



Australian  
Human Rights  
Commission

# Social Justice and Native Title Report 2016

ABORIGINAL AND TORRES STRAIT ISLANDER  
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander  
Social Justice Commissioner

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#### **Social Justice and Native Title Report 2016**

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A full list of acknowledgements is contained at Appendix 1.

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#### **Cover photography**

Image from Garma Festival 2016 courtesy of Carla Orsatti/NITV/Yothu Yindi Foundation ©NITV 2016.

Photo: Mark Ngarrgun Pupuli performing ceremony at the Garma Festival 2016. Mark's clan group is Yek Yederr, his homeland is Yederr and his language is Magati Ke, his main totem is Ku Warum (green tree snake).

Wadeye is Australia's largest Aboriginal community and is made up of 20 clan groups who organise under the concept of Thamarrurr. In 2016 senior clan leaders from Wadeye attended Garma as the guests of the Yolngu people continuing a cultural, social and economic exchange that goes back a millennia.

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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.**

The Australian Human Rights Commission sits on the land of the Gadigal people of the Eora Nation. We acknowledge your ownership of this country and we salute your Elders past, present and those yet to emerge.

The *Social Justice and Native Title Report 2016* was written on your lands and we honour you, the Gadigal people, by producing a record that advocates for the human rights of Aboriginal and Torres Strait Islander peoples throughout Australia.



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19 October 2016

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

Dear Attorney

***Social Justice and Native Title Report 2016***

We are pleased to present to you the *Social Justice and Native Title Report 2016*, in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) and section 209 of the *Native Title Act 1993* (Cth).

The Report examines the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples from 1 July 2015 to 30 June 2016. In doing so, it provides an overview of the year with respect to social justice and native title issues.

The Report outlines major developments during the year, including the united call for action in the Redfern Statement, reviews of the Indigenous Advancement Strategy and ongoing challenges in relation to Indigenous incarceration. We also report on progress regarding the Constitutional recognition of Australia's first peoples, the place of broader treaty discussions, and the High Court decision on paperless arrest laws.

In Chapter 2 we examine the rights of Aboriginal and Torres Strait Islander peoples to participate in the economy through greater choice, participation and control over their own income, particularly in the light of the history of stolen wages.

Following on from last year's report, Chapter 3 focuses on native title developments and the Indigenous Property Rights Project which is progressing a national dialogue and reform process for self-determined economic development on the Indigenous Estate.

We also look at Australia's human rights performance on issues facing Aboriginal and Torres Strait Islander Australians which arose at the Universal Periodic Review (UPR) process of the United Nations Human Rights Council in 2015.

We look forward to discussing the Report with you.

Yours sincerely

Gillian Triggs  
**President**  
**Acting Aboriginal and Torres Strait Islander**  
**Social Justice Commissioner**

Robynne Quiggin  
**Deputy Aboriginal and Torres Strait Islander**  
**Social Justice Commissioner**

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.

## (a) Office holders

- Mick Gooda: 2010-2016
- Dr Tom Calma AO: 2004-10
- Dr William Jonas AM: 1999-2004
- Zita Antonios: 1998-99 (Acting)
- Professor Mick Dodson AM: 1993-98

## (b) 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.

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

[http://humanrights.gov.au/social\\_justice/index.html](http://humanrights.gov.au/social_justice/index.html)

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## Professor Gillian Triggs

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*Acting Aboriginal and Torres Strait Islander  
Social Justice Commissioner*

**Emeritus Professor Gillian Triggs** is the President of the Australian Human Rights Commission, with a five year appointment. She was Dean of the Faculty of Law and Challis Professor of International Law at the University of Sydney from 2007-12 and Director of the British Institute of International and Comparative Law from 2005-7. She is a former Barrister and a former Governor of the College of Law.

Professor Triggs has combined an academic career with international commercial legal practice and has advised the Australian and other governments and international organisations on international legal and trade disputes. Her focus at the Commission is on the implementation in Australian law of the human rights treaties to which Australia is a party, and to work with nations in the Asia Pacific region on practical approaches to human rights.

Professor Triggs' is the author of many books and papers on international law, including *International Law, Contemporary Principles and Practices (2nd Ed, 2011)*.



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## Robynne Quiggin

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*Deputy Aboriginal and Torres Strait Islander  
Social Justice Commissioner*

**Robynne Quiggin** is a Wiradjuri lawyer, based in Sydney. She has worked across a number of legal and policy areas of relevance to Indigenous Australians including consumer issues, human rights, governance, the arts and heritage. She is currently the Deputy Aboriginal and Torres Strait Islander Social Justice Commissioner at the Australian Human Rights Commission.

Robynne has served on a number of boards including the Arts Law Centre of Australia, the Council of the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and Gadigal Information Services. She is currently deputy chair of the board of Bangarra Dance Theatre, a Trustee of the Australian Museum, chair of Westpac's Reconciliation Action Plan Committee, a director of the board of the Lowitja Institute and a member of the Indigenous Law Bulletin's Editorial Panel.



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# Foreword

As Acting Aboriginal and Torres Strait Islander Social Justice Commissioner and Deputy Aboriginal and Torres Strait Islander Social Justice Commissioner, we are pleased to present the *Social Justice and Native Title Report 2016*.

This is the seventh and final report during the term of previous Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda. Mr Gooda was appointed Royal Commissioner to the Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory in August this year.

During his term as Aboriginal and Torres Strait Islander Social Justice Commissioner Mr Gooda reflected on the impact of lateral violence in Indigenous communities. He advocated for a new relationship with government that focused on Indigenous knowledge and expertise on matters that impact on their lives. Mr Gooda participated in international forums and progressed a human rights agenda with national, state and territory governments. He supported community driven initiatives like the Bourke justice reinvestment work, and could be found most mornings at the National Centre for Indigenous Excellence, boxing with the young people of Redfern together with local Aboriginal leadership and the local police.

We all felt the shocking impact of the images of the boys in Don Dale Youth Detention Centre, when the media brought their treatment out of the confines of the institution and into our lounge rooms.

For Indigenous Australians, there was a sense of familiarity mixed with sadness and anger about the high levels of over representation in police custody and gaols, and knowledge that the criminal justice system has always been central to the process of colonisation.

This year we acknowledge that 25 years ago the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) tabled 339 recommendations. Immediately after the release, there was a period of implementation and monitoring across the states. But the momentum was lost long ago and the numbers of Indigenous people incarcerated have increased.

In this, as in many areas of law and policy, Romlie Mokak's reference to WEH (Bill) Stanner's 1968 Boyer lecture, *The Great Australian Silence* in his 2016 Medicine and Society Oration titled *A question of value: Aboriginal and Torres Strait Islander Health* is particularly pertinent.

In his lecture Stanner noted the absence of Aboriginal peoples from the histories and commentaries he reviewed. He wrote:

... inattention on such a scale cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned into habit and over time

into something like a cult of forgetfulness practised on a national scale. We have been able for so long to disremember the Aborigine that we are now hard put to keep them in mind even when we most want to do so.<sup>1</sup>

Mokak poses the question:

What price for that silence, for that inattention, that forgetting, that disremembering?<sup>2</sup>

As we wait for the Western Australian coroner to decide whether to accede to Ms Dhu's family's request to release the footage of her final hours, we think about the longstanding silence, inattention and disremembering in regard to the RCIADIC recommendations. We see disproportionately high numbers of men and women held in police cells, incarcerated in gaols, and significant numbers passing away from violence, illness or a combination of both while detained by the state this year. These increasing rates of incarceration and death, 25 years after the RCIADIC are an intolerably high price.

Key to changing these statistics and the experiences of Indigenous peoples is proper engagement – real listening, valuing and implementing the solutions proposed by Indigenous Australians. It is a call that Commissioner Gooda made repeatedly, as have other Indigenous leaders. In practice this would include:

- delivering on measures set out in the Redfern Statement. We understand that initial meetings have been positive and hope they continue to strengthen;
- following through on setting justice targets and encouraging state and territory governments to do the same;
- ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT);
- continue to progress consultations with Aboriginal and Torres Strait Islander peoples about Constitutional recognition, agreements and treaty;
- implementation of a reform agenda being developed by the Indigenous Property Rights Project;
- reconsideration of an opt in approach to income programs; and
- commitment to the issues raised at the Universal Periodic Review (UPR) including a suitable tracking and monitoring mechanism.

These and other initiatives would make structural change and contribute to a system which values Indigenous knowledge and is less likely to be silent about, or inattentive to the human rights of Indigenous peoples.

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1 W.E.H Stanner, (2010) *The Dreaming and Other Essays*, Black Ink Books, Melbourne, 297.

2 Romlie Mokak, 'A question of value: Aboriginal and Torres Strait Islander Health', (Speech delivered at the 2016 Medicine and Society Oration, Melbourne, 10 August 2016) <[http://www.lowitja.org.au/sites/default/files/docs/CRANLANA-RMokak\\_10082016.pdf.pdf](http://www.lowitja.org.au/sites/default/files/docs/CRANLANA-RMokak_10082016.pdf.pdf)>, 3







# Executive summary

In accordance with statutory duties, the Aboriginal and Torres Strait Islander Social Justice Commissioner reports to Parliament each year on the enjoyment and exercise of the human rights of Aboriginal and Torres Strait Islander peoples. This includes a requirement to report on the operation of the *Native Title Act 1993* (Cth) and its impact on the human rights of Aboriginal and Torres Strait Islander peoples, in particular their rights to land, waters and resources. This combined *Social Justice and Native Title Report 2016* (the Report) covers the significant human rights issues that have occurred during the reporting period of 1 July 2015 to 30 June 2016.

This Report is the seventh and final annual report covering the term of the previous Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda. Mr Gooda resigned effective 1 August 2016 to take up his appointment as a Commissioner for the Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory.

In light of the above, this report is presented by the Acting Aboriginal and Torres Strait Islander Social Justice Commissioner Gillian Triggs and Deputy Aboriginal and Torres Strait Islander Social Justice Commissioner Robynne Quiggin.

## (a) Chapter 1: Year in review

This chapter provides a snapshot of the key issues and developments that have affected Aboriginal and Torres Strait Islander peoples in the enjoyment and exercise of their human rights during the reporting period.

Discussion in this chapter focuses on the following issues:

- The anniversaries of the Wave Hill walk-off from Kalkarinji by the Gurindji people, the Northern Territory Aboriginal Land Rights Act, the report of the Royal Commission into Aboriginal Deaths in Custody and the launch of the Close the Gap campaign 10 years ago
- The continued impact of the Indigenous Advancement Strategy (IAS)
- The Redfern Statement
- Recognition of Australia's first peoples in the Constitution and the place of broader treaty discussions
- Progress of the Close the Gap Campaign
- Justice issues including paperless arrest laws, fine default laws and justice reinvestment
- Reform proposals regarding remote communities in Western Australia

Appendices 2 and 3 also report on:

- the complaints of discrimination received by the Australian Human Rights Commission from Aboriginal and Torres Strait Islander peoples during the reporting period (Appendix 2)
- Indigenous peoples' participation at international fora including the United Nations Permanent Forum on Indigenous Issues (UNPFII) and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (Appendix 3).

A key focus of chapter 1 is the ongoing disengagement between Aboriginal and Torres Strait Islander peoples and government, despite years of reports and recommendations advocating change. 2016 marks a number of important milestones in Indigenous affairs, such as the 50 year anniversary of the Wave Hill walk off and 40 years since the introduction of land rights legislation in the Northern Territory, a decade since Close the Gap Campaign and 25 years since the Royal Commission into Aboriginal Deaths in Custody.

We celebrate the reliance and courage of the Indigenous people who drove these significant positive changes.

We also recognise that there is a growing sentiment amongst Aboriginal and Torres Strait Islander peoples that conditions for many are deteriorating rather than improving. Rates of violence and suicide remain unacceptable. Punitive approaches to criminal justice issues in the states and territories are entrenched, incarceration rates of Indigenous peoples are on the rise and Aboriginal and Torres Strait Islander peoples continue to die in custody. The allegations of abuse inflicted on young inmates at the Don Dale Youth Correctional Facility in the Northern Territory particularly overshadow the release of this report.

There must be a greater focus on alternatives to custody including investment in individuals, families and communities. The Commission supports a 'Justice Reinvestment' approach to these issues, and reports on the Maranguka Justice Reinvestment Project, an initiative taking this path in Bourke.

From justice to health to Constitutional recognition; the Commission urges all governments to listen and act on the advice of Aboriginal and Torres Strait Islander peoples regarding the issues that most affect them, as outlined in the *Redfern Statement*.

## **(b) Chapter 2: Indigenous peoples' right to participate in the economy**

Chapter 2 examines the rights of Aboriginal and Torres Strait Islander peoples to participate in the economy through greater choice, participation and control over their own income.

There is a history in Australia of Aboriginal and Torres Strait Islander peoples being subjected to income control and other forms of economic management and restriction by government. This initially occurred through a variety of laws that sequestered wages, property and savings, and continue to the present day via modern policies such as the Cashless Debit Card Trials and Community Development Programme.

Income is fundamental to the wellbeing and ability of Aboriginal and Torres Strait Islander peoples to realise other economic, social and cultural rights. These matters, along with the establishment of a variety of Stolen Wages reparation schemes are considered in chapter 2, including the need for a human rights and evidenced based approach to economic participation.

## **(c) Chapter 3: Native Title**

Chapter 3 provides an overview of the significant issues that have arisen in relation to the exercise and enjoyment of Aboriginal and Torres Strait Islander peoples' native title rights and interests under the *Native Title Act 1993* (Cth).



A brief overview of the native title determinations and agreements that have occurred during the reporting period is provided, along with consideration of the following significant cases:

- *Western Australia v Willis* (2015) 239 FCR 175
- *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776
- *Mingli Wanjurri McGlade (formerly Wanjurri-Nungala) v Registrar Native Title Tribunal* WAS 137/2016

The primary focus however of chapter 3 is reporting on progress of the Indigenous Property Rights Project (Project), facilitated by the Commission and led by the Indigenous Strategy Group in consultation with the Indigenous Property Rights Network and key stakeholders.

The Project is an important mechanism for Aboriginal and Torres Strait Islander peoples to develop and lead a policy and legislative reform agenda to address challenges to self-determined economic development on the Indigenous Estate. The Indigenous Estate includes the rights and interests of Aboriginal and Torres Strait Islander peoples to land, sea, waters and resources held under native title law, state and territory land rights regimes, and extending to land held for the benefit of Indigenous peoples by government and other bodies.

Chapter 1 addresses issues and recommendations for reform with a particular emphasis on the following:

- tools for securing, sustaining and optimising the Indigenous Estate
- heritage protection and sustainable land use
- risk and commercial use of the Indigenous Estate
- sustainable business
- managing the financial benefits of economic development
- compensation
- relationships and engagement

The vital Project work by the Indigenous Strategy Group and Indigenous Property Rights Network is ensuring that the benefits of the Indigenous Estate are maintained for Aboriginal and Torres Strait Islander peoples now and into the future.

## (d) Chapter 4: Universal Periodic Review

Chapter 4 looks at Australia's human rights performance through the lens of the Universal Periodic Review (UPR) process, with particular reference to the human rights issues facing Aboriginal and Torres Strait Islander peoples.

This chapter includes information on Australia's recent appearance before the United Nations Human Rights Council for the UPR, Australia's adoption, implementation and monitoring of recommendations, and information on the UPR process more generally.

Importantly, this chapter also explores the value of a UPR monitoring mechanism based on the framework provided by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). A number of case studies explore the issues of justice, health equality and remote communities to demonstrate how Aboriginal and Torres Strait Islander peoples and representative bodies might be able to develop their own indicators for monitoring the progress of the UPR over the next four years.

# Recommendations

**Recommendation 1:** The Australian Government follow up the initial meetings with Indigenous leadership with regular consultations which materially inform policy and legislation impacting Aboriginal and Torres Strait Islander peoples.

**Recommendation 2:** The Australian Government pursue the key priorities for change and recommendations outlined in the Redfern Statement, utilising the Council of Australian Governments and other processes to engage states and territories.

**Recommendation 3:** The Australian Government establish and promote a monitoring and reporting framework to measure government progress in relation to Indigenous child welfare.

**Recommendation 4:** The Australian Government, as a matter of urgency, support the development of justice targets, Justice Reinvestment initiatives and other evidence based state and territory legislative, administrative and service delivery initiatives that will contribute to substantial reductions in Indigenous incarceration rates.

**Recommendation 5:** The Australian Government prioritise early intervention and prevention initiatives that provide comprehensive support and protection from violence to vulnerable Indigenous populations including women, children and the elderly.

**Recommendation 6:** The Australian Government ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

**Recommendation 7:** The Australian Government follow through on the *Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013-2023* by:

- providing new, quarantined funding for each of the activities outlined in that plan; and
- continuing to work with the National Health Leadership Forum to oversee the progress of the plan.

**Recommendation 8:** The Australian Government work with the Western Australian Government to ensure that the principles of free, prior and informed consent underpin the consultation with Aboriginal peoples regarding any proposed land tenure changes as a part of its Regional Services Reform policy.

**Recommendation 9:** The Australian Government support the outcomes of the national consultations conducted by the Referendum Council.

**Recommendation 10:** The Australian Government include the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and review existing legislation, policies and programmes for conformity with the UNDRIP.

**Recommendation 11:** The Australian Government encourage state and territory governments to consult with Indigenous peoples about the need to establish or re-establish stolen wages reparations schemes.

**Recommendation 12:** The Australian Government should make the Cashless Debit Card and the Community Development Program in remote communities' voluntary, opt-in schemes (See *Social Justice Native Title Report 2015*, Recommendation 5).

**Recommendation 13:** The Australian Government conduct independent evaluations of the Cashless Debit Card Trials and Community Development Program which involve participation and feedback from Aboriginal and Torres Strait Islander peoples directly affected and make these evaluations publically available.

**Recommendation 14:** The Australian Government work with the states, territories and relevant stakeholders including the National Native Title Tribunal, to ensure the integration of key information about the Indigenous Estate on state and territory land title information systems.

