholarships to attend Oxford and Cambridge for further study. The outstanding students will study for Masters or Doctorate degrees.⁸²</p>
<p>30 May 2012 <i>Schools to become community hubs</i></p>	<p>The NSW Government announced that 15 schools in Aboriginal and Torres Strait Islander and other disadvantaged communities will become 'community hubs' and provide afterhours services under the Connected Communities initiative.⁸³</p>
<p>31 May 2012 <i>New Guide to Preventing Chronic Disease for Aboriginal and Torres Strait Islanders released</i></p>	<p>The National Aboriginal Community Controlled Health Organisations and the Royal Australian College of General Practitioners jointly released the <i>Guide to Preventing Chronic Disease for Aboriginal and Torres Strait Islanders</i>. The Guide is a practical resource intended to provide GPs and other health professionals with, user-friendly guide to best practice in preventive healthcare for Aboriginal and Torres Strait Islander patients.⁸⁴</p>

80 National Reconciliation Week, 'What is National Reconciliation Week', <http://reconciliation.org.au/nrw2012/what-s-nrw-> (viewed 1 June 2012).

81 Surfing Victoria, 'Russel Molony Wins The Australian Indigenous Surfing Title', (Media release, 30 May 2012). At <http://www.surfindiaustralia.com/news-details.php?id=2766> (viewed 11 October).

82 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, 'Indigenous students to study at Cambridge and Oxford', (Media release, 20 May 2012). At <http://jennymacklin.fahcsia.gov.au/node/1963> (viewed 11 October 2012).

83 S Smith, 'NSW to transform schools into community hubs', *ABC News*, 30 May 2012. At <http://www.abc.net.au/news/2012-05-30/nsw-to-transform-schools-into-community-hubs/4040806> (viewed 11 October 2012).

84 The Hon W Snowdon MP, Minister for Indigenous Health, 'New Guide to Preventing Chronic Disease for Aboriginal and Torres Strait Islanders', (Media release, 31 May 2012). At <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/mr-yr12-ws-ws009.htm> (viewed 23 October 2012).

Date & event	Summary of event
3 June 2012 <i>Mabo 20th anniversary</i>	The 20th anniversary of the <i>Mabo</i> decision being handed down by the high court provided an opportunity to celebrate, but also reflect that the promise of the decision is yet to be fully realised. ⁸⁵
4 June 2012 <i>Committee on the Rights of the Child</i>	Australia appeared before the Committee on the Rights of the Child as part of its periodic review. ⁸⁶
7 June 2012 <i>School attendance success in Gunbalanya</i>	After struggling with low school attendance rates, the Gunbalanya school restructured the academic year to fit better with seasonal and cultural events. The changes saw a significant increase in attendance rates. ⁸⁷
7 June 2012 <i>Wadeye celebrate education settlement</i>	In 2007 a complaint of discrimination against the Commonwealth and Northern Territory governments was made on behalf of members of the Thamarrur community who had attended or attend the local school. After extensive negotiations, an agreement was reached which included a public commitment by the Federal Minister for Education to provide the Wadeye community with funds of \$7.7 million to be used for education purposes. ⁸⁸
11 June 2012 <i>Dr Tom Calma receives recognition</i>	Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma, was awarded an Officer of the Order of Australia. He was recognised for his distinguished service to the Aboriginal and Torres Strait Islander community as an advocate for human rights and social justice, through contributions to government policy reform and cross cultural understanding. ⁸⁹

85 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 'The promise of Mabo is yet to be fully realised', (Media release, 1 June 2012). At http://humanrights.gov.au/about/media/media_releases/2012/31_12.html (viewed 23 October 2012).

86 The committee presented its report on Australia in August 2012. See Committee on the Rights of the Child, *Concluding observations: Australia*, CRC/C/AUS/CO/4 (28 August 2012). At http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf (viewed 11 October 2012).

87 X Canna, 'NT school experiment exceeds expectations', *The Australian*, 7 June 2012. At <http://www.theaustralian.com.au/news/breaking-news/nt-school-experiment-exceeds-expectations/story-fn3dxity-1226387617865> (viewed 11 October 2012).

88 'Wadeye given \$7m over discrimination claims', *ABC News*, 7 June 2012. At <http://www.abc.net.au/news/2012-06-06/wadeye-school-education-funds-agreement/4055650> (viewed 23 October 2012).

89 Australian Human Rights Commission, 'Commission congratulates Dr Tom Calma', (Media release, 12 June 2012). At http://humanrights.gov.au/about/media/news/2012/53_12.html (viewed 23 October 2012).