**Recommendation 15:** The Australian Government support Indigenous land holders to more comprehensively map the extent of their Indigenous Estate.

**Recommendation 16:** The Australian Government support the Indigenous Strategy Group's endorsed model(s) for long-term leasing.

**Recommendation 17:** The Australian Government support the review of state and territory land use planning regimes in consultation with Indigenous organisations to ensure the Traditional Owners of the Indigenous Estate can exercise the right to free, prior and informed consent regarding land use planning decisions.

**Recommendation 18:** The Australian Government:

- recognise the key roles that native title Prescribed Bodies Corporate (PBCs), Native Title Representative Bodies and Service Providers (NTRB/SPs), the National Native Title Council and locally based, Indigenous-led specialist cultural and economic development organisations play in driving and supporting economic development on the Indigenous Estate; and
- ensure these Indigenous-led organisations are properly funded and supported to carry out this important work, in addition to any statutory duties they may have.

**Recommendation 19:** The Australian Government support locally based research and scoping initiatives to identify Indigenous-led economic development opportunities suited to the unique land holdings and strengths of Traditional Owner groups, including opportunities to develop the cultural economy, partner with local operations and 'tap in' to industry initiatives in the broader region.

**Recommendation 20:** The Australian Government fund effective, applied training in business and other skills to build the capacity of Aboriginal and Torres Strait Islander directors and managers.

**Recommendation 21:** The Australian Government support the analysis of risks for both Indigenous land holders and financial institutions with the objective of developing a new risk framework to underpin decision making, investment and business practices regarding the Indigenous Estate in partnership with Indigenous people and financial institutions.

**Recommendation 22:** The Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.

# Recommendations

**Recommendation 23:** The Australian government continue to support and resource locally designed employment programs including ranger and other culturally based land management programs beyond the current 2020 commitment.

**Recommendation 24:** The Australian Government support the development of tailored governance arrangements and other tools to support effective benefit sharing and wealth management strategies.

**Recommendation 25:** The Australian Government work with the states and territories to avoid limiting recognition of native title rights to take resources in consent determinations.

**Recommendation 26:** The Australian Government prioritise funding Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) to pursue native title compensation claims on behalf of their clients through litigation or agreement making.

**Recommendation 27:** The Australian Government continue to support and resource the Australian Human Rights Commission to facilitate the Indigenous Property Rights Project with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, in order for the agenda developed by the Indigenous Strategy Group to be further advanced and achieved.

**Recommendation 28:** The Australian Government, in cooperation with representative bodies, use the UNDRIP to develop subject specific indicators and work with the Australian Human Rights Commission to monitor the implementation of UPR recommendations relating to Aboriginal and Torres Strait Islander peoples.



# Chapter 1 :

## Year in review

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# 1.1 Introduction

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This chapter provides a year in review snapshot of key issues relating to the enjoyment and exercise of the human rights of Aboriginal and Torres Strait Islander peoples during the reporting period, including:

- The Redfern Statement
- The Indigenous Advancement Strategy (IAS) and ongoing reviews of its impact
- Recognition of Aboriginal and Torres Strait Islander peoples in the Constitution and the place of broader treaty discussions
- Close the Gap
- Justice issues including the Northern Territory's paperless arrest laws, incarceration for fine defaulting in Western Australia, and justice reinvestment
- The Regional Services Reform policy affecting remote communities in Western Australia

Appendices 2 and 3 to this report also detail:

- Discrimination complaints received by the Australian Human Rights Commission (Commission) from Aboriginal and Torres Strait Islander peoples during the 2015-16 period (at Appendix 2).<sup>1</sup>
- Developments at key international forums, including the United Nations Permanent Forum on Indigenous Issues (UNPFII) and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (at Appendix 3).

## (a) Anniversaries

This year marked a number significant anniversaries for Aboriginal and Torres Strait Islander peoples including:

- 50 years since the Wave Hill walk off by the Gurindji People of the Northern Territory
- 40 years since the commencement of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
- 25 years since the report of the Royal Commission into Aboriginal Deaths in Custody
- 10 years since the launch of the Close the Gap Campaign.

### (i) The Wave Hill walk-off

In August 2016 Aboriginal and Torres Strait Islander peoples commemorated 50 years since Gurindji man, the late Vincent Lingiari, led his countrymen and women off the large pastoral station that had been established on their country at Kalkarinji. At the time, the station was known as Wave Hill and was owned by the British based Vestey family.<sup>2</sup>

The Aboriginal stockmen and domestic servants were paid much less than their non-Aboriginal counterparts, given inadequate rations and subjected to poor working conditions. Their children were taken from them and they were subjected to extreme brutality by local police, station managers and other stockmen.<sup>3</sup> When they walked off the station and set up camp at Daguragu (Wattie Creek) the Gurindji joined a widespread campaign for equal wages which had started at Brunette Downs station.

This industrial action became known as the Wave Hill 'walk off'. While it was part of a national campaign for equal wages and employment conditions, at the heart of the seven-year strike was the Gurindji people's fight for their land.



The persistence and resolve of the Gurindji people was recognised when nine years after the walk off, Prime Minister Gough Whitlam transferred to them the leasehold title to land at Wave Hill station. The announcement of the transfer was immortalised in Mervyn Bishop's now famous photograph of the former Prime Minister pouring sand into Mr Lingiari's hands.

The Prime Minister's words still resonate today as the struggle for land, a place in the economy and equal standards of health, employment and education continues:

On this great day, I, Prime Minister of Australia, speak to you on behalf of all Australian people – all those who honour and love this land we live in. For them I want to say to you: I want this to acknowledge that we Australians have still much to do to redress the injustice and oppression that has for so long been the lot of Black Australians.

Vincent Lingiari, I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people and I put into your hands part of the earth itself as a sign that this land will be the possession of you and your children forever.<sup>4</sup>

The strength of the people as they continued to assert their rightful place as traditional owners was described in 1978 by Gurindji man, the late Pincher Nyurmiari:

Wurlurturr-warla pani ngumpit ngaliwuny-ma ngumpit-ma Gurindji-ma. Nyawa-ma-lu yuwani marru-nganyju-warla. Nyawa-ma-rla ngurra karrinya ngumpit-ku-rni. Kula wapurr pani kaya-ngku-ma lawara. Nyanuny maramara-rni ngunyunu. Ngumpit-tu-rni nyangani-ma murlany-mawu-ma kayirrak kullarrakarra. Yumi-ma-rla karrinyani.

Whitefellas massacred our Gurindji ancestors. Then they put up their station houses, yards and stock camps. But this land is Aboriginal land and whitefellas haven't succeeded in getting rid of us. Aboriginal people still recognise each other as the traditional owners all 'round this area. The law has always been here.<sup>5</sup>

The ground breaking action of the Gurindji occurred at a time when Indigenous peoples around the country were fighting for legislation to recognise their rights to land and a system for return of that land. The Yolngu people commenced the Gove case (*Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, the first native title case in Australia. The Woodward Royal Commission had been established to inquire into suitable ways to recognise Aboriginal rights to land in the Northern Territory, and South Australia passed the *Aboriginal Lands Trust Act 1966* (SA) recognising certain Aboriginal land rights in that state.

## **(ii) The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)**

Following the recommendations of the Woodward Royal Commission, in December 1976 the Commonwealth parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA).<sup>6</sup>

This year we celebrate 40 years of the operation of this landmark legislation, and recognise its importance for Aboriginal peoples of the Northern Territory and the high water mark it set for further legislation.

Approximately 50% of the land of the Northern Territory is now Aboriginal land granted under the ALRA.<sup>7</sup> This is in no small part due to the ongoing hard work and dedication of the four Northern Territory land councils; the Anindilyakwa Land Council, the Central Land Council, the Northern Land Council and the Tiwi Land Council.

In April this year the Kenbi land claim, one of Australia's longest running land claims under the ALRA, was settled after 37 years. Title deeds to over 500 square kilometres of land around the Cox Peninsula opposite Darwin were handed back to Larrakia Traditional Owners.<sup>8</sup>

In a speech at the Kenbi Land Claim handback ceremony, Samuel Bush-Blanasi, Chairman of the Northern Land Council stated:

Today, let us join together in a spirit of real celebration. The realisation of the Kenbi land claim is a great occasion for us all. This beautiful place we call Cox Peninsula, and the islands to the west, are finally back in Aboriginal hands, and many more Aboriginal people than just the few Traditional Owners will benefit from that. Aboriginal people themselves now have great opportunities for economic development. Caring for this country, nurturing its cultural and environmental values, will now be the responsibility of Aboriginal people themselves. We will all be better off for that.<sup>9</sup>

The Commission congratulates the Traditional Owners of the land and all those who worked on and supported the claim.

### **(iii) Close the Gap**

This year also marks 10 years since the beginning of the Close the Gap Campaign on 17 March 2006. The response of the Australian Government to the campaign has led to a broader community understanding of the challenges for addressing Indigenous health inequality, and has led governments to make substantial improvements to their policies and programs nationwide. This has included through the adoption of benchmarks and targets over a 25 year period, and significant reforms to inter-governmental funding arrangements to meet these. Solid progress has been made over the last decade, including in the areas of infant and child health, smoking rates and increased access to medicines.<sup>10</sup>

There is still a long way to go to achieve health equality for Aboriginal and Torres Strait Islander peoples within a generation, but it is important to acknowledge that sustained change is a long term goal. It will require consistent and concerted efforts to maintain funding and policy directions and support direct initiatives such as community controlled medical services.

### **(iv) The Royal Commission into Aboriginal Deaths in Custody**

The 25 year anniversary of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) brings great sadness and frustration.<sup>11</sup> The Commission extends sincere condolences to the families and communities across the country who have lost loved ones while in custody.

The inquiry and report of the RCIADIC are highly regarded because of the thorough analysis of the circumstances of the 99 Indigenous deaths in custody during 1980-1989. These individual reports were accompanied by regional reports and a comprehensive national report that scrutinised policing and custodial practices, identified the underlying causes of the high numbers of Indigenous people in custody and an extensive suite of 339 practical recommendations to support fundamental changes.

Current statistics are an indictment on the failure to properly implement and monitor the RCIADIC's recommendations. The number of Aboriginal and Torres Strait Islander peoples entering the criminal justice system has substantially increased over the 25 years since the report was handed down.<sup>12</sup> In 2016 Aboriginal and Torres Strait Islander prisoners account for just over a quarter (27%) of the total Australian prisoner population, almost doubling from 14% in 1991.<sup>13</sup>

Until recently, the Australian Government had resisted the adoption of justice targets or policy directions that support more preventative and reparative rather than punitive approaches to crime. However, in September 2016 during a meeting with Indigenous signatories to the *Redfern Statement*, the Hon Nigel Scullion, Minister for Indigenous Affairs, provided a promising commitment to justice targets stating:

We [the Australian Government] want to work with the states in ensuring that we use whatever levers we can and whatever persuasion we can for them to adopt the justice targets.<sup>14</sup>

The Commission supports a justice reinvestment approach that addresses the social determinants of health, adopts justice targets and invests in the expertise provided by Indigenous legal organisations that can also help bring about the change that is necessary to stop the high levels of contact between Aboriginal and Torres Strait Islander peoples and the justice system.<sup>15</sup>

The Australian Government continues to consider ratification of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT). The OPCAT requires that an independent National Preventative Mechanism (NPM) be established to conduct inspections of all places of detention. This would include prisons, juvenile detention, local and offshore immigration detention facilities and other places where people are deprived of their liberty.

The establishment of a NPM under OPCAT would facilitate a greater level of transparency and accountability regarding conditions for, and treatment of people in Australian detention facilities.<sup>16</sup> The Commission urges swift ratification of OPCAT and the establishment of the NPM.

## (b) Summary

The anniversaries of the Wave Hill walk off, the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), the Close the Gap Campaign and the Royal Commission into Aboriginal Deaths in Custody are a reminder of how much has changed, and how much remains to be done. While there has certainly been substantial progress in relation to land and our participation in the economy, over representation in police and corrections remains and reports of terrible treatment and deaths continue.

As the former Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas has remarked:

Indigenous affairs seems to have become a series of anniversaries - operating as an annual reminder of the unfulfilled promises and commitments of governments.<sup>17</sup>

The coalition of Aboriginal and Torres Strait Islander peak organisations who drafted the Redfern Statement observed recently that there is already a firm body of evidence on which to base reform. Over the last 25 years there have been three significant inquiries producing the *Report of the Royal Commission into Aboriginal Deaths in Custody*, the *Bringing them Home Report* and *Reconciliation: Australia's Challenge: the final report of the Council for Aboriginal Reconciliation*.<sup>18</sup> All of these reports provide well accepted evidence and recommendations for better policy and outcomes for Aboriginal and Torres Strait Islander peoples. However, the lack of sustained implementation and the consequent rising numbers of people in custody and out-of-home care highlights the urgent need for a genuine commitment from government at all levels to listen and follow through with informed policy.

## 1.2 The Redfern Statement

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The absence of any real engagement in Aboriginal and Torres Strait Islander affairs during the 2016 Federal Election campaign sparked a united call for action from a coalition of Aboriginal and Torres Strait Islander peak representative organisations.

In a strategic effort to get the major parties to more fully consider their commitments to Aboriginal and Torres Strait Islander peoples, the coalition of peak bodies came together on 9 June 2016 to sign an election platform declaration called the Redfern Statement.<sup>19</sup>

The Redfern Statement covers issues ranging from engagement, health, justice, violence prevention, disability, children and families. It calls for a new dialogue and relationship moving forward with government to address some of the major challenges facing Aboriginal and Torres Strait Islander peoples.

The Commission hopes that the Redfern Statement will provide the impetus for the change that is so desperately needed by Indigenous communities.

### **Text Box 1.1:**

#### Redfern Statement – introduction

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We stand here as Aboriginal and Torres Strait Islander peak representative organisations with a deep concern:

- that in 2016 First Peoples continue to experience unacceptable disadvantage;
- that the challenges confronting Aboriginal and Torres Strait Islander people continue to be isolated to the margins of the national debate;
- that Federal Government policies continue to be made for and to, rather than with, Aboriginal and Torres Strait Islander people; and
- that the transformative opportunities for Government action are yet to be grasped.

Stand with us to let this statement and call for Government action be heard and acted upon by our nation's leaders.

The coalition of peaks raised the continued failure of the Australian Government to address the disadvantage experienced by Aboriginal and Torres Strait Islander peoples, despite years of reports and recommendations outlining the required changes.

The Redfern Statement called on the 45th Parliament to meaningfully engage with Aboriginal and Torres Strait Islander peoples and commit to a plan of action aimed at addressing issues regarding health, justice, violence prevention, early childhood and disability as a matter of national priority.<sup>20</sup>

### Text Box 1.2:

#### Call for Action by Aboriginal and Torres Strait Islander peak organisations<sup>21</sup>

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- Commit to resource Aboriginal and Torres Strait Islander led solutions, by:
  - Restoring, over the forward estimates, the \$534 million cut from the Indigenous Affairs portfolio in the 2014 Budget to invest in priority areas outlined in this statement; and
  - Reforming the *Indigenous Advancement Strategy* and other Federal funding programs with greater emphasis on service/need mapping (through better engagement) and local Aboriginal and Torres Strait Islander organisations as preferred providers
- Commit to better engagement with Aboriginal and Torres Strait Islander peoples through their representative national peaks, by:
  - Funding the National Congress of Australia's First Peoples (Congress) and all relevant Aboriginal and Torres Strait Islander peak organisations and forums; and
  - Convening regular high level ministerial and departmental meetings and forums with the Congress and the relevant peak organisations and forums.
- Recommit to Closing the Gap in this generation, by and in partnership with COAG and Aboriginal and Torres Strait Islander people:
  - Setting targets and developing evidence-based, prevention and early intervention oriented national strategies which will drive activity and outcomes addressing:
    - family violence (with a focus on women and children);
    - incarceration and access to justice;
    - child safety and wellbeing, and the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care; and
    - increasing Aboriginal and Torres Strait Islander access to disability services.
  - Secure national funding agreements between the Commonwealth and States and Territories (like the former National Partnership Agreements), which emphasise accountability to Aboriginal and Torres Strait Islander peoples and drive the implementation of national strategies.
- Commit to working with Aboriginal and Torres Strait Islander leaders to establish a Department of Aboriginal and Torres Strait Islander Affairs in the future, that:
  - Is managed and run by senior Aboriginal and Torres Strait Islander public servants;
  - Brings together the policy and service delivery components of Aboriginal and Torres Strait Islander affairs and ensures a central department of expertise;
  - Strengthens the engagement for governments and the broader public service with Aboriginal and Torres Strait Islander people in the management of their own services.
- Commit to addressing the unfinished business of reconciliation, by:
  - Addressing and implementing the recommendations of the Council for Aboriginal Reconciliation, which includes an agreement making framework (treaty) and constitutional reform in consultation with Aboriginal and Torres Strait Islander peoples and communities.

## (a) Children and young people

The high rates of Aboriginal and Torres Strait Islander children in out-of-home care remains gravely concerning. The Redfern Statement called for an evidence based approach to child welfare, reinforced by measurable targets and greater investment in family support. It also stresses an approach to child welfare which is underpinned by a strong national focus emphasising greater transparency and accountability from government.<sup>22</sup>

The starting point for these efforts needs to be discussions with Aboriginal and Torres Strait Islander peoples, sector peaks and those involved in national initiatives such as the Family Matters – ‘Kids safe in culture, not care’ (Family Matters) campaign.

The Family Matters campaign is a national initiative led by Aboriginal and Torres Strait Islander child welfare peak bodies, in partnership with the non-government sector, to address the overrepresentation of Indigenous kids in out-of-home care.<sup>23</sup>

In February 2016 the initiative held a landmark forum to discuss how to bring about changes to the ‘ongoing, extraordinary rates of removal of Aboriginal and Torres Strait Islander children into out-of-home care, leaving children separated from their families and their cultures.’<sup>24</sup> Bringing together over 100 industry leaders from across the country,<sup>25</sup> the group devised a strategy for guiding future action in this space, backed by working groups in each state and territory and top-level priorities to reduce overrepresentation.<sup>26</sup> More information on these priorities appears in Text Box 1.3 below.

### **Text Box 1.3:**

#### Family Matters campaign core commitments<sup>27</sup>

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- Building a coalition for change to lead strategy development and implementation
- Securing national commitment to improve Aboriginal and Torres Strait Islander child safety and to prioritise early intervention through Coalition of Australian Government (COAG) targets
- Supporting and empowering communities to reduce child removal
- Establishing and promoting a monitoring and reporting framework to measure government progress on key policy imperatives; and
- Supporting strategic state/territory based strategies that create precedents or embed innovation in Indigenous child safety law, policy and practice.

The campaign is a community driven approach led by Aboriginal and Torres Strait Islander peoples, and the Commission hopes that all governments work with the Family Matters coalition and draw on their collective expertise to bring about meaningful change for Aboriginal and Torres Strait Islander families.<sup>28</sup>

## (b) Domestic and family violence

Evidence shows that violence against Aboriginal and Torres Strait Islander women and children is widespread and remains at disproportionately high levels.<sup>29</sup> Data shows:

- much higher rates of assault (including sexual assault) against Aboriginal and Torres Strait Islander peoples than non-Indigenous Australians.
- the majority of assaults carried out against Aboriginal and Torres Strait Islander peoples are by perpetrators known to the victim, with family members often identified as the offender.
- Aboriginal and Torres Strait Islander women suffer physical assault at a disproportionately high rate as compared to non-Indigenous women.<sup>30</sup>

Aboriginal and Torres Strait Islander women are hospitalised for family violence related assault at a much higher rate than non-Indigenous women and are more likely to be killed as a result of violent assault.<sup>31</sup> Previous Aboriginal and Torres Strait Islander Social Justice Commissioners have reported on this issue in a number of *Social Justice and Native Title Reports*.<sup>32</sup>

Preventing and addressing domestic and family violence through a human rights based approach takes into account the complex interrelated factors impacting the capacity of Aboriginal and Torres Strait Islander women and children to enjoy freedom from violence and abuse. The Commission has previously reported that a human rights based approach on this issue should take account of the following:

- The entitlement of Indigenous women, children and men to live their lives in safety and with dignity, free from fear of violence or abuse. This is a cultural and human right.
- The complexity of Indigenous women's experience of discrimination and violence.
- The intersection of inequality based on race and gender.
- The right of Indigenous peoples to full and effective participation in decisions which directly or indirectly affect their lives, including participation and partnership in program planning, development, implementation and evaluation.
- The broader social and economic factors which impact on the enjoyment of rights by Indigenous people, with a consequent need for a holistic approach that addresses the causes and consequences of violence and abuse.<sup>33</sup>

Text Box 1.4 outlines the Redfern Statement priorities for the Australian Government to prevent violence against Aboriginal and Torres Strait Islander women and children.

**Text Box 1.4:**

Preventing violence against Aboriginal and Torres Strait Islander women and children<sup>34</sup>

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**1. Funding Aboriginal and Torres Strait Islander Community Controlled Organisations to meet need**

The Federal Government should:

- Develop an evidence-based assessment of the overall quantum of funding (both Federal and State) for services for Aboriginal and Torres Strait Islander victim/survivors of family violence to meet need;
- Calculate legal need amongst Aboriginal and Torres Strait Islander women experiencing violence - in particular in relation to the core legal services of the Family Violence Prevention Legal Services (FVPLS) and Aboriginal and Torres Strait Islander Legal Services (ATSILS);
- Determine quantum of services required to meet legal need and the cost associated with these services. This would include identifying service gaps to be addressed over time; and
- Invest in early intervention and prevention services with a priority for services that are Aboriginal and Torres Strait Islander community controlled.

**2. A national holistic whole-of-government plan**

Clear and unambiguous leadership is required from the Australian Government to address this national crisis. The government should lead, through COAG, the development of a national, holistic and whole-of-government plan to address violence against Aboriginal and Torres Strait Islander women and children. The plan should include:

- A concrete implementation plan with clear roles, responsibilities and funding allocations;
- Development of a target to reduce violence; and
- The creation of an oversight mechanism to lead the development and ongoing monitoring of the plan. Membership should include relevant Government Departments, Aboriginal and Torres Strait Islander representative bodies and service delivery organisations.

**3. Reinstatement of the National Family Violence Prevention Legal Services Program**

The Productivity Commission has identified that FVPLS are uniquely placed to provide legal services and supports to Aboriginal and Torres Strait Islander victim/survivors of family violence. Reinstating the National FVPLS Program with a direct allocation of funding will demonstrate a strong commitment from the Federal Government to the importance of the FVPLS model. The reinstated Program should include:

- A commitment to FVPLS as specialist providers of Aboriginal and Torres Strait Islander family violence legal services;
- Minimum 5-year funding agreements including CPI increases;
- National coverage of holistic FVPLS services commensurate to need within 5 years; and
- Continued ongoing funding for the National Forum to build the capacity of FVPLS units and provide a unified national voice in law reform, and policy and program development.



#### **4. National data collection**

The Federal Government should establish a national data body on Aboriginal and Torres Strait Islander family violence and incarceration rates. This should ensure a consistent national approach to data collection to inform policy development.

#### **5. Policy development priorities**

The Federal Government should work with and invest in Aboriginal and Torres Strait Islander organisations to undertake further policy development on:

- Addressing barriers for Aboriginal and Torres Strait Islander women to accessing services; and
- Addressing the nexus between being a victim/survivor of family violence, incarceration, and the removal of Aboriginal and Torres Strait Islander children.

### **(c) Aboriginal and Torres Strait Islander people with disability**

Current statistics estimate that as many as 45% of Aboriginal and Torres Strait Islander people live with disability, with at least 7.7% identifying as having severe or profound disability.<sup>35</sup>

Despite the high prevalence of disability in Indigenous communities, there is a lack of data available for policymakers to understand and respond to people's needs.

Aboriginal and Torres Strait Islander people with disability often report feeling 'doubly disadvantaged' as a result of historical government interventions in their families and lack of understanding of their cultural background. This can contribute to an under-reporting of disability among Indigenous peoples and inequities in accessing support for their disability. This is not limited to disability services, but extends to areas including education, employment and transport, affecting social health and wellbeing.<sup>36</sup>

As was highlighted at the Redfern meeting, this can also impact on policy and service delivery approaches such as the National Disability Insurance Scheme (NDIS) to deliver meaningful change to Indigenous communities.

For these reasons, the Redfern Statement called on the Australian Government to address the issues outlined in Text Box 1.5 below:

**Text Box 1.5:**

Addressing disability for Aboriginal and Torres Strait Islander people<sup>37</sup>

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**1. Work to address intersectional discrimination**

There is a need to address the unique circumstances which lead to systemic disadvantage for people who are both Aboriginal or Torres Strait Islander and have disability in all Government policies under the Indigenous Advancement Strategy and National Disability Strategy.

**2. Equitable access to the NDIS by Aboriginal and Torres Strait Islander people**

It is vital that the roll-out of the NDIS includes investment in adequate resources to allow for community-led solutions that understand and respond to the complex social circumstances affecting Aboriginal and Torres Strait Islander people with disability.

**3. Establish disability access targets as part of the Closing the Gap framework and NDIS Quality Assurance and Outcomes framework**

The establishment of targets would enable monitoring of the NDIS, to ensure equitable access for Aboriginal and Torres Strait Islander people.

**4. Invest in research and development to build an evidence-base of data**

Investment in a strong evidence-base would support innovations in the Aboriginal and Torres Strait Islander disability sector and enable effective evaluation of its social impact.

**5. Address the imprisonment rates of Aboriginal and Torres Strait Islander people with a cognitive or psychosocial disability**

A high number of Aboriginal and Torres Strait Islander people in the prison system have a form of disability. Government should resource a therapeutic model of justice for people with cognitive and psychosocial disability.

**6. Fund training and community leadership initiatives**

This training would empower regional and remote communities to conduct a self-directed need, capacity and infrastructure analysis of disability supports and solutions.

For over 10 years, the Commission has raised concerns about the particular difficulties faced by Aboriginal and Torres Strait Islander people with disability who are incarcerated, including those with a cognitive and psychiatric impairment.<sup>38</sup>

On 2 December 2015, the Australian Senate referred the matter of indefinite detention of people with cognitive and psychiatric impairment to the Senate Community Affairs References Committee for inquiry. Submissions to the inquiry included one from a consortium of Australia's foremost socio-legal researchers and community organisations, outlining a strategic approach to address factors resulting in the indefinite and recurrent detention of people with disability.<sup>39</sup> The Committee is due to report on 29 November 2016.<sup>40</sup>

The introduction of the NDIS holds some promise for a more coordinated approach with agreed standards but the prime responsibility for supporting people with disability in a custodial setting remains with the justice system. The NDIS will be responsible for:

- a. aids and equipment required by a participant for the purpose of improving functioning regardless of the activity they are undertaking but not fixed aids and equipment such as a hoist (in the same way as for people not in custody to the extent appropriate in the circumstances of the person's custody), and
- b. supports to facilitate the participant's transition from custody to the community where these needs are specific to the participant's disability and additional to transition needs of other people living in custody.<sup>41</sup>

Last year's *Social Justice and Native Title Report* included a discussion about the rollout of the NDIS and its effectiveness for Aboriginal and Torres Strait Islander peoples.

The Commission will continue to follow the progress of these reforms and look forward to an approach which addresses the health and welfare needs of incarcerated Aboriginal and Torres Strait Islander people with disability.

## (d) The Health Priorities of Australia's First Peoples

Closing the Gap in health equality between Aboriginal and Torres Strait Islander people and non-Indigenous Australians is an agreed national priority.

Despite the regular upheaval of major policy changes, significant budget cuts and changes of Government in the short election cycles, there have still been encouraging improvements in Aboriginal and Torres Strait Islander health outcomes. But much remains to be achieved and as we move into the next phase of Closing the Gap, enhanced program and funding support will be required.

For health equality for Australia's First Peoples, the Redfern Statement called on the Australian Government to address the issues outlined in Text Box 1.6 below:

### **Text Box 1.6:**

#### The Health Priorities of Australia's First Peoples

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##### **1. Restoration of funding**

The current funding for Aboriginal health services is inequitable. Funding must be related to population or health need, indexed for growth in service demand or inflation, and needs to be put on a rational, equitable basis.

##### **2. Make Aboriginal Community Controlled Services (ACCHS) the preferred providers**

ACCHS should be considered the 'preferred providers' for health services for Aboriginal and Torres Strait Islander people. Where there is no existing ACCHS in place, capacity should be built within existing ACCHS to extend their services to the identified areas of need.

##### **3. Create guidelines for Primary Health Networks**

The next Federal Government should ensure that the Primary Health Networks (PHNs) engage with ACCHS and Indigenous health experts to ensure the best primary health care is delivered in a culturally safe manner.

#### **4. Resume indexation of the Medicare rebate, to relieve profound pressure on ACCHS**

The pausing of the Medicare rebate has adversely and disproportionately affected Aboriginal and Torres Strait Islander people and their ability to afford and access the required medical care.

#### **5. Address the imprisonment rates of Aboriginal and Torres Strait Islander people with a cognitive or psychosocial disability**

The Strategy requires a considered Implementation Plan with Government support to genuinely engage with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to develop local, culturally appropriate strategies to identify and respond to those most at risk within our communities.

#### **6. Develop a long-term National Aboriginal and Torres Strait Islander Social Determinants of Health Strategy**

The Federal Government must prioritise the development of a National Aboriginal and Torres Strait Islander Social Determinants of Health Strategy that takes a broader, holistic look at the elements to health and wellbeing for Australia's First Peoples.

### **(e) Resetting the relationship with government**

The Redfern Statement emphasised the extent to which Aboriginal and Torres Strait Islander peoples experience disconnection from the Australian Government's processes of policy development and implementation despite repeated efforts to engage.

Aboriginal and Torres Strait Islander community members, peak bodies, research institutions, representative bodies such as National Congress of Australia's First Peoples (National Congress), land council and Prescribed Bodies Corporate have a wealth of specialist knowledge, but there is a strong sense that this knowledge is not making its way into government policy.

It is pleasing that, after some delay, the Prime Minister met with the Co-Chairs of National Congress earlier this year,<sup>42</sup> and that following the release of the Redfern Statement the Indigenous Affairs Minister, the Hon Nigel Scullion, met with the coalition of signatory peak bodies.<sup>43</sup>

Meetings such as these are crucial to reinvigorating the relationship between Aboriginal and Torres Strait Islander peoples and the Australian Government, and to outlining a mutual plan of action for addressing key challenges facing Indigenous peoples.

# 1.3 Reviews of the Indigenous Advancement Strategy

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The previous two *Social Justice and Native Title Reports* closely monitored the introduction and implementation of the Australian Government's Indigenous Advancement Strategy (IAS) which aimed to 'rationalise and streamline' Indigenous affairs programs and grant funding.<sup>44</sup>

This major restructure of program policy and funding by the Department of Prime Minister and Cabinet (PM&C) has been a key challenge facing the organisations and programs that serve Aboriginal and Torres Strait Islander peoples in recent years.

The very high levels of concern and dissatisfaction with the IAS from Aboriginal and Torres Strait Islander organisations and service users culminated in:

- a Senate Inquiry
- internal and external reviews of aspects of the IAS initiated by PM&C
- an Australian National Audit Office (ANAO) audit assessing 'whether PM&C has effectively established and implemented the IAS'.<sup>45</sup>

In previous Reports the Commission welcomed the prospect of a more effective process, and expressed serious concern at the outcomes, including the costs of holding the reviews necessary to fix the process. The outcome of these reviews, including recommendations and subsequent revisions to the IAS, are discussed below.

## (a) Senate Inquiry

The Indigenous Advancement Strategy (IAS) tendering process was referred to the Senate's Finance and Public Administration Reference Committee Inquiry ('Senate Inquiry') on 19 March 2015. The Senate Inquiry examined the 'impact on service quality, efficiency and sustainability' of the IAS and called for submissions on a wide range of issues, including the extent of consultation with services providers, the evidence base for the program design, and information about organisations successful in receiving funding.<sup>46</sup>

The Inquiry handed down its report on 16 March 2016.<sup>47</sup> It made nine recommendations about the nature of reform required, outlined in Text Box 1.7

**Text Box 1.7:**

Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy* tendering process, 'List of recommendations'<sup>48</sup>

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- Future funding rounds are not blanket competitive processes but underpinned by robust planning and mapping needs
- Future tendering processes should be done in consultation with groups and based on community need
- Future selection criteria and guidelines should give appropriate weighting to the contribution and effectiveness of Aboriginal and Torres Strait Islander organisations
- Organisations should be awarded longer contracts where appropriate in order to deliver sustainable services to their communities
- Department of Prime Minister and Cabinet (PM&C) should improve its overall IAS communication plan so that all stakeholders are fully informed and have access to clear and timely information
- A full internal review process should be undertaken by PM&C and be made public
- The Government should release revised funding guidelines as a draft for consultation with Aboriginal and Torres Strait Islander communities and their organisations
- The Government should prioritise investment in capacity building and support for smaller community controlled organisations in future funding processes
- The Government should act immediately to address the 30 June 2016 funding deadline for organisations.

The Senate Committee highlighted the views of Aboriginal and Torres Strait Islander peoples who receive frontline services, not just those of organisations which applied for funding under the IAS.<sup>49</sup> This approach contributed to recommendations which capture the concerns raised by Aboriginal and Torres Strait Islander peoples and organisations. The recommendations particularly recognise the benefit of forward planning and investing in capacity building for Aboriginal and Torres Strait Islander organisations, and their implementation should create improvements in the process.

## (b) Department of Prime Minister and Cabinet reviews

Department of Prime Minister and Cabinet (PM&C) initiated both an internal review of the IAS, focusing on the grant round, and an external review of the IAS Guidelines and processes associated with the 2014 IAS grant funding round.<sup>50</sup>

PM&C indicated that a number of key findings were made that demonstrated the effectiveness of the IAS.<sup>51</sup> Some of the key findings included broad statements that the IAS is an 'innovative strategy' aimed at streamlining and improving the effectiveness of the services and support within Indigenous Affairs, and that

agile decision-making and internal processes used in the round were effective in enabling the round to be successfully completed.<sup>52</sup>

The Senate Committee was critical of the findings of PM&C's internal review, commenting that:

the findings of the internal review are very broad and do not appear to address many of the issues raised through this inquiry process.<sup>53</sup>

A number of public forums were held across Australia in late 2015 as part of the external review, including with seven peaks representing 500 organisations.<sup>54</sup>

Whilst it is important that the views of stakeholders and particularly Aboriginal and Torres Strait Islander peoples were sought regarding the revision process, the Senate Inquiry noted that this external process was not guided by a formal terms of reference or other structural direction about the nature and scope of the review, appearing to 'limit meaningful engagement for stakeholders'.<sup>55</sup>

In particular, the Commission agrees with the Senate Committee's view that it would have been valuable for PM&C to release a draft of the revised IAS Guidelines for consideration by Aboriginal and Torres Strait Islander peoples prior to their implementation. Early release would have given people an opportunity for detailed consultation and feedback.<sup>56</sup>

### (c) Revised grant guidelines

Revised IAS Guidelines were released and implemented by PM&C in late March 2016.<sup>57</sup> IAS funding applications received on or after March 2016 are subject to these revised IAS Grant Guidelines.<sup>58</sup>

One of the key criticisms regarding the IAS has been targeted at the competitive nature of the initial tendering process that resulted in Aboriginal and Torres Strait Islander organisations and mainstream non-government organisations essentially being pitted against one another for funding. Competitive tendering may be suitable in some sectors or projects but it is unlikely to be a suitable national approach across a broad range of work in a diverse community. The essential criteria of need can fall away in favour of price, scale and other drivers of efficiency. The Senate Inquiry noted that the initial model:

Did not recognise the enhanced outcomes of service delivery by Indigenous organisations<sup>59</sup>

It appears that this issue has been addressed in part with the replacement of the Demand Driven grant process with the Community Led grants process.<sup>60</sup> According to PM&C, a core objective of this change is to better enable Aboriginal and Torres Strait Islander peoples to:

work closely with their local PM&C Regional Network Office staff in the development of projects that deliver long-term and sustainable outcomes based on what a community needs.<sup>61</sup>

However, PM&C has not completely ruled out the use of competitive tendering for the purpose of inviting future applications.<sup>62</sup>

There was some frustration expressed during the Senate Inquiry about PM&C's objectives often not aligning with local needs.<sup>63</sup> The Commission hopes that the genuine needs of Aboriginal and Torres Strait Islander peoples are able to be met through this new process and that needs mapping occurs in an ongoing way.