Date & event	Summary of event
13-22 June 2012 <i>Rio+20 United Nations Conference on Sustainable Development.</i>	The United Nations Conference on Sustainable Development (known as Rio+20) took place in Rio de Janeiro in June 2012. The conference focused on two themes: <ul style="list-style-type: none"><li data-bbox="481 569 1130 624">• a green economy in the context of sustainable development poverty eradication<li data-bbox="481 643 1103 668">• the institutional framework for sustainable development.⁹⁰

90 United Nations Conference on Sustainable Development, 'Objective & Themes', <http://www.uncsd2012.org/objectiveandthemes.html> (viewed 11 October 2012).

Appendix 3

Chronology of the Intervention – Northern Territory Emergency Response and Stronger Futures

15 June 2007	The <i>Little Children are Sacred</i> ¹ report is publicly released by the Northern Territory Government.
21 June 2007	The Australian Government announces the introduction of the Northern Territory Emergency Response measures.
7 August 2007	The five NTER Bills are introduced into, and passed by the House of Representatives: <ul style="list-style-type: none">• Northern Territory National Emergency Response Bill 2007• Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth)• Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth)• Appropriation (Northern Territory National Emergency Response) Bill (No 1) 2007–2008 (Cth)• Appropriation (Northern Territory National Emergency Response) Bill (No 2) 2007–2008 (Cth).
9 August 2007	The Senate referred the five Bills to the Senate Standing Committee on Legal and Constitutional Affairs, which received 154 submissions. ²
10 August 2007	The Senate Standing Committee on Legal and Constitutional Affairs conducted its sole public hearing for this inquiry.
13 August 2007	The report of the Senate Standing Committee on Legal and Constitutional Affairs was tabled in Parliament.
17 August 2007	All five Bills were passed by the Senate and received assent.
June 2008	The new Labor Government commissioned an independent review of the NTER.
October 2008	The NTER Review Board reported to the Australian Government. ³

1 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.inquirysaac.nt.gov.au/pdf/bipacsa_final_report.pdf (viewed 11 October 2012).

2 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Submissions and Additional Information received by the Committee*. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm (viewed 11 October 2012).

3 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008). At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 11 October 2012).

23 October 2008	The Australian Government issued its initial response to the Report of the NTER Review Board. ⁴
11 December 2008	The <i>Social Security and Veterans' Entitlements Legislation Amendment (Schooling Requirements) Act 2008</i> was passed, introducing the School Enrolment and Attendance Measure (SEAM). SEAM links welfare payments to school attendance.
21 May 2009	The Australian Government issued its final response to the Report of the NTER Review Board. ⁵ The Australian Government released the <i>Future Directions for the Northern Territory Emergency Response: Discussion paper</i> . ⁶
June–August 2009	The Australian Government consulted with Aboriginal communities on ways that certain identified NTER measures could be redesigned.
23 November 2009	The Australian Government released its <i>Report on the Northern Territory Emergency Response Redesign Consultations</i> and the independent report it commissioned from the Cultural and Indigenous Research Centre Australia (CIRCA). ⁷
24 November 2009	The Australian Government released its policy statement on the proposed redesigned NTER measures. ⁸

4 The Hon J Macklin, for Families, Community Services and Indigenous Affairs, 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At <http://www.jennymacklin.fahcsia.gov.au/node/254> (viewed 11 October 2012). The Government accepted the three overarching recommendations of the Review Report.

5 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (2009). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory-including-northern-territory-emergency-response/australian-government-and-northern-territory-government-response-to-the-report-of-the-nter-review> (viewed 11 October 2012).

6 FaHCSIA, *Future Directions for the Northern Territory Emergency Response: Discussion paper* (2009). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory-including-northern-territory-emergency-response/future-directions-for-the-northern-territory-emergency-response-discussion-paper> (viewed 11 October 2012).

7 FaHCSIA, *Report on the Northern Territory Emergency Response Redesign Consultations* (2009). At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/publications-articles/closing-the-gap-in-the-northern-territory-including-northern-territory-emergency-response/report-on-the-northern-territory-emergency-response-redesign-consultations?HTML> (viewed 11 October 2012); Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/final_report_09_engage_strat_0.pdf (viewed 11 October 2012).

8 FaHCSIA, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response* (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 11 October 2012).