Changes to the format of the application process demonstrate attention to making the application process more 'user-friendly'. The Commission is interested to hear how Indigenous organisations find working with the online application processes and electronic Smart Form, particularly whether this works for Aboriginal and Torres Strait Islander organisations in more remote locations.

## (d) Australian National Audit Office audit

At the time of writing, a performance audit of the IAS process was being undertaken by the Australian National Audit Office (ANAO), in order to assess whether PM&C had effectively established and implemented the IAS to achieve its intended outcomes.<sup>64</sup>

The Commission looks forward to the findings of the ANAO report which is due in December 2016.<sup>65</sup> It is particularly important that the ANAO process clearly identify on what basis previous funding decisions have been made, whether they are compliant with Commonwealth guidelines, and a performance framework moving forward.

## (e) Conclusion

For all of the rhetoric of efficiency savings that prompted the IAS, it does not appear that its implementation has resulted in substantial efficiency increases or, most importantly, better outcomes for Aboriginal and Torres Strait Islander peoples.

The Commission acknowledges that the ANAO's 2012 report, *Capacity Development for Indigenous Service Delivery* demonstrated that a more effective and streamlined process was needed so that organisations serving Aboriginal and Torres Strait Islander peoples are better supported and that duplication of reporting and administrative processes is minimised.<sup>66</sup>

Unfortunately, the resulting restructures have not solved the issues identified. The promise of an easier system with less red tape has not materialised and Indigenous peoples have been left with greater uncertainty, often fewer staff and in some instances, without a service at all. As the Senate Inquiry found:

For all the upheaval created, the outcome appears to be that organisations funded previously have, by and large, been funded to do the same activities with less money.<sup>67</sup>

The multiple reviews of the IAS conducted over the past 18 months, though welcome, have also been costly and they have reiterated what Aboriginal and Torres Strait Islander peoples have been saying all along - that they must be placed at the centre of any reform processes affecting them.

The Commission hopes that better results will come out of the next reporting period and will monitor the progress of the new arrangements to determine whether they address the concerns raised in the multiple review processes.



# 1.4 Justice and the 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody

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The overrepresentation of Aboriginal and Torres Strait Islander peoples in custody is one of the most challenging human rights issues facing Australia today. It causes immense distress and disturbance to family and community life and requires urgent action.

Successive Aboriginal and Torres Strait Islander Social Justice Commissioners have raised concerns about both Indigenous victims of crime and offenders, encouraging a human rights based approach to addressing criminal conduct, policing, sentencing and incarceration, particularly through justice reinvestment.

Indigenous and non-Indigenous communities held great hopes that the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) would bring sustained change, driving Indigenous incarceration numbers down and laying the foundations for a safer and more culturally conscious approach to policing, sentencing and incarceration. Not only have these hopes gone unrealised, but Aboriginal and Torres Strait Islander peoples are now even more likely to be imprisoned than at the time of the RCIADIC report.<sup>68</sup>

Despite these distressing circumstances, the ‘tough on crime’ narrative remains strong and measures that use custody as a first response rather than a last resort contribute to the extraordinarily high numbers of incarcerated Indigenous people. Examples of these measures include the ‘paperless arrest’ laws in the Northern Territory and the practice of gaoling fine defaulters. As long as laws like these continue, incarceration rates will remain unacceptably high, and too many Indigenous people will be at risk of dying in custody.

In New South Wales, local Aboriginal groups have taken the initiative to build partnerships and engage in positive community building activities to prevent offending behavior. This justice reinvestment work is particularly well progressed in Bourke and Cowra. Disappointingly, the state government’s announcement in mid-2016 of \$3.8 billion funding for prisons over the next four years is indicative that incarceration remains an ongoing priority for justice policy.<sup>69</sup>

The following sections detail some of the most problematic policy and legal measures from a human rights perspective.

## 1.5 Paperless arrest laws

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Last year's *Social Justice and Native Title Report* discussed the nature and scope of the Northern Territory's so called 'paperless arrest' powers which came into effect in December 2014.<sup>70</sup>

The laws, made by amendments to the *Police Administration Act* (NT), allow police, without a warrant, to arrest and take a person into custody for up to four hours if they reasonably suspect the person has committed, is committing, or is about to commit an 'infringement notice offence', i.e. an offence of the kind that is not punishable by a term of imprisonment and that would usually involve the issuing of an infringement notice under the *Summary Offences Act*, *Liquor Act*, or the *Misuse of Drugs Act*.<sup>71</sup>

If the person is intoxicated, the police may detain him or her for longer than four hours until they believe the person is no longer intoxicated.

Last year's report described the disproportionate effect of these powers on Aboriginal and Torres Strait Islander peoples and documented the case of Walpiri man Kumanjayi Langdon who tragically lost his life in custody after being detained for drinking alcohol in a public park.

The words of the Coroner on that case are powerful:

The grief and sadness that a family feels at the death of their loved one is compounded where that death occurs in custody, away from family and friends. Kumanjayi had the right to die as a free man and in the circumstances, he should have done. In my view, unless the paperless arrest laws are struck from the Statute books, more and more disadvantaged Aboriginal people are at risk of dying in custody, and unnecessarily so. That is why I will recommend its repeal.<sup>72</sup>

Despite the Coroner's recommendations, the paperless arrest laws remain in place.<sup>73</sup> Until they are reformed, Indigenous peoples in the Northern Territory are at risk of unnecessary periods of incarceration for minor offences. These kind of offences would be better dealt with by issuing a warning or on-the-spot fine, diverting people away from the criminal justice system in a manner consistent with the recommendations of the RCIADIC.<sup>74</sup>

### (a) High Court decision on 'paperless arrest' laws

In March 2015 the North Australian Aboriginal Justice Agency (NAAJA) and Ms Miranda Bowden (the plaintiffs) began legal proceedings in the High Court of Australia contesting the validity of the paperless arrest powers. Ms Bowden had previously been detained for almost 12 hours under the laws.

The Australian Human Rights Commission (the Commission) was granted leave to intervene in the matter by way of written submissions. Amongst other things the plaintiffs and the Commission argued that the laws are invalid as they give punitive powers to police, breach the separation of powers in Chapter III of the Commonwealth Constitution and undermine the institutional integrity of the Northern Territory Court system by removing from judicial oversight the involuntary detention of a citizen.<sup>75</sup>

The High Court upheld the validity of the paperless arrest laws, affirming the ability of Northern Territory police to arrest and detain people for an infringement notice offence.<sup>76</sup> The High Court found that the laws can not be characterised as punitive, as they do not give 'unfettered discretion' to police.<sup>77</sup>

Though the Court determined that the 'paperless arrest' laws are valid, in doing so the majority held that on a proper construction, the *Police Administration Act* (NT) still requires a person arrested to be brought before a court as soon as 'reasonably practicable'.<sup>78</sup> The four hour period prescribed in the legislation operates as a maximum time for detention under the new provisions, and so cannot be, regarded as the norm by police.<sup>79</sup>

According to the joint reasoning, of Justices French, Kiefel and Bell:

That time limit does no more than impose a cap on what is a reasonably practicable time to make a determination about which one of the options under s 133AB(3) is to be exercised.<sup>80</sup>

In practice, the High Court's judgment means that people who are detained under 'paperless arrest' laws should be released once police make a decision about how they are to be dealt with under section 133AB. A person must not be detained for longer than is reasonably practicable to make a determination about whether to:

- release them unconditionally
- issue them with an infringement notice
- release them on bail, or
- bring them before a court.<sup>81</sup>

The difficulty remaining is that there is no mechanism for oversight or enforcement of the time limits under the paperless arrest laws. Placement in police custody is serious and can be dangerous, especially for people with compromised mental and physical health. There remains a real risk that these laws allow for people to be taken into custody for minor infringements, or the mere apprehension that they might commit an offence, and remain there for periods longer than the High Court has stipulated. This may result in arbitrary detention, or risks to health and wellbeing. If these laws remain in place, proper mechanisms to enforce time limits must be introduced.

## 1.6 Fine defaulting and imprisonment

In August 2014, Yamatji woman Ms Dhu, died less than two days after entering police custody at South Hedland police station in Western Australia. Ms Dhu was detained in relation to unpaid fines amounting to \$3,622.<sup>82</sup> An autopsy revealed that she died from severe sepsis and pneumonia originating from an infection from a pre-existing rib injury.<sup>83</sup>



Carol Roe outside the inquest into the death of her granddaughter Ms Dhu. On Friday 15 April 2016 she joined a march in Perth calling for the recommendations of the Aboriginal deaths in custody royal commission to be implemented. Photograph: Calla Wahlquist for the Guardian

A coronial inquest into Ms Dhu's death began on 23 November 2015 and is expected to deliver its findings later in 2016. In the interim however, some distressing accounts have been published about the alleged treatment of Ms Dhu by prison and medical staff during her time in custody. It has been reported that Ms Dhu was mocked by police, and that despite expressing severe pain and distress, she was repeatedly returned to police cells by medical professionals at Hedland Health Campus.<sup>84</sup> The Commission extends its deepest

sympathies to Ms Dhu's family, and our sincere hope that the Coroner's report results in an overhaul of institutional responses to these kinds of medical emergencies.

In addition, better options must be developed to ensure that fines can be appropriately dealt with, without a custodial response. As noted below, the fact that a person has received a fine is recognition their conduct does not warrant a harsher penalty, and in particular a term of imprisonment. This is particularly urgent for Aboriginal women who are overrepresented in the fine-defaulter prisoner population in Western Australia.<sup>85</sup>

### (a) Fine defaulting policy in Western Australia

In Western Australia, people who are unable or who refuse to pay fines issued by the courts can have additional penalties applied in order to 'pay out the balance'<sup>86</sup> of their fine, including:

- suspension of their driver's license
- immobilisation of their vehicle
- seizure and sale of their property/goods
- undertaking a period of community service or a work and development order
- a term of imprisonment.<sup>87</sup>

In accordance with this policy, individuals may apply to enter into a payment plan to repay their debt or are otherwise able to pay off approximately \$300 for every six hours of work they undertake as a part of a community service order. Minimum weekly work periods of at least 12 hours are set for persons whose fines are more than \$600.<sup>88</sup>

In the event that a person does not have any property to sell, or fails to comply with a community service or work development order, a warrant may be issued for their arrest and imprisonment.<sup>89</sup>

Fines may be 'cut out' at a notional rate of \$250 per day in custody. Amendments were made to the policy in 2008, allowing people to serve time in custody for multiple fines concurrently. This means that some fine debts are now 'cut out' more quickly by a period in custody than by performing community work.<sup>90</sup>

### (b) Report of the Inspector of Custodial Services

In April 2016 the Inspector of Custodial Services released the report *Fine defaulters in the Western Australian prison system* (Fine Defaulters Report) in accordance with the statutory responsibility of that office to provide independent oversight on matters that concern WA prisons.<sup>91</sup>

The report covers the timeframe from July 2006 to June 2015 and examines a number of matters within the core responsibilities of the Inspector, as addressed below.

The Inspector noted that the death of Ms Dhu was not the impetus for the review, being a matter outside his jurisdiction, but he nonetheless acknowledged that the concurrent coronial inquest added 'poignancy and urgency'<sup>92</sup> to the report's findings.

### **(i) Number and profile of fine defaulters**

According to the Fine Defaulters Report, a total of 7,025 people have been imprisoned exclusively for fine default from July 2006 to June 2015, with an average of 800 people gaoled annually in WA since 2006/07.<sup>93</sup>

The Report highlighted that Aboriginal women are the 'most likely cohort to be in prison for fine default',<sup>94</sup> with unemployed Aboriginal women particularly affected.<sup>95</sup>

The Report also noted that:

- Aboriginal women comprised only 15 per cent of total prisoner receptions but 22 per cent of fine default receptions
- 64% of female fine defaulters in custody were Aboriginal women, and
- 38% of male fine defaulters in custody were Aboriginal men.<sup>96</sup>

54% of the offences for which fine defaulters were gaoled were traffic related, including driving without a licence, and drink driving.<sup>97</sup>

Whilst those in prison for fine default comprise a very small percentage of the total prison population, as the case with Ms Dhu highlighted, the outcomes can be devastating for individuals and families.

### **(ii) The cost of incarcerating fine defaulters**

The Report found that fine defaulters made up a relatively small proportion of the total prison population in Western Australia,<sup>98</sup> and the average length of time spent in custody by fine defaulters was very short.<sup>99</sup> However, it also found that '[i]t is far more expensive per day to house short stay prisoners than longer term prisoners'.<sup>100</sup>

Preliminary figures reported from the Department of Corrective Services indicate that it is likely to be at least twice as expensive to house short term prisoners, costing up to an average of \$770 a day versus just \$332 per day for long term prisoners.<sup>101</sup>

Based on these figures, it has cost the Western Australian Government approximately \$42 million to imprison 7,462 fine defaulters between 2006 and June 2014, not including additional justice system costs.<sup>102</sup> This expenditure seems particularly disproportionate considering the often relatively small individual amounts owed in fines.<sup>103</sup>

### **(iii) Impact of fine defaults on prison population and operation**

The Report found that fine defaulters spend relatively short amounts of time incarcerated.<sup>104</sup> 80% of people in prison for fine default are held for less than a week and, of this population, 22% of are released within 48 hours.<sup>105</sup> Since March 2008, the average length of stay for fine defaulters has been 4.5 days.<sup>106</sup>

The Fine Defaulters Report revealed that the high turnover rate of fine defaulters within the WA prison system places particular stress on prison services, describing it as 'risky and disruptive for prisons'.<sup>107</sup> The report noted the intensive, time consuming nature of processing involved for each prisoner.<sup>108</sup>

These findings about the increased stress on already stretched prison services are very concerning, not only in light of the death of Ms Dhu but also for the general health and welfare of rest of the prisoner population.

#### **(iv) Ongoing relevance of the Royal Commission into Aboriginal Deaths in Custody**

A number of parallels can be drawn with the findings of the Fine Defaulters Report and the findings of the RCIADIC. The Fine Defaulters Report questioned the fairness of incarcerating people for unpaid fines, an offender population who have been fined by courts as an alternative to imprisonment, stating that:

By definition, people who have been fined for an offence do not deserve to be in prison for their offence ... when a court fines someone, it has explicitly ruled out using tougher options such as immediate imprisonment, a suspended sentence, a community based order or an intensive supervision order.<sup>109</sup>

The report also went on to stress the importance of imprisonment as an option of last resort and noted that the law should apply equally to all.<sup>110</sup>

The findings of the Fine Defaulters Report reiterates two of the recommendations of RCIADIC, namely:

- **Recommendation 92:** governments should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.
- **Recommendation 121:** governments should ensure that sentences of imprisonment are not automatically imposed in default of payment of a fine.<sup>111</sup>

It is disappointing that these critical recommendations have not been fully implemented in a sustained manner more than 25 years after the RCIADIC.



## 1.7 Royal Commission into the Don Dale Youth Correctional Facility

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Allegations of abuse inflicted on youth inmates at the Don Dale Youth Correctional Facility came to light this year during a recent episode of Four Corners.<sup>112</sup>

In response, the Prime Minister and Attorney General announced on 26 July 2016 that there would be a Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory (the Royal Commission).<sup>113</sup>

Though some stakeholders have called for the terms of reference to be broadened to a national focus, it is important that the Royal Commission concentrate its immediate attention on the situation in the Northern Territory. The Commission expects there will be a number of findings from this process that will also be relevant to other correctional facilities across the country.

The Royal Commission commenced on 6 September 2016 and is due to report by 31 March 2017.<sup>114</sup>

The Australian Human Rights Commission is closely monitoring all related developments.

### **Text Box 1.8:**

Royal Commission into the Detention of Children in the Northern Territory - Plain English version of the Letters Patent<sup>115</sup>

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Inquire into:

1. Failings in the child protection and youth detention systems of the Government of the Northern Territory during the period since the commencement of the Northern Territory Youth Justice Act 2005 (the relevant period).
2. The treatment, during the relevant period, of children and young persons detained at youth detention facilities administered by the Government of the Northern Territory (the relevant facilities), including the Don Dale Youth Detention Centre in Darwin.
3. Whether any such treatment may have constituted:
  - a. a breach of a law of the Commonwealth or Northern Territory; or
  - b. a breach of a duty of care, or any other legal duty, owed by the Government of the Northern Territory to persons detained at the relevant facilities; or
  - c. an inconsistency with or be contrary to a human right or freedom that:
    - i. is embodied in a law of the Commonwealth or of the Northern Territory; and
    - ii. is recognised or declared by an international instrument; or
  - d. a breach of a rule, policy, procedure, standard or management practice that applied to any or all of the relevant facilities.
4. What, if any, oversight mechanisms and safeguards were in place during the relevant period at the relevant facilities to ensure that the treatment of children and young persons detained is appropriate, and whether those oversight mechanisms and safeguards have failed, or are failing, to prevent inappropriate treatment, and if so, why.

5. Whether there were deficiencies in the organisational culture, structure or management in, any or all of the relevant facilities.

6. Whether more should have been done by the Government of the Northern Territory to take appropriate measures to prevent the recurrence of inappropriate treatment of children and young persons detained at the relevant facilities and, in particular, to act on the recommendations of past reports and reviews, including:

- a. the Review of the Northern Territory Youth Detention System Report, of January 2015; and
- b. the Report of the Office of the Children's Commissioner of the Northern Territory about services at Don Dale Youth Detention Centre, of August 2015.

7. What measures should be adopted by the Government of the Northern Territory, or enacted by the Legislative Assembly of the Northern Territory, to prevent inappropriate treatment of children and young persons detained at the relevant facilities, including:

- law reform
- reform of administrative practices
- reform of oversight measures and safeguards
- reform of management practices, education, training and suitability of officers; and
- any other relevant matters.

8. What improvements could be made to the child protection system of the Northern Territory, including the identification of early intervention options and pathways for children at risk of engaging in anti-social behaviour.

9. The access, during the relevant period, by children and young persons detained at the relevant facilities, to appropriate medical care, including psychiatric care.

## 1.8 Justice reinvestment

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Aboriginal and Torres Strait Islander communities have long advocated for an approach to crime and justice that directly addresses the underlying issues contributing to high levels of contact with the justice system.

A 'justice reinvestment' approach is preventative rather than punitive, seeking to divert funding away from gaols and towards communities to address the social factors which influence crime.

Justice reinvestment has been the subject of significant community advocacy since 2009, including previous *Social Justice and Native Title Reports*. A number of state and Commonwealth inquiries and evaluations have reported positive findings into the value of a justice reinvestment approach.<sup>116</sup> A coordinated governmental strategy that responds to these evaluations and embraces justice reinvestment as a means of addressing crime and that invests in and works with Indigenous led, community controlled organisations is urgently needed.

### (a) Bourke Justice Reinvestment Project

While governments have been slow to adopt a justice reinvestment approach significant community driven work is underway in a number of locations across Australia. A number of pilot initiatives have been ongoing in Ceduna, Katherine, the Australian Capital Territory, Cowra and Bourke.<sup>117</sup> This section will focus on the NSW community of Bourke and the particular work of the Maranguka Justice Reinvestment Project (Maranguka Project).

The Maranguka Project was explored in the 2014 *Social Justice and Native Title Report*, which detailed how the Aboriginal people of Bourke are stepping up in partnership with Just Reinvest NSW (Just Reinvest) to break the cycle of crime in their community.<sup>118</sup>

This project has achieved a number of important milestones since then, namely:

- significant data collection and analysis to better understand community needs and the nature and drivers of local crime
- establishment of 'backbone' infrastructure to facilitate collaboration and track progress, and
- agreement reached on a common agenda to reduce youth crime and increase community safety.<sup>119</sup>

Funding has been secured for the next phase of the Maranguka Project. A strategy called *Growing Our Kids Up Safe, Smart and Strong* will be undertaken via a number of working groups comprised of community members, government and non-government agencies and service providers and will address the following priority areas:

- early childhood
- 8-18 year olds
- the role of men.<sup>120</sup>

A significant amount of effort has been undertaken to understand the situation in Bourke in order to begin to address their challenges in a way that is evidence and place based.<sup>121</sup>

The Commission supports the ongoing work of the Bourke Aboriginal Community through Maranguka and Just Reinvest, as well as the Cross Sectoral Leadership Group made up of various members of NSW Government. Together, they are establishing how this strategy will work for the people of Bourke in line with the strengths, needs and challenges of the community.<sup>122</sup>

## (b) Change the Record

The Change the Record campaign is another example of a coalition of leaders coming together to address issues relating to Aboriginal and Torres Strait Islander peoples and the criminal justice system.

The group behind the campaign consists of leading Indigenous and non-Indigenous community and human rights groups. It is committed to principles of justice reinvestment and community based solutions to violence and imprisonment.

The Change the Record campaign released its *Blueprint for Change* (Blueprint) on 30 November 2015. The Blueprint is a plan of action for all levels of government to begin addressing increasing levels of imprisonment and violence among Aboriginal and Torres Strait Islander communities.<sup>123</sup>

A snapshot of the Blueprint's key recommendations appears below in Text Box 1.9. The setting of detailed and measurable justice targets is a key element of the Blueprint, as well as genuine engagement with Indigenous peoples and a commitment to addressing the underlying causes of crime, not just the criminal conduct.

The Commission hopes that all levels of government engage with the Blueprint and use it to work with Aboriginal and Torres Strait Islander peoples to guide necessary reforms through the Council of Australian Government (COAG) process.

### **Text Box 1.9:**

#### Blueprint for Change key recommendations<sup>124</sup>

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Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to forge agreement through COAG to:

- a) Establish a national, holistic and whole-of-government strategy to address imprisonment and violence rates. This strategy should contain a concrete implementation plan and build on the National Indigenous Law and Justice Framework 2009-2015. In addition, the strategy should be linked to related areas of COAG reform including the National Framework for Protecting Australia's Children 2009-2022 and the National Plan to Reduce Violence Against Women and their Children 2010-2022.
- b) Set the following justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system:
  - i) Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040;
  - ii) Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children.

In addition, these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets and a commitment to halve the gap in the above overarching goals by no later than 2030.

- c) Jointly establish, or task, an independent central agency with Aboriginal and Torres Strait Islander oversight to co-ordinate a comprehensive, current and consistent national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander imprisonment and violence rates.
- d) Ensure that laws, policies and strategies aimed at, and related to, reducing Aboriginal and Torres Strait Islander imprisonment and violence rates are underpinned by a human-rights approach, and have in place a clear process to ensure they are designed in consultation and partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies.
- e) Support capacity building, and provide ongoing resourcing of Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to ensure that policy solutions are underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people's culture and identity, and recognition of the history of dispossession and trauma experienced by many communities.

## 1.9 Remote Aboriginal communities

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Last year's *Social Justice and Native Title Report* detailed the Western Australian government's announcements in late 2014 flagging the potential closure of a number of remote Aboriginal communities in that state.<sup>125</sup>

Statements about the withdrawal of funding for essential services and anticipated closure of up to 150 communities were made by the Hon Colin Barnett MLA following the transfer of essential service delivery functions from the Commonwealth to States earlier in 2014.<sup>126</sup>

Not surprisingly, these announcements caused significant stress and anxiety to many Aboriginal people living in remote communities in Western Australia and to many other Aboriginal and Torres Strait Islander peoples across the country. The proposals were also met with widespread protests and expressions of support for remote communities from around the world.<sup>127</sup>

In July 2016, the Western Australian Government released their report, *Resilient Families, Strong Communities: A roadmap for regional and remote Aboriginal communities* (the Roadmap). The report outlines the direction for future reform in the state and the broader vision of strengthening Aboriginal families in regional and remote areas in ways to ensure outcomes are comparable with other state residents.<sup>128</sup>

The Roadmap sets out a number of key directions, priority actions and areas for consultation as a part of the planned reform process for communities in WA. The information in Text Box 1.10 below outlines the ten priority actions identified by the Roadmap that will be undertaken in the first two years of this process:

### **Text Box 1.10:** Priority Actions

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- Identify up to 10 communities by the end of 2016 with which the government will work to upgrade essential and municipal infrastructure.
- Commence in 2016–17 a \$20 million initiative to ensure that the residents of town-based reserves in the Pilbara receive the same services and opportunities, and are subject to the same payment responsibilities, as other residents of the relevant town.
- Work with community leaders and organisations in Roebourne in 2016–17 to co-design a reorientation of government-funded services to respond better to local needs and achieve better local outcomes.
- Publish during 2016–17 mapping of government-funded services in the Kimberley and Pilbara to support work between government agencies, other organisations and communities on developing place-based service systems.
- Commence in 2016–17 an initiative in Kununurra with community leaders and organisations to co-design a family-centred, earlier intervention service delivery model to support and enable better outcomes for local families.
- Continue to support the trial and evaluation of the Commonwealth Government's Cashless Debit Card in the East Kimberley.
- Work with the Commonwealth Government to implement the Compulsory Rent Deduction Scheme in Western Australia.

- Commit \$25 million towards a three-year Kimberley Schools Project, starting in 2016–17, that seeks to accelerate student improvement in opt-in schools and communities.
- Create new opportunities from 2016–17 for Aboriginal people and businesses in the regions through state government recruitment, purchasing and contracting practices.
- Establish an Aboriginal Housing Fund of up to \$200 million to increase housing choices and support services for Aboriginal families in the North West over four years.<sup>129</sup>

Despite initial statements about the ‘closure’ of communities, the government has confirmed that no steps will be taken to forcibly move Aboriginal people out of communities.<sup>130</sup> However, the government has indicated that it will be withdrawing support from smaller Aboriginal communities (which is primarily in the form of diesel fuel subsidies) and instead concentrating its efforts on increased investment into larger communities.<sup>131</sup> As a result it anticipates ‘migration’ away from smaller outstations.<sup>132</sup>

This is a very troubling aspect of the Roadmap. As Andrew Meehan, Director of ANTaR pointed out:

You may not be removing people physically from those communities but you are basically starving them of essential services that every citizen around the country takes for granted.<sup>133</sup>

People live in specific remote communities for a variety of reasons, including the fact that it might be their traditional country over which they have native title rights and interests, or that they or their families have strong connections as a result of being moved to that area by previous governments.

Removing people’s ability to live on their own country, and in their own communities prevents them from exercising the rights to belong to an Indigenous community or nation in accordance with tradition set out in articles 9 and 11 of the *United Nations Declaration on the Rights of Indigenous Peoples* the (UNDRIP) and is likely to cause further harm to people, families and culture.<sup>134</sup>

### (a) Service delivery and mutual responsibility

As a part of its regional services reform, the Western Australian Government will concentrate its initial efforts on the Pilbara and Kimberley regions where approximately 9,000 Aboriginal people reside in one of 244 town based reserves or remote communities.<sup>135</sup>

The state government will target its investment in selected existing Aboriginal communities ‘where there is best potential for long-term growth’ in order to create ‘high functioning regional networks’ based around regional towns, the justification being that towns ‘have the scale to support better infrastructure, services and governance’.<sup>136</sup>

Investment is also dependent upon those selected communities agreeing to partner with government and accept principles of ‘mutual responsibility’ in order to receive normal essential, municipal and housing services.<sup>137</sup> The full extent of what this will entail in practical terms is not entirely clear, but the Roadmap does say that residents will be obliged to pay bills and maintain their houses and public space.<sup>138</sup>

Additions to housing stock will primarily be in the form of ‘transitional housing’ over public and community housing.<sup>139</sup> To be eligible for transitional housing at least one adult in a household must be working and children are required to maintain an 85 per cent school attendance rate.<sup>140</sup>

## (b) Tenure reform

The government has flagged that providing improvements to essential, municipal and housing services in remote Aboriginal communities will require further planning and engagement with Aboriginal people around existing land tenure arrangements.<sup>141</sup>

Two thirds of land tenure changes in existing communities and across all of Western Australia's 37 town based reserves currently exist as unallocated Crown land or Crown reserves.<sup>142</sup> The majority of the relevant parcels of reserve land are held by the Aboriginal Lands Trust (ALT) who have the overall responsibility for managing the reserves.<sup>143</sup> Some of this land has been leased to Aboriginal organisations but it is not owned by individuals and in accordance with the *Aboriginal Affairs Planning Act 1972 (WA)* can only be transferred to appropriate Aboriginal land holders.<sup>144</sup>

Complex land tenure arrangements can create difficulties in delivering essential infrastructure, services and maintenance reform. However, any proposals for land tenure reform should be clearly communicated to communities, native title representatives bodies and service providers with sufficient time allowed for traditional decision making to occur.

All proposals must comply with the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples the (UNDRIP), including the principles of free, prior and informed consent. This means that Aboriginal communities should also be free to reject land tenure reform proposals where appropriate.

If communities do opt for land tenure reform, the Commission expects that the Future Acts process under the Native Title Act will be followed and all relevant native title holders be appropriately compensated if native title land is to be extinguished in the process.

## (c) Supporting families

The Western Australian Government has announced greater investment aimed at supporting Aboriginal families in certain remote communities as a core part of its regional services reform.<sup>145</sup>

Investment will specifically target:

- family and child centered services
- harm reduction
- improved employment opportunities
- place based services.<sup>146</sup>

The government's Roadmap has outlined that there will be 'innovative changes' to service delivery that will meet the specific needs and circumstances of Aboriginal people, whether they are based in regional or remote locations.<sup>147</sup>

The Roadmap is low on detail about what these reforms will look like, but it indicates the initial preference is to work with communities who wish to address social issues such as drug and alcohol abuse.



It is important that Aboriginal people work with government to tackle issues in their communities. However, the Commission hopes that government will work on evidence based, community driven, health focused solutions rather than regulatory initiatives alone such as the Cashless Debit Card or alcohol restrictions.<sup>148</sup>

It is important that efforts to address alcohol and other forms of substance abuse should empower local communities and be evidence based, while complying with laws about drug use.<sup>149</sup>

A number of trial projects are either underway, under consideration, or set to begin in 2016-17 as a part of the regional services reform process. These include:

- Compulsory Rent Deduction Scheme
- Community level model for prenatal, postnatal and early childhood development
- North West Aboriginal Housing Fund
- Kimberley Schools Project.<sup>150</sup>

Trials such as those planned to take place in Kununurra in 2016-17 in partnership between Aboriginal leaders and residents, the Regional Services Reform Unit and the Department for Child Protection and Family Support have great potential to address community concerns.<sup>151</sup> The Commission hopes that this mechanism will provide much needed early intervention support to families in need and enable children to stay at home with their families. The Commission will observe the development of the Kununurra trial with great interest, and hopes that the voices of Aboriginal community members are heard in this process.

Efforts aimed at improving employment and the workforce participation of Aboriginal people through the Roadmap are much needed and appear to be positive. However, long term investment needs to occur beyond the public sector, be backed up by training to the growing youth populations and result in meaningful employment opportunities.

In addition to the issues identified by the Roadmap, the Commission hopes that the findings of the WA Auditor General's 2015 report into the Remote Area Essential Services Program are urgently addressed. The *Delivering Essential Services to Remote Aboriginal Communities* report found that of the 27 Aboriginal communities in the Kimberley, Pilbara and Goldfield areas:

- a number had drinking water well below Australian standards
- E-coli was found in at least one community every month before June 2014
- unsafe levels of nitrate were found in four communities by at least twice that of the Australian standard
- fourteen communities had nitrate levels unsafe for bottle fed babies in 2014.<sup>152</sup>

A number of findings from this report were also picked up in the Roadmap, such as the need for a more coordinated approach to remote service delivery, particularly housing, as well as the need for better contracting, outcome based services and long term rather than ad hoc investment.<sup>153</sup>

## (d) Consultation

The Western Australian Government has highlighted that working with Aboriginal people to drive the reform process in regional communities is essential to achieving long term, lasting change.<sup>154</sup>

Community based and stakeholder consultation commenced in the Pilbara and Kimberley regions in August 2016.<sup>155</sup> However, there is still uncertainty around some aspects of the consultation process, including what resources are being committed to this process and what steps will be taken for those Aboriginal people living outside of the designated reform areas.<sup>156</sup>

Though considerable effort has gone into the establishment of governance structures for the reform process, including the inclusion of Aboriginal input, it is concerning that the government has waited this long to undertake comprehensive engagement with Aboriginal people regarding the proposed changes to their communities.<sup>157</sup>

As flagged in last year's *Social Justice and Native Title Report*, it is important that infrastructure and service provisions are made for communities that might receive an influx of Aboriginal people following the removal of government support in certain neighboring areas.<sup>158</sup> Some service providers had indicated in the earlier stages of the announcements that they were not equipped to deal with such changes.

The Commission hopes that the consultation process will be conducted in an open and transparent manner that maximizes the participation of Aboriginal peoples, consistent with the principles of the UNDRIP. It is particularly interested in what effort is being made by government to consult with Aboriginal communities that will no longer receive government support. These communities need to be able to make informed decisions about what the removal of government support will mean for them.

## 1.10 Close the gap

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This year marks the 10th anniversary since former Aboriginal and Torres Strait Islander Social Justice Commissioner, Professor Tom Calma AO, proposed the establishment of a human rights-based public campaign to close the life expectancy gap for Aboriginal and Torres Strait Islander peoples in a generation.

During the reporting period the Close the Gap Campaign welcomed Dr Jackie Huggins, Co-Chair of the National Congress of Australia's First Peoples, and Ms Pat Turner, CEO of the National Aboriginal Community Controlled Health Organisation to the roles of Co-Chair and interim Co-Chair (respectively) for the Campaign. Both Aboriginal women bring decades of leadership and experience to the Campaign.

After 10 years, there is still a lot of work to do before the gap in health equality between Indigenous and non-Indigenous people closes. However, accelerated improvement is expected across many of the targets in the coming years as a result of the impact of earlier investments. In the Campaign's 2016 *Progress and Priorities Report*, Jackie Huggins noted that:

The usual lag that occurs after the implementation of any major program or policy means that we should expect to see some meaningful changes to the health outcomes of our people after a few more years of sustained effort and investment.<sup>159</sup>

The Campaign hopes that updated data from the 2016 Census confirms significant improvement in the health of Aboriginal and Torres Strait Islander peoples. However, the impact of short-term political cycles in a volatile global economic environment means that consistent and sustained programs are constantly under pressure.

The 2016 Close the Gap Campaign *Progress and Priorities Report* continued to call on all governments to:

consider the generational effort that is required to attain health equality, rather than chop and change approaches based on an unrealistic appreciation of the health gains possible only a few years after an initiative is introduced.<sup>160</sup>

It is encouraging that, at a minimum, the life expectancy of Aboriginal and Torres Strait Islander peoples is now improving at the same pace of non-Indigenous Australians. However, to close the gap between these groups, the rate of progress for Indigenous peoples needs to double.

In light of the level of improvement already achieved with the disjointed, short-term policies and inconsistent funding levels that have plagued the sector, long-term, planned and sustained programs will facilitate the next level of progress required to truly close the gap.

It is important that the bi-partisan support for closing the gap in this generation leads to long-term program and funding commitments that ensure the best outcomes for Aboriginal and Torres Strait Islander peoples.