25 November 2009	The Australian Government introduced the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) (Welfare Reform Bill) into the House of Representatives. ⁹
26 November 2009	The Senate referred the Welfare Reform Bill to the Senate Community Affairs Legislation Committee along with the Families, Housing, Community Services and Indigenous Affairs and other Legislation Amendment (2009 Measures) Bill 2009 (Cth) and Senator Siewert's private senator's Bill, (the Families, Housing, Community Affairs and Other Legislation (Restoration of Racial Discrimination Act) Bill 2009 (Cth).
1 February 2010	Submissions to the Senate Community Affairs Legislation Committee's Inquiry were due. The Committee received 95 submissions. ¹⁰
4, 11, 15, 17, 22, 25, 26 February 2010	The Senate Community Affairs Legislation Committee held public hearings.
24 February 2010	The House of Representatives passed the Welfare Reform Bill.
10 March 2010	The Senate Community Affairs Legislation Committee reported on its inquiry. ¹¹
21 June 2010	The Senate passed the Welfare Reform Bill.
29 June 2010	The Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010 (Cth) received assent.
1 July 2010	Most amendments under the <i>Welfare Reform Act</i> (not including lifting the suspension of the RDA) commenced. ¹²

9 The Government also introduced the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth).

10 Parliament of Australia, 'Submissions received by the Committee', http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/index.htm (viewed 11 October 2012).

11 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 11 October 2012).

12 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), cl 2.

31 December 2010	The provisions lifting the suspension of the RDA over the NTER legislation and actions under it commenced. ¹³
21 June 2011	The Government released the <i>Stronger Futures</i> Discussion Paper.
June – August 2011	The Government consulted with Aboriginal communities in the Northern Territory about the <i>Stronger Futures</i> Discussion Paper. ¹⁴
18 October 2011	The Government released the <i>Stronger Futures</i> consultation report. It also releases CIRCA's report on the Government's consultation and communication strategy. ¹⁵
10 November 2011	The Government released the evaluation report into the operation of the NTER. ¹⁶
23 November 2011	The Government introduced the <i>Stronger Futures</i> legislative package into Parliament: <i>Stronger Futures in the Northern Territory Bill 2011</i> ; <i>Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011</i> (<i>Stronger Futures Bills</i>); <i>Social Security Legislation Amendment Bill 2011</i> .
25 November 2011	The Senate referred the <i>Stronger Futures Bills</i> to the Community Affairs Legislation Committee for Inquiry. ¹⁷
1 February 2012	Submissions to the Senate Community Affairs Legislation Committee Inquiry were due. The Committee received 454 submissions.
29 February 2012	The Senate Committee published its report.
29 June 2012	<i>Stronger Futures</i> legislation passed the Senate and received Royal Assent.
30 June 2012	NTER funding measures were due to cease. ¹⁸
18 August 2012	Many NTER legislative measures were due to cease. ¹⁹

13 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 1. For a discussion of the applicability of the RDA to new income management measures see 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* (10 February 2010), paras 50–53. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 11 October 2012).

14 *Stronger Futures* documents are available at: FaHCSIA, *Stronger Futures in the Northern Territory* <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/stronger-futures-in-the-northern-territory> (viewed 11 October 2012).

15 *Stronger Futures* documents, above.

16 *Stronger Futures* documents, above.

17 *Stronger Futures* documents, above. 18 FaHCSIA, *Stronger Futures in the Northern Territory, discussion paper*, note 93.

19 *Northern Territory National Emergency Response Act 2007* (Cth), s 6.

Appendix 4

Amendments to the Stronger Futures legislation compared with the recommendations of the Australian Human Rights Commission

The amendment	The human rights concern it addresses	Comments
<p>Income management</p> <p>Determination of external referral agency - The Government amendment requires that, when considering whether an agency, body or department should be allowed powers to refer people to income management, the Minister must be satisfied that they or their employees or officers have 'functions, powers or duties in relation to the care, protection, welfare or safety of adults, children or families.'¹</p>	<p>The concern was that the Minister could give any agency the power, including agencies with no connection and therefore no knowledge of child welfare. Our recommendation was that the agencies must 'have a relevant connection to promoting the welfare and wellbeing of children'.</p>	<p>The Government amendment still allows a broad range of agencies to be given the power to refer.</p>
<p>Appeal and Review – The Government amendment requires that before making a determination that an agency has the power to refer people to Income Management, the Minister must be satisfied that there is an appropriate process for reviewing these decisions.²</p> <p>The Minister is bound to consider a list of factors when making a determination of the satisfactoriness of the review process including its timeliness, cost, independence, provision of interpreters, and whether applicants are entitled to be represented and heard.³</p>	<p>The initial concern was that there was no review mechanism of external agencies' referral decisions. The decision would bind Centrelink, meaning Centrelink made no decision, meaning the decision was not reviewable via Centrelink's review procedures.</p> <p>Our recommendation was that the final decision to refer to Income Management must be made by Centrelink and the individual therefore be availed of Centrelink's avenues of review and appeal.</p>	<p>The amendment does not provide the same guarantees which Centrelink's review and appeal procedures provide.</p>

1 *Social Security Legislation Amendment Act 2012* (Cth), Schedule 1, item 6 – inserting s 123TGAA(2) into the *Social Security (Administration) Act 1999* (Cth).