### (a) Implementation Plan

Last year's *Social Justice and Native Title Report*, recommended that the Australian Government finalise the *Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013-2023* (Implementation Plan). The launch of the Implementation Plan occurred shortly thereafter and the Commission commends the work of Minister Fiona Nash, the Department of Health in partnership with the National Health Leadership Forum (NHLF) for development of the Implementation Plan. This document should be a clear guide as to where efforts and resources should be concentrated in the next phase of closing the gap.

To ensure the success of the Implementation Plan, the Commission suggests that the NHLF continue to be involved in the monitoring and evaluation of the Plan's application. It is also critical that the Implementation Plan be funded adequately, without negatively impacting on the many other services and programs that need to continue being delivered in parallel.

# 1.11 Constitutional recognition

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Recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution has been a substantial focus during Commissioner Gooda's term and his work is outlined in a number of *Social Justice and Native Title Reports*.<sup>161</sup>

Despite years of processes and numerous recommendations on this issue, the prospect of reform and recognition remains uncertain. The process has continued to be hampered by a lack of political action and engagement with Aboriginal and Torres Strait Islander voices.

Some important developments have taken place during the reporting period, including the appointment of the Referendum Council and much needed budgetary injections to drive the consultation process with members of the Aboriginal and Torres Strait Islander community.<sup>162</sup>

Many were in favour of holding the referendum to coincide with the 50th anniversary of the 1967 Referendum in which the majority of Australians voted for amendments to the Constitution allowing for Aboriginal and Torres Strait Islander peoples to be included in the national census and for the Commonwealth to make laws with respect to them. This timeframe is now unrealistic and the focus is on preparations for a proper consultation process with Aboriginal and Torres Strait Islander peoples.

Timing issues aside, the 50th anniversary of the 1967 Referendum will be an important milestone for both reflection on the true history of this country, and the ongoing need for recognition, meaningful self-determination, reparation and reconciliation.

## (a) Referendum Council

The composition of the Referendum Council on constitutional recognition of Aboriginal and Torres Strait Islander peoples was announced by the Australian Government on 7 December 2015.<sup>163</sup>

This followed the initial commitment to establish the council by former Prime Minister Tony Abbott and Leader of the Opposition Bill Shorten at the Bipartisan Summit on recognition on 6 July 2015.<sup>164</sup> This commitment was a response to the calls of the Aboriginal and Torres Strait Islander caucus that took place in the lead up to the summit.<sup>165</sup>

The Referendum Council is comprised of a number of eminent Indigenous and non-Indigenous peoples, and is chaired by Mr Mark Leibler AC and Ms Pat Anderson AO.<sup>166</sup>

The Referendum Council is charged with advising the government on the 'progress and next steps towards a referendum',<sup>167</sup> including assisting with settling a question and the appropriate timing of such an event.<sup>168</sup> Importantly, the Referendum Council will help guide a national conversation so that all Australians can have their say on recognition, including Aboriginal and Torres Strait Islander peoples.<sup>169</sup>

This process will involve a series of national consultations on the issue, using both traditional and digital methods. It will occur in tandem with a series of Indigenous designed and led consultations, recognising the vital role that Indigenous peoples play in this process.<sup>170</sup>

### (i) Progress of the Referendum Council

The inaugural meeting of the Referendum Council was held on 14 December 2015. There have also been four subsequent meetings focusing on:

- developing a framework for the national consultation process (28 January 2016)<sup>171</sup>
- the parameters for a referendum proposal in the lead up to the public consultation process (21-22

March 2016)<sup>172</sup>

- the need to undertake Indigenous and community wide consultations in the second half of 2016, as well as the development of a digital platform to maximize community input (10 May 2016)<sup>173</sup>
- progress to date regarding the first phase of consultation and next steps (9 August 2016).<sup>174</sup>

The Referendum Council identified the following proposal framework to guide the consultation process:

- addressing the sections of the Constitution, including section 25 and section 51(xxvi), that are based on the outdated notion of ‘race’
- ensuring continued capacity for the Commonwealth Government to make laws for Aboriginal and Torres Strait Islander peoples
- formally acknowledging Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia
- providing an Aboriginal and Torres Strait Islander body to advise Parliament about matters affecting Indigenous peoples
- providing a constitutional prohibition on racial discrimination.<sup>175</sup>

## **(ii) First phase of consultations**

The first phase of consultations with Aboriginal and Torres Strait Islander peoples took place in mid-2016, with meetings held in Broome, Thursday Island and Melbourne.<sup>176</sup>

These meetings were attended by approximately 150 participants and represent an important first step in the lead up to the series of Indigenous-led dialogues which will soon be held around the country.<sup>177</sup>

Feedback received throughout these initial meetings was diverse and some participants expressed a willingness not to be bound by a particular ‘artificial deadline’ for example, the proposal to hold the referendum on the 17 May 2017.<sup>178</sup>

In light of this, members of the Referendum Council have agreed to a new timeframe for consultations which will now continue into 2017. The presentation of a final report of the council will be made by mid next year.<sup>179</sup>

Members of the Referendum Council have also resolved to produce a public discussion paper to guide the community discussion on constitutional recognition, particularly around options for reform and key issues. This will be published prior to the next phase of consultation and will be translated into a number of Indigenous languages.<sup>180</sup>

## **(b) Recognise campaign**

The Recognise campaign aims to raise awareness of, and support for, constitutional recognition of Aboriginal and Torres Strait Islander peoples and amendments dealing with discrimination in the constitution.

The role of Recognise is separate but complimentary to the Referendum Council. It is important that Recognise continues to raise awareness among the general community while the Referendum Council focuses on developing the model for change.

One of the keystones of the Recognise campaign’s awareness raising efforts has been the extensive ‘Journey to Recognition’ described as ‘an epic relay across our country building momentum to recognise Aboriginal and Torres Strait Islander peoples in our Constitution’.<sup>181</sup> The Recognise Journey has covered close to 40,000 kilometres, engaging with more than 27,000 people at 365 events across 273 communities around Australia.<sup>182</sup>

## 1.12 Talking treaty

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The rich discussions about constitutional recognition have provided fertile ground for the re-emergence of a conversation about a formal agreement between the Australian Government and Aboriginal and Torres Strait Islander peoples.

The goals of constitutional recognition and a treaty are not mutually exclusive, and as many Indigenous peoples have pointed out, they are both vital to recognising our historical legacy and resetting the relationship between Indigenous peoples, the rest of the Australian community and the state.<sup>183</sup>

A range of practical considerations arise regarding a treaty, including:

- **Governance** - who has the mandate to speak for and on behalf of Aboriginal and Torres Strait Islander groups?
  - Will agreements be sought between individual nations or on behalf of the Aboriginal and Torres Strait Islander nations from a particular state or territory?
- **Substance** - what matters will be covered by an agreement?
- **Process** - how will an agreement process work? What is the timeframe?

Some of these discussions and deliberations have already started taking place in Victoria where the state government has commenced a negotiation process with Indigenous representatives over the content of a legally binding treaty.<sup>184</sup>

The Victorian progress has synergies with work already commenced by the Assembly of First Nations (AFN), which has been discussed in previous *Social Justice and Native Title Reports*.<sup>185</sup> The Victorian treaty process and the work of the AFN may provide a framework to progress the future of agreement making between all Aboriginal and Torres Strait Islander peoples and Australian governments.

### (a) Victorian treaty process

On 3 February 2016 the Victorian Government held a meeting with members of the Victorian Aboriginal community to discuss issues of self-determination and constitutional recognition.<sup>186</sup>

This meeting is about hearing directly from the Victorian Aboriginal community on constitutional recognition and what self-determination should look like in a modern Victoria. We are working to present – and fight for – these views on the national stage.<sup>187</sup>

A significant number of Aboriginal people attended the forum and overwhelmingly supported the motion to pursue the issue of a treaty between the Victorian Government and Aboriginal Victorians.<sup>188</sup>

Speaking of the government's commitment to the self-determination agenda and treaty process, Victorian Premier Daniel Andrews said:

Victoria's treaty with Aboriginal Victorians will be the first of its kind in our nation's history. And Aboriginal people will lead this change.<sup>189</sup>

Following the February meeting, the Victorian Government organised a further four regional community meetings in Mildura, Horsham, Shepparton and Bairnsdale to progress the treaty mandate and discuss the following:

- What does successful self-determination look like?
- The fundamental principles for a treaty
- The relationship between constitutional recognition and treaty
- The creation of a representative Aboriginal structure.<sup>190</sup>

A statewide forum was then organized to take place on the 26-27 May 2016, with 400 people in attendance and over 4000 online.<sup>191</sup> The forum identified a number of next steps that needed to take place in order to progress the self-determination agenda, including the creation of an Aboriginal Treaty Interim Working Group (ATIWG), developing a framework to assist with the planning of future treaty discussions and a permanent Aboriginal representative structure.<sup>192</sup>

### **(i) Aboriginal Treaty Interim Working Group (ATIWG)**

During the writing of this report, expressions of interest for an Aboriginal Treaty Interim Working Group (ATIWG) were sought to facilitate the broader treaty agenda in Victoria.

The task of the ATWIG will be to ‘consult Aboriginal Victorians and advise the Minister for Aboriginal Affairs on the development of a treaty and the broader self-determination agenda.’<sup>193</sup>

More specifically, the ATIWG will identify options for the Victorian Government regarding a representative structure, treaty process and encouraging broader support and participation on these issues from Aboriginal Victorians.<sup>194</sup> The ATIWG will then report back on these matters at the statewide Aboriginal forum scheduled to take place in December 2016.<sup>195</sup>

### **(b) Next steps**

The Commission commends the Aboriginal community of Victoria and the Victorian Government for valuing self-determination and embarking on its practical realisation.

The word ‘treaty’ is simply another name given to a formal agreement process. A treaty with Aboriginal and Torres Strait Islander peoples will not diminish the rights of non-Indigenous Australians. Instead, it can be an enriching process for all Australians that can allow the addressing of past wrongs while delivering a package of reforms for the future.

Australia is the only remaining Commonwealth country that is yet to complete a formal settlement process with its First Peoples. However, there are already countless forms of other agreements that exist between Aboriginal and Torres Strait Islander peoples and the government. The Noongar Settlement featured in last year’s *Social Justice and Native Title Report* is just one example.<sup>196</sup>

As the current discussion around constitutional recognition, and movements in Victoria demonstrate:

there is without a doubt a growing desire within the Australian populace for some resolution with Aboriginal Australia.<sup>197</sup>

The progress in Victoria demonstrates that, with community and government support, this is possible.

The Commission, along with the rest of Australia will be watching closely as progress in Victoria unfolds. If Aboriginal and Torres Strait Islander people are willing, governments should listen, and engage in a genuine conversation about what such an agreement might look like.

## 1.13 Conclusion and recommendations

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The 2015–2016 reporting period has been another significant year in monitoring the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples. Though there have been steps towards resolution of the policy upheaval that characterised the previous few years in Indigenous affairs, progress has been slowed by a lack of genuine engagement between government and Aboriginal and Torres Strait Islander peoples.

Ongoing issues between Aboriginal and Torres Strait Islander peoples and the justice system has overshadowed this reporting period, as evidenced by the events at Don Dale and a distressing number of Indigenous deaths in custody.<sup>198</sup>

Twenty-five years after unacceptably high numbers of deaths prompted a Royal Commission the nation has seen multiple deaths of Aboriginal men and women in police and correctional custody in most states and territories. Aboriginal families have also battled inaction by police charged with investigating the violent deaths of their loved ones. The persistence of these issues contributes to a sense in the Aboriginal and Torres Strait Islander community that the situation is getting worse not better.

The Commission encourages the Australian Government to continue the initial meetings with Indigenous leadership to pursue the key priorities for change and recommendations outlined in the Redfern Statement.

### Recommendations

**Recommendation 1:** The Australian Government follow up the initial meetings with Indigenous leadership with regular consultations which materially inform policy and legislation impacting Aboriginal and Torres Strait Islander peoples.

**Recommendation 2:** The Australian Government pursue the key priorities for change and recommendations outlined in the Redfern Statement, utilising the Council of Australian Governments and other processes to engage states and territories.

**Recommendation 3:** The Australian Government establish and promote a monitoring and reporting framework to measure government progress in relation to Indigenous child welfare.

**Recommendation 4:** The Australian Government, as a matter of urgency, support the development of justice targets, Justice Reinvestment initiatives and other evidence based state and territory legislative, administrative and service delivery initiatives that will contribute to substantial reductions in Indigenous incarceration rates.

**Recommendation 5:** The Australian Government prioritise early intervention and prevention initiatives that provide comprehensive support and protection from violence to vulnerable Indigenous populations including women, children and the elderly.

**Recommendation 6:** The Australian Government ratify the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).

**Recommendation 7:** The Australian Government follow through on the *Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan 2013–2023* by:

- providing new, quarantined funding for each of the activities outlined in that plan; and
- continuing to work with the National Health Leadership Forum to oversee the progress of the plan.



**Recommendation 8:** The Australian Government work with the Western Australian Government to ensure that the principles of free, prior and informed consent underpin the consultation with Aboriginal peoples regarding any proposed land tenure changes as a part of its Regional Services Reform policy.

**Recommendation 9:** The Australian Government support the outcomes of the national consultations conducted by the Referendum Council.

**Recommendation 10:** The Australian Government include the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and review existing legislation, policies and programmes for conformity with the UNDRIP.

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# Chapter 2:

## Indigenous peoples' right to participate in the economy

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## 2.1 Introduction

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For generations, Aboriginal and Torres Strait Islander peoples have been subjected to legal and administrative controls limiting their enjoyment of basic rights and freedoms.

States and territories have legislated to control Indigenous peoples' property, employment and income including wages, savings and social security benefits since the mid 1800s. As a result, many Aboriginal and Torres Strait Islander peoples have been left with limited economic and social choices and little opportunity to accrue and pass their assets on to future generations.

State and territory laws facilitated the non-payment and underpayment of wages to Aboriginal and Torres Strait Islander peoples, and the diversion of wages into government managed trust and savings accounts. In some cases, these laws also provided for forced employment. In others, employment could only be obtained following the grant of a permit or licence. Many Aboriginal children and young people were forced into work arrangements as farm hands or domestic servants without the permission of their parents and without proper payment.

Excessive regulation of the employment, income and property of Indigenous peoples has directly contributed to their poverty by limiting their capacity to engage in work, receive a fair income and to manage and build assets; all factors that contribute to a reasonable standard of living. When it is a struggle to obtain adequate housing and cover basic living expenses, owning a home or small business which might be passed on to children and grandchildren becomes simply a dream.

Decades of regulation have created barriers to Aboriginal and Torres Strait Islander peoples' social mobility and engagement with the economy. Even today, employment and income statistics show that Aboriginal and Torres Strait Islander peoples are less engaged in mainstream employment markets. The labour force participation gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians aged 15-64 is 20.5% (55.9% participation compared with 76.4%)<sup>1</sup> and on average, Aboriginal and Torres Strait Islander peoples receive only half of the total weekly income of other Australians. The average equivalised gross weekly household (EGWH) income for Aboriginal and Torres Strait Islander peoples is \$465 compared to the average EGWH income of \$869 for non-Indigenous Australians.<sup>2</sup>

This chapter provides a human rights perspective on the economic participation of Aboriginal and Torres Strait Islander peoples, particularly in relation to work, income and social security. It includes consideration of various state and territory approaches to the repayment of money and wages withheld under past regimes. It will also consider current welfare programs which continue to regulate income and work participation for some Indigenous peoples, the Cashless Debit Card (also known as the Healthy Welfare Card) and the Community Development Program.

## 2.2 A human rights approach to economic participation

International human rights standards, including the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), set out the framework and obligations relating to the progressive realisation (and non-regression)<sup>3</sup> of key rights that comprise a human rights approach to economic participation, including rights to work, to favourable conditions of work, to social security and to privacy.

### (a) The right to work and to favourable conditions of work

Rights to work and to favourable conditions of work are specified in the UNDRIP, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Convention on the Rights of Persons with Disabilities* (CRPD), are set out in Text Box 2.1.

#### **Text Box 2.1:**

UN convention articles setting out the right to work and to favourable conditions of work (extracts)

#### ***International Covenant on Economic, Social and Cultural Rights (ICESCR)***

##### **Article 6(1)**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

##### **Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

a. Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

a. Safe and healthy working conditions;

b. Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

c. Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>4</sup>

***International Convention on the Elimination of all forms of Racial Discrimination (ICERD)***

**Article 2**

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- a. Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
- b. Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;
- c. Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- d. Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- e. Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.<sup>5</sup>

**Article 5 (e)(i)**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

e. Economic, social and cultural rights, in particular:

- (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.<sup>6</sup>

***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)***

**Article 10**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- a. The right to work as an inalienable right of all human beings;
- b. The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

- c. The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
  - d. The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
  - e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
  - f. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
- a. To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
  - b. To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
  - c. To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
  - d. To provide special protection to women during pregnancy in types of work proved to be harmful to them.<sup>7</sup>

### ***Convention on the Rights of Persons with Disabilities (CRPD)***

#### **Article 27**

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:
- a. Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;
  - b. Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;
  - c. Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;
  - d. Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
  - e. Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;



- f. Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
  - g. Employ persons with disabilities in the public sector;
  - h. Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
  - i. Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;
  - j. Promote the acquisition by persons with disabilities of work experience in the open labour market;
  - k. Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.
2. States Parties shall ensure that persons with disabilities are not held in slavery or in servitude, and are protected, on an equal basis with others, from forced or compulsory labour.<sup>8</sup>

## (b) The right to social security

The right to social security is specified in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and the *Convention on the Rights of Persons with Disabilities* (CRPD), are set out in Text Box 2.2.

### **Text Box 2.2:**

UN convention articles setting out the right to social security (extracts)

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#### ***International Covenant on Economic, Social and Cultural Rights (ICESCR)***

##### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.<sup>9</sup>

#### ***International Convention on the Elimination of all forms of Racial Discrimination (ICERD)***

##### **Article 5(e)(iv)**

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

e. Economic, social and cultural rights, in particular:

(iv) The right to public health, medical care, social security and social services.<sup>10</sup>

## ***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)***

### **Article 11(1)(e)**

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

e. The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.

### **Article 13(a)**

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

a. The right to family benefits.

### **Article 14(2)(c)**

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

c. To benefit directly from social security programmes.<sup>11</sup>

## ***Convention on the Rights of Persons with Disabilities (CRPD)***

### **Article 2(a-e)**

2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

a. To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

b. To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;

c. To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;

d. To ensure access by persons with disabilities to public housing programmes;

e. To ensure equal access by persons with disabilities to retirement benefits and programmes.<sup>12</sup>

In addition to the rights specified above, the ICERD, CEDAW and CRPD set out the right to own property, to inherit and to obtain financial credits, each of which relate to an individual's ability to generate, maintain and pass on wealth.<sup>13</sup>

The United Nations Committee on Economic, Social and Cultural Rights (ESCR Committee) recognises the universal applicability of the right to work and to enjoy just and favourable conditions of work as a right of everyone, without distinction of any kind, and the right to social security as compensation for a lack of employment related income.<sup>14</sup>



The ESCR Committee notes that the reference to 'everyone' includes the rights of all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers.<sup>15</sup>

By virtue of Australia's ratification of these international conventions, the Australian Government has obligations to respect, protect, promote and to achieve the full realisation of the right to work, to favourable conditions of work and the right to social security. The Parliamentary Joint Committee on Human Rights (PJCHR) established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) interprets the Australian Government's international obligations under article 2(1) of ICESCR as including:

- the immediate obligation to satisfy certain minimum aspects of the right
- the obligation not to unjustifiably take any backwards steps (retrogressive measures) that might affect the right
- the obligation to ensure the right is made available in a non-discriminatory way
- the obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of the right.<sup>16</sup>

According to the PJCHR, the right to work entails 'the right to decent work providing an income that allows the worker to support themselves and their family, and which provides safe and healthy conditions of work'.<sup>17</sup> The right to social security is interpreted as recognising the:

importance of adequate social benefits in reducing the effects of poverty and play[ing] an important role in realising many other economic, social and cultural rights, particularly the right to an adequate standard of living and the right to health.<sup>18</sup>

### (c) The right to privacy

The right to privacy in the *International Covenant on Civil and Political Rights* (ICCPR) is important within the context of a human rights approach to participation in the economy.

Article 17 of the ICCPR states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>19</sup>

The 2016 Review of Stronger Futures Measures in the Northern Territory by the PJCHR stated that:

Privacy is linked to notions of personal autonomy and human dignity: it includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others. The right to privacy requires that the state does not arbitrarily interfere with a person's private and home life.<sup>20</sup>

Aboriginal and Torres Strait Islander peoples' lives have been subject to state interference, limiting the extent to which they can make decisions about how to use their income, including social security payments. This has often been justified on the grounds of assistance and harm prevention, but measures taken are not always reasonable, necessary or proportionate to achieving that objective.<sup>21</sup>

## (d) Indigenous peoples and economic participation

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) recognises and affirms Indigenous peoples' unique collective and individual rights to self-determine their own affairs and shape their own lives in a manner of their choosing.<sup>22</sup> The UNDRIP provides a set of standards which have been adapted to the conditions commonly faced by Indigenous peoples around the world.

The specific rights within the UNDRIP that relate to the right to work, to favourable conditions of work and to social security for indigenous peoples are set out in Text Box 2.3.

### **Text Box 2.3:**

*United Nations Declaration on the Rights of Indigenous Peoples: Indigenous peoples' right to work, to favourable conditions of work and to social security*

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#### **Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.<sup>23</sup>

#### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.<sup>24</sup>

Government and non-government policies and programs aimed at giving effect to Aboriginal and Torres Strait Islander peoples' rights to work, to favourable conditions of work and social security should be measured against the foundational UNDRIP principles of self-determination, participation in decision making based on free, prior and informed consent and good faith, respect for and protection of culture, and equality and non-discrimination.

### (e) Indigenous peoples and the Agenda for Sustainable Development

The United Nations General Assembly adopted the 2030 Agenda for Sustainable Development on 25 September 2015.<sup>25</sup> The Agenda for Sustainable Development includes 17 Sustainable Development Goals (SDGs) and 169 targets aimed to guide global development efforts on poverty eradication, food security, environmental sustainability and the rule of international law.<sup>26</sup> In particular, goal 8 aims to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all.<sup>27</sup>

The SDGs and targets are relatively consistent with the international human rights and labour standards and obligations established in the UNDRIP and International Labour Organisation Convention No. 169.<sup>28</sup> The goals present an opportunity to develop and monitor specific indicators in relation to work and social security for indigenous peoples.

## 2.3 Stolen wages and reparations

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### (a) Background

Across the country, many Aboriginal and Torres Strait Islander peoples have been subjected to forced labour and substandard working conditions from the early days of the colony until at least the mid 1900s. The non-payment or underpayment of wages to Aboriginal and Torres Strait Islander peoples and the diversion of their wages into government controlled trust and savings accounts was authorised under a range of state and territory laws.<sup>29</sup>

By 1911, the Northern Territory and every state except Tasmania had legislative and administrative controls in place which affected almost every aspect of Aboriginal and Torres Strait Islander peoples' lives.<sup>30</sup> Legislative provisions often applied to both adults and children.

Aboriginal and Torres Strait Islander peoples were commonly subjected to poor conditions of work across a range of industries and sectors. This year marked the 50th anniversary of the ground breaking Gurindji walk off from the Wave Hill station in favour of proper wages and working conditions.

The Wave Hill walk off was not the first protest by Indigenous peoples against civil, political and economic exclusion. For example, the Cummeragunja walk-off of 1939 saw the Aboriginal residents of Cummeragunja station cross the Murray River from New South Wales to Victoria in order to get away from mistreatment and excessive restrictions imposed by the *Aborigines Protection Act 1909* (NSW) and to protest against the directing of profits generated by their successful station commercial enterprise to the Aboriginal Protection Board, away from the community.<sup>31</sup>

Aboriginal and Torres Strait Islander peoples know this history well, and have continuously advocated for recognition of their contribution to infrastructure, services, agricultural production, fisheries and other industries as well as reparations for unpaid wages. For decades Indigenous people have been speaking out and building the case for a just settlement for workers and their descendants.<sup>32</sup>

Text Box 2.4 below sets out some of the state and territory laws which regulated the employment and wages of Aboriginal and Torres Strait Islander peoples.

#### **Text Box 2.4:**

#### National overview of historical employment and wage controls targeting Aboriginal and Torres Strait Islander peoples

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##### **Queensland**

Queensland implemented employment and wage controls over Aboriginal and Torres Strait Islander peoples from 1897.<sup>33</sup> By 1901, legislation introduced a minimum wage for Indigenous workers working under a permit that was one-eighth of the wage of non-Indigenous workers. Employers were instructed to pay wages of Indigenous people directly to the police protector.<sup>34</sup>

##### **New South Wales**

The New South Wales Board for the Protection of Aborigines (NSW Protection Board) was established in 1883.<sup>35</sup> Legislation introduced in 1909 enabled the NSW Protection Board to exert controls over Aboriginal employment and wages including the apprenticing of Aboriginal children.<sup>36</sup>

### **Western Australia**

Aboriginal children in Western Australia were apprenticed from 1874 and legislation introduced in 1886 authorised employment contracts between employers and Aboriginal workers over the age of 14.<sup>37</sup> Under these contracts there was no requirement for wages to be paid. Instead, Aboriginal workers were provided with rations, clothing and blankets. The legislation did not provide for Aboriginal wages to be held in trust, however this became the normal practice in Western Australia.<sup>38</sup>

### **Northern Territory**

By 1910, the Northern Territory had introduced legislation controlling employment and wages of Aboriginal people. Employers were required to apply for a licence to employ an Aboriginal person and there was no requirement for Aboriginal workers to be paid.<sup>39</sup>

The *Aboriginal Ordinance Act 1933* (Cth) set out provisions directing employers to pay wages of Aboriginal workers to the Protector of Aborigines and, in some cases, authorised non-payment of wages to Aboriginal workers if their dependants were being cared for by the employer.<sup>40</sup>

### **South Australia**

From 1884 South Australia introduced legislation which authorised the apprenticing of Aboriginal children until the age of 21.<sup>41</sup> In 1911, the property and finances of Aboriginal people could be controlled by the chief protector.<sup>42</sup>

### **Victoria**

Victoria introduced legislation from 1866 which authorised the apprenticing of Aboriginal children and from 1869, Aboriginal employment was controlled through certificates and contracts.<sup>43</sup> From 1871, the wages of Aboriginal workers were to be paid directly to their local guardian.<sup>44</sup>

### **Australian Capital Territory and Tasmania**

There is limited information on the public record about how Aboriginal peoples' employment and wages were controlled in the Australian Capital Territory (ACT) and Tasmania. However, it is understood that children were apprenticed in Tasmania under existing child welfare laws and the NSW Protection Board had jurisdiction in some areas of the ACT.<sup>45</sup>

In 1996, the Human Rights and Equal Opportunity Commission (HREOC) handed down its decision in *Bligh v Queensland* [1996] HREOCA 28 (the Palm Island Wages case) in relation to complaints received from six Aboriginal people from Palm Island in Queensland.<sup>46</sup> The applicants claimed that between 1975 and 1984 they had been treated contrary to the *Racial Discrimination Act 1975* (Cth) (RDA), by being:

- paid wages at a rate less than that paid to non-Aboriginal people
- employed on terms and conditions significantly less favourable than those provided to non-Aboriginal people.<sup>47</sup>

When handing down his decision, Commissioner Carter stated:

The entrenched policy of the government was that whatever the proper payment was for a particular service provided by a non-Aboriginal worker, the payment to be made to an Aboriginal worker doing the same work and providing the same level of skills had necessarily to be less... This deep seated resistance to paying a proper wage was enduring; in spite of agitation by different trade unions the resistance remained firm; when the impact of Commonwealth legislation was recognised the only response was an intensely political dialogue between governments espousing apparently different policies which continued for about 10 years.<sup>48</sup>

The Australian Human Rights Commission's records indicate that since 1996, 509 complaints have been received under the RDA relating to the underpayment of wages to Aboriginal and Torres Strait Islander peoples. All of the complaints were Queensland based, with the exception of one matter recorded from the Northern Territory.

Since the Palm Island Wages case, a number of reparation schemes have been established across Australia, starting with the Queensland Government's Underpayment of Award Wages Process (UAWP), which commenced on 31 May 1999.<sup>49</sup> Then in 2004, the New South Wales Government appointed a panel to consult with Aboriginal people about the best way to repay monies held in trust.<sup>50</sup>

On 13 June 2006, the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) announced it would conduct an inquiry into wages stolen from Aboriginal and Torres Strait Islander peoples.<sup>51</sup>

The Committee received 129 submissions and held public hearings in Queensland, New South Wales, Western Australia and the Australian Capital Territory.<sup>52</sup> The evidence received by the Committee indicated that the control exerted by governments over the wages of Aboriginal and Torres Strait Islander people had direct, indirect and continuing impacts. The Committee stated that:

A number of witnesses directly attributed the current poverty of some Indigenous Australians to the discriminatory treatment and control of wages that Indigenous workers were subjected to through the 19th and 20th century.<sup>53</sup>

The states of Western Australia, South Australia, Victoria and Tasmania did not provide submissions or evidence to the inquiry.<sup>54</sup> However, following the Committee's findings, Western Australia established a stolen wages reparations taskforce in 2007.<sup>55</sup>

The Aboriginal wages reparations schemes conducted to date are listed below.

## **(b) Reparation and compensation schemes**

### **(i) Queensland**

In Queensland between 1999 and 2012, there were three compensation and reparations processes for Aboriginal and Torres Strait Islander peoples who had their wages or savings taken under the laws listed in Text Box 2.5.

**Text Box 2.5:**

Queensland legislation relating to the control of Aboriginal and Torres Strait Islander wages and savings

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- *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (as amended from time to time)
- *Aboriginals Preservation and Protection Act 1939*
- *Torres Strait Islander Act 1939*
- *Aborigines and Torres Strait Islanders Affairs Act 1965*
- *Aborigines Act 1971*
- *Torres Strait Islander Act 1971*
- *Aborigines Act and Torres Strait Islanders Act Amendment Act 1974*
- *Community Services (Aborigines) Act 1984*
- *Community Services (Torres Strait) Act 1984*

Under the Queensland Government's Underpayment of Award Wages Process (UAWP) a single payment of \$7,000 was made available to Aboriginal and Torres Strait Islander people employed by the government on Aboriginal reserves between 31 October 1975 (the commencement date of the *Racial Discrimination Act 1975* (Cth)) and 29 October 1986 (from which point award wages were paid to all workers).<sup>56</sup>

It is understood that 5,729 claims were paid under the UAWP with a total of approximately \$40 million paid to former employees.<sup>57</sup>

In May 2002, the Queensland Government announced an Indigenous Wages and Savings Reparations Scheme.<sup>58</sup> The Queensland Government allocated \$55.4 million to the scheme, however only \$35.5 million was distributed.<sup>59</sup> The initial eligibility criteria stated that people who had their wages or savings controlled under one of the Acts could claim \$4,000 (if born on or before 31 December 1951) or \$2,000 (if born between 1 January 1952 and on or before 31 December 1956).<sup>60</sup> Then in March 2008, the government announced a second round of top up payments to eligible Indigenous claimants.<sup>61</sup> This meant that persons born on or before 31 December 1951, received a combined capped total of \$7,000 and those persons born between 1 January 1952 and on or before 31 December 1956 received a combined capped total of \$3,500.<sup>62</sup>

Following the decision of the Full Federal Court in *Baird v Queensland* (2006) FCR 451,<sup>63</sup> between 2006 and 2012 the Queensland Government introduced a compensation settlement scheme for mission workers who worked in churches in Aurukun, Hope Vale, Wujal Wujal, Doomadgee and Mornington Island and who had been paid less than award wages for their work. Individual payments varied from \$3,500 to \$85,000 with the total compensation amount paid being \$5.9 million.<sup>64</sup>

**(ii) Recent developments in Queensland**

In August 2015, the Queensland Government appointed a Stolen Wages Reparations Taskforce (Taskforce), to provide independent advice and recommendations to the Queensland Government on the most appropriate way to distribute the \$21 million Stolen Wages Reparations Fund to people whose wages or savings were controlled by previous Queensland Governments.

The Queensland Government and the Taskforce acknowledged early in the process that the Stolen Wages Reparations Fund would not be able to fully repay people what they were owed, but was intended as a gesture of reparation and reconciliation:

We consider there remains an opportunity to reset the relationship between Aboriginal and Torres Strait Islander Queenslanders and the government and we should initiate a negotiation process for the establishment of that new relationship to occur as soon as possible.<sup>65</sup>

The 11 Taskforce members were appointed for a three year term and included Aboriginal and Torres Strait Islander peoples from across Queensland. Former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda, chaired the Taskforce. Between September 2015 to November 2015, the Taskforce undertook more than 50 community consultations across the state, which included community and individual meetings, and received more than 500 written submissions.<sup>66</sup>

In December 2015 the Taskforce submitted an interim report with recommendations primarily focused on the commencement and structure of the scheme. The Queensland Government responded by accepting most of the Taskforce recommendations. The government declined the Taskforce recommendation to remove the requirement for applicants to sign a 'Deed of Agreement' agreeing not to take legal action for stolen wages and savings.<sup>67</sup> The Taskforce believed this requirement was 'counterproductive to the intent of the reparations process' concluding that 'to offer a gesture of reconciliation that is conditional upon signing a waiver somewhat diminishes the community's view of government's sincerity.'<sup>68</sup>

The Taskforce submitted their report *Reconciling Past Injustice* in March 2016.<sup>69</sup> The report made 13 recommendations based on information received by Aboriginal and Torres Strait Islander community members.

The recommendations set out the eligibility criteria for the scheme, the establishment of a Reparations Review Panel and proposed further 'acts of reconciliation' to provide some closure to people affected by the oppressive policies of the time. The five key issues identified by the Taskforce for the Queensland Government's consideration are set out in Text Box 2.6.

### **Text Box 2.6:**

#### Queensland Stolen Wages Reparations Taskforce Report

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The Taskforce noted five key issues for the consideration of the Queensland Government, being:

1. immediate closure of the Aborigines Welfare Fund
2. public acknowledgement of the use of stolen wages and savings to help build Queensland, particularly through the purchase and expansion of hospitals and other infrastructure
3. scholarships to enable documentation of Queensland's stolen wages and savings history from Aboriginal and Torres Strait Islander perspectives
4. reframing the relationship between Aboriginal and Torres Strait Islander Queenslanders and government, and
5. divestment of government housing to Aboriginal and Torres Strait Islander peoples.<sup>70</sup>

A full description of these recommendations can be found at Appendix 4.



The Queensland Stolen Wages Reparations Scheme commenced on 18 December 2015 and closes on 16 December 2016. New eligible claimants can claim up to \$9,200 for each person born on or before 31 December 1951, or \$4,600 for each person born between 1 January 1952 and 31 December 1959.<sup>71</sup>

Applicants who received payments under previous Queensland stolen wages schemes are entitled to 'top-up' payments of up to \$2,200 for each person born on or before 31 December 1951, or \$1,100 for each person born between 1 January 1952 and 31 December 1956.<sup>72</sup> Claimants who had been ineligible under previous Queensland stolen wages schemes can be reassessed.

As at the time of writing this report, a class action has also been commenced by 300 Queensland workers in the Federal Court.<sup>73</sup>

### **(iii) New South Wales**

The *Aborigines Protection Act 1909* (NSW) and the *Aborigines Act 1969* (NSW) were the key Acts that regulated the lives of Aboriginal people in New South Wales.

After many years of lobbying, a panel was appointed in 2004 to consult with Aboriginal people of New South Wales on the best way to repay monies owed.<sup>74</sup> The New South Wales Government subsequently announced the establishment of the Aboriginal Trust Fund Repayment Scheme (ATFRS) consisting of the ATFRS Unit and Panel to repay monies held in trusts established and managed by the state between 1900 and 1969.<sup>75</sup> This included pensions, child endowments, apprentice wages, inheritances and compensation payments (insurance) paid to Aboriginal people in New South Wales.