2 *Social Security Legislation Amendment Act 2012* (Cth), s 6 – inserting s 123TGAA(3) into the *Social Security (Administration) Act 1999* (Cth).

3 *Social Security Legislation Amendment Act 2012* (Cth), s 6 – inserting s 123TGAA(4) into the *Social Security (Administration) Act 1999* (Cth).

The amendment	The human rights concern it addresses	Comments
<p>Leasing</p> <p>The original Bill required Land Councils to assist the owners of community living area land in dealings with their land under the new regulations, ‘at the Land Councils expense’.</p> <p>The Government amendment removed the ‘at the Land Councils expense’ provision.⁴</p>	<p>This was a positive, although quite minor amendment. It addressed the specific concern that Land Councils would be unreasonably financially burdened.</p>	<p>This amendment is welcomed. However our main concern, which was not addressed, was that a draft of the proposed Regulations was not publically available so we could not make informed comment.</p>
<p>Alcohol</p> <p>Penalties for alcohol-related offences – The Government amendment added ‘offences regarding <1350ml alcohol’ to the offences which are considered ‘police infringement offences’ under the NT Liquor Regulations.⁵ This means that the police <i>may</i> issue an infringement notice for those offences rather than charge individuals and subject them to the maximum penalty of 100 penalty units or 6 months imprisonment.</p>	<p>This allows the police the discretion as to whether to charge an individual or give them an infringement notice. However it leaves the maximum penalty for alcohol-related offences involving <1350ml at 6 months imprisonment.</p>	<p>We remain concerned about the severity of the maximum penalty for these lower level alcohol-related offences.</p>
<p>Definition of alcohol/liquor</p> <p>The Government amendment substituted ‘liquor’ for ‘alcohol’ and inserting ‘ethyl’ before ‘alcohol’ in order to provide clarity as to what measures of alcohol are used.⁶</p>	<p>This amendment satisfies the recommendation in our submission that the definition of alcohol needs clarifying.</p>	

4 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), Sch 2, para 4.

5 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 11.

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

The amendment	The human rights concern it addresses	Comments
<p>Review</p> <p>The Opposition amendment (which was also proposed by the Greens) reduces the review period from 7 years to 3 years and for the review to be completed by 4 years instead of 8.⁷</p>	<p>The Commission had recommended a reduction of the review period.</p> <p>The <i>Stronger Futures (Consequential and Transitional provisions) Act</i> still has a seven year review period.</p>	
<p>Store licencing</p> <p>The amendment, proposed by both the opposition and the Greens, removes specific reference to ‘Aboriginal people’ (replacing it with ‘the community’) regarding assessment of licensed premises.⁸</p>	<p>This amendment attempts to make the legislation less explicitly aimed at Aboriginal people.</p>	
<p>Effect on other Acts</p> <p>Following ‘this part has effect’ the Government amendment replaced ‘despite any other law of the Commonwealth with despite the Competition and Consumer Act 2010.’⁹</p>	<p>We expressed concern in our submission that ‘any other legislation’ would include the RDA, DDA and Privacy Act.</p> <p>This amendment makes specific what relevant legislation is to be overridden with this provision.</p>	
<p>RDA</p> <p>The following provision was inserted into the Stronger Futures in the Northern Territory Bill and the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill:</p> <p>‘The Racial Discrimination Act is not affected</p> <p>This Act does not affect the operation of the Racial Discrimination Act 1975.’</p>	<p>There was no ‘notwithstanding clause’ inserted into the Social Security Legislation (Amendment) Bill which contains the provisions regarding Income Management. This means that if income management were challenged in the courts as breaching the RDA it would be open for the Government to argue that the income management regime was intended to override the RDA.</p>	<p>Although the wording of the ‘notwithstanding clauses’ is not as the Commission would prefer, we note the strong Explanatory Memoranda regarding the intended effect of the clauses.</p>

7 *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 3, 28, 111, and 117.

8 *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 3, 6, 15.

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

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 and Torres Strait Islander peoples have a collective, rather than purely 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/unpfil/documents/DRIPS_en.pdf (viewed 2 October 2011).

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/repbody/report2009/index.html (viewed 6 September 2012).

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