Applications for the ATFRS opened in September 2005 and closed in June 2010.<sup>76</sup> By 2011, a total of \$12.9 million was repaid as ex gratia payments.<sup>77</sup> The amount was originally calculated using a conversion rate whereby \$100 owed in 1969 would be worth \$3,521 in 2005.<sup>78</sup> However, in 2009 changes to the ATFRS capped all ex gratia payments at \$11,000.

In June 2015, the New South Wales Parliament referred an inquiry into reparations for the Stolen Generations to its Legislative Council General Purpose Standing Committee (the Committee).<sup>79</sup> The Committee's terms of reference required it to inquire into:

- the New South Wales Government's response to the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families entitled *Bringing them Home (1997)* (Bringing them Home Report)
- the recommendations made in the Bringing them Home Report regarding reparations
- potential legislation and policies to make reparations to members of the Stolen Generations and their descendants, including approaches in other jurisdictions.<sup>80</sup>

The Committee made 35 recommendations including Recommendation 16:

That the New South Wales Government, in consultation with the Aboriginal community, re-establish the Aboriginal Trust Fund Repayment Scheme to continue repaying the 'stolen wages' of Aboriginal people, taking into account any lessons learnt from the previous operation of the scheme, with the scheme to operate for an open-ended period of time.<sup>81</sup>

The New South Wales Parliament is expected to provide their response to the Legislative Council's report in December 2016.<sup>82</sup>

### **(iv) Western Australia**

The laws that operated to exert control over Aboriginal peoples' lives in Western Australia up until 1972

were set out in the *Aborigines Act 1905* (WA), followed by the *Native Welfare Act 1963* (WA). Under this legislation, Aboriginal people in Western Australia had up to 75% of their wages held in trusts administered by government departments.<sup>83</sup>

In 2007, the Western Australian Government established a stolen wages reparation taskforce. The taskforce examined practices of government control that applied between 1905 and 1972 and handed down its report in 2008.<sup>84</sup>

In 2012, the Western Australian Government established a stolen wages reparations scheme. Eligible applicants included people born before 1958, and excluded the descendants of people who had passed away. The application period for an ex gratia payment of up to \$2,000 was from 6 March 2012 to 30 November 2012 (extended from 6 September 2012).<sup>85</sup> The total amount paid by the Western Australian Government for reparations of stolen wages is estimated to be \$2.5 million.<sup>86</sup>

### (c) Lessons from the schemes

Criticisms of the state and territory compensation and reparations schemes from Aboriginal and Torres Strait Islander peoples and non-government organisations include:

- insufficient access to state archival records
- lack of transparency about how the wages and savings of Aboriginal and Torres Strait Islander peoples were ledgered, spent and transferred
- insufficient time allowed to prepare and submit applications for the schemes
- payments not sufficient to cover monies owed or compensate for wages stolen
- overly cautious approach of the states, with some claimants required to sign an indemnity before the release of payment, and
- the limited scope and failure to consider non-government institutions such as churches, missions and pastoral stations.

Despite the criticisms of the schemes, they do signify present day attempts by the states to recognise the rights of Indigenous peoples to equality and non-discrimination, to work, to favourable conditions of work (i.e wages), to financial property, to social security, to privacy and to inheritance (as descendant family members were often eligible where the affected person had passed away).

The schemes also provide useful lessons from the examination of records and oral histories, and from the present day efforts to repair the past. It is clear that government interventions based on mandatory control of wages and social security payments in order to achieve social purposes are fraught and can lead to breaches of human rights. It can also lead to unintended consequences including financial exclusion and intergenerational economic marginalisation.

Further, the proper operation of reparation and compensation schemes is complex, time consuming and requires a flexible approach. States that started this process in the mid 2000s are still finalising them after a number of adjustments.

The Commission hopes that Queensland, New South Wales and Western Australia will continue their valuable reparations work, and that other states and territories will establish inquiries to investigate the specific needs of Indigenous peoples whose economic participation was restricted and controlled in those jurisdictions.

## 2.4 Control of welfare measures – finances and employment

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Prior to the early 1940s, Aboriginal and Torres Strait Islander peoples had limited entitlements to federally administered social security benefits.<sup>87</sup> By the early 1940s the Australian Government had expanded its role in relation to social security,<sup>88</sup> and the Commonwealth Department of Social Services became fully operational.

This change was in part facilitated by the Commonwealth taking sole responsibility of income tax in 1942, enabling expansion of its role.<sup>89</sup> All Commonwealth social services benefits were then consolidated into the *Social Services Act 1947* (Cth). This Act was amended by the *Social Services Act 1959* (Cth) which allowed for all eligible Aboriginal and Torres Strait Islander people to receive the maternity allowance, widows' pension, old-age and invalid pension and unemployment and sickness benefits, with the exclusion of people who were considered 'nomadic or primitive'.<sup>90</sup>

Last year's *Social Justice and Native Title Report* (Report) provided a brief overview of Aboriginal and Torres Strait Islander peoples' experience of income management, emphasising the need for a human rights approach to welfare to ensure laws and policies are non-discriminatory and promote the ability of Aboriginal and Torres Strait Islander peoples to exercise choice, participation and control.<sup>91</sup>

This section will follow up on policy measures discussed in last year's Report, primarily the implementation of the Cashless Debit Card (also known as the Healthy Welfare Card) Trials, the Community Development Program (CDP) in remote communities and will consider the extent to which these measures are consistent with human rights standards.<sup>92</sup>

### (a) Cashless Debit Card Trials

The *Social Security Legislation Amendment (Debit Card Trial) Act 2015* (Cth) (Debit Card Trial Act) was passed on 14 October 2015 and came into force on 12 November 2015. The Debit Card Trial Act amended social security legislation to enable a trial of cashless welfare arrangements, through use of a Cashless Debit Card, during the period 1 February 2016 to 30 June 2018.<sup>93</sup>

For all working age people living in the trial areas, 80% of certain Centrelink payments ('trigger payments') are paid into a restricted bank account linked to the debit card and the remaining 20% is paid into the recipients normal account.<sup>94</sup> The money in the debit card account cannot be withdrawn as cash and cannot be used to purchase alcohol or gamble.

An individual can apply to a community panel to request the restricted and unrestricted portions of their social security payment be changed up to a 50% cash and 50% card split.<sup>95</sup>

The Cashless Debit Card was recommended in the Forrest Review *Creating Parity* report in 2014 which proposed it as a measure to prevent individuals from spending welfare payments on drugs and alcohol, encouraging financial stability and responsible spending.<sup>96</sup>

### (b) Human rights concerns about the Cashless Debit Card Trials

Two reviews of the Cashless Debit Card policy have been conducted, including:

- the Senate Standing Committee on Community Affairs (Committee) inquiry into the Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Debit Card Trial Bill),<sup>97</sup> and
- Parliamentary Joint Committee on Human Rights (PJCHR) reviews of the Debit Card Trial Bill.<sup>98</sup>

Key human rights concerns emerging from these reviews include the impact of the Cashless Debit Card on rights to:

- equality and non-discrimination
- social security, and
- privacy.

In examining the compatibility of the Cashless Debit Card with human rights standards, the PJCHR considered whether human rights were limited and whether the limits could be justified.<sup>99</sup> The analytical framework used by the PJCHR for this assessment is set out below in Text Box 2.7.<sup>100</sup>

#### **Text Box 2.7:**

#### Analytical framework of the Parliamentary Joint Committee on Human Rights<sup>101</sup>

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In general, any measure that limits a human right must comply with the following criteria (the limitation criteria):

- be prescribed by law;
- be in pursuit of a legitimate objective;
- be rationally connected to its stated objective; and
- be a proportionate way to achieve that objective.

Where a bill or instrument limits a human right, the committee requires that the statement of compatibility provide a detailed and evidence-based assessment of the measures against these limitation criteria.

#### **(i) Right to equality and non-discrimination**

The Statement of Compatibility with Human Rights is a mandatory statement that sets out the Bill drafter's assessment of the compatibility of the draft legislation with the rights and freedoms recognised by the international human rights treaties ratified by Australia. The Statement of Compatibility with Human Rights for the Debit Card Trial Bill says that trial locations for the Cashless Debit Card will be selected on the basis of 'high levels of welfare dependence and where gambling, alcohol and/or drug abuse are causing unacceptable levels of harm within the community.'<sup>102</sup>

Populations of the proposed trial sites, currently Ceduna, Kununurra and Wynham, comprise a high proportion of Indigenous peoples.<sup>103</sup> This has led to concerns of indirect discrimination on the basis of race.<sup>104</sup> The PJCHR concluded in its inquiry into the Debit Card Trial Bill:

It therefore appears likely that the measures may disproportionately impact on Indigenous persons, and as such may be indirectly discriminatory unless this disproportionate effect is demonstrated to be justifiable. This has not been explored in the statement of compatibility.<sup>105</sup>

### **(ii) Right to social security**

The PJCHR noted the role of social security in creating social inclusion, citing the UN Committee on Economic, Social and Cultural Rights' General Comment 19 on article 9 which states:

Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.<sup>106</sup>

The PJCHR also considered the similarity of the Cashless Debit Card program to income management measures under the Stronger Futures policy in the Northern Territory, particularly with regard to the right to social security.<sup>107</sup> It commented that:

the evidence regarding that income management regime was that it 'fails to promote social inclusion... stigmatises individuals, and as such, limits the enjoyment of the right to social security'.<sup>108</sup>

### **(iii) Right to privacy**

The PJCHR found that the Debit Card Trial Bill limited the right to a private life as set out in article 17(1) of the *International Covenant on Civil and Political Rights* (ICCPR):<sup>109</sup>

Restricting how a person can access, and where they can spend, their social security benefits, interferes with the person's right to personal autonomy and therefore their right to a private life. In addition, being able to only access 20 percent of welfare payments in cash could have serious restrictions on what a person is able to do in their private life. There are many instances where a person would only be able to use cash to purchase goods or services, such as at markets.<sup>110</sup>

Issues of choice and restriction were also raised by the Australian Human Rights Commission (Commission) in its submission to the inquiry of the Senate Standing Committee on Community Affairs on the Debit Card Trial Bill.

In particular, the Commission was concerned that the Debit Card Trial Bill allowed for an automatic quarantining model to be applied without the consent of the participant and regardless of how they have managed their financial affairs in the past.<sup>111</sup> The Commission noted:

the importance of ensuring the participation of affected people in all aspects of the design, delivery and monitoring of the income management measures. This would enable individuals and communities to decide on the most appropriate measures to meet their particular needs and the Government to respond to the specific circumstances of individual people and communities.<sup>112</sup>

The Committee noted similar concerns, particularly in regard to 'the mandatory nature of the trial' given that 'existing income management strategies were shown to be most effective when participation was voluntary'.<sup>113</sup> A number of submissions to the Committee also expressed concern about the lack of avenues for exemption from the trial, and the lack of incentives to transition from the trial and away from welfare dependence.<sup>114</sup>

The Committee recommended that, prior to the passage of the Debit Card Trial Bill, that the Minister for Social Services:

Include safety net provisions in the proposed legislative instrument to ensure that vulnerable people impacted by the trial are able to be exited from the trial, where appropriate, to ensure they are not further disadvantaged.<sup>115</sup>

## (c) Conclusion of human rights assessment

In assessing whether the limitations of rights within the Debit Card Trial Bill could be justified, the PJCHR considered reports which evaluated income management regimes in the Northern Territory since 2013.<sup>116</sup>

What emerged from these evaluations was that income management did not achieve its aims of building financial capability and changing behaviour when it was imposed on a compulsory and blanket basis, without regard for the individual circumstances of those subjected to it.<sup>117</sup> The PJCHR concluded that:

[s]ignificantly, the design of a compulsory income management regime appears to hamper its possible effectiveness, by failing to properly target those who would be assisted by income management.<sup>118</sup>

Further information was requested by the PJCHR on 8 September 2015 from the Hon Alan Tudge, former Assistant Minister to the Prime Minister regarding the compatibility of these rights with the Debit Card Trial Bill.<sup>119</sup> However, the Bill passed both houses of Parliament before a response was received.<sup>120</sup>

In relation to income management, the PJCHR concluded:

The income management measures engage and limit the right to equality and non-discrimination, the right to social security and the right to privacy and family. Although the committee considers that under certain conditions income management is a legitimate and effective mechanism, evidence before the committee indicates that compulsory income management is not effective in achieving its stated objective of supporting vulnerable individuals and families...

A human rights compliant approach requires that any measures must be effective, subject to monitoring and review and genuinely tailored to the needs and wishes of the local community. The current approach to income management falls short of this standard.<sup>121</sup>

The PJCHR recommended:

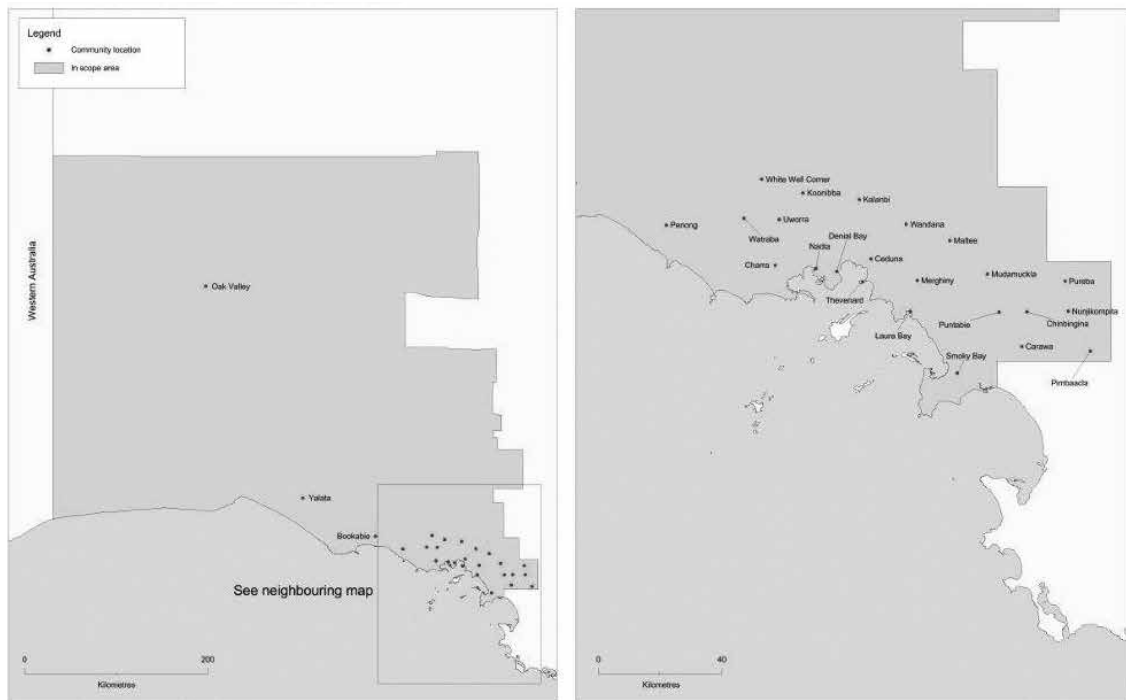
- the continuation of community led income management where there has been a formal request for income management in a particular community following effective consultation on the particular modalities of its operation, including whether it should be a voluntary program, and
- that income management should be imposed on a person only when that person has been individually assessed as not able to appropriately manage their income support payments. Information concerning rights and processes of appeal should be provided to the person immediately and in a language that they understand.<sup>122</sup>

## (d) Ceduna trial

Cashless Debit Card trials commenced in Ceduna and surrounding areas in South Australia on 15 March 2016. In September, there were 752 people participating, 565 of whom are Indigenous.<sup>123</sup>

As part of the Cashless Debit Card Trial in Ceduna, the Australian Government has invested over \$1 million in new and existing support services for Ceduna residents, including community-based mental health support, domestic violence support through the Family Violence Legal Service, financial and money management advice and alcohol and drug counselling and support.<sup>124</sup>

These maps show the communities in and around Ceduna that are included in the Cashless Debit Card Trial.



**Map: Cashless Debit Card Trial areas in South Australia including Ceduna and surrounding townships. Department of Social Services (27 April 2016).**

### (e) Kununurra and Wyndham trials

Trials of the Cashless Debit Card system commenced in the Western Australian communities of Kununurra and Wyndham in April 2016.<sup>125</sup> As at September 2016, 984 Indigenous people are participating, from a total of 1,199 participants.<sup>126</sup>

The Australian Government has invested \$1.6 million to improve and increase support services for people living in the Kununurra and Wyndham regions, including for drug and alcohol support services, financial and money management advice, targeted youth activities and family support services.<sup>127</sup>

The communities in and around Kununurra and Wyndham that are included in the Cashless Debit Card Trial are indicated in the map following.



**Map: Cashless Debit Card Trial areas in the East Kimberley region. Department of Social Services (27 April 2016).**

## (f) Community concerns about the Cashless Debit Card Trials

The Australian Government has stated that all trials were ‘co-designed’ with local community leaders.<sup>128</sup> However, there are mixed reports from community members about their engagement in the development of the trials.

In last year’s *Social Justice and Native Title Report*, former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda emphasised the importance of consultation and free, prior and informed consent.<sup>129</sup> He stated that:

meaningful engagement with Aboriginal and Torres Strait Islander peoples is not just a step in the policy implementation process but an opportunity for our people to participate in decisions that will impact on our communities.<sup>130</sup>

Some community members support the Cashless Debit Card Trial, stating that their primary concern is for the children of their communities and for future generations. Kununurra Aboriginal leader Ian Trust said that:

It’s about human rights, for kids having a fair chance of being born without foetal alcohol syndrome, disease, living in a household where there’s no violence, where they can be well fed and cared for.<sup>131</sup>

The Commission respects Mr Trust’s vision for the Kununurra region, but remains concerned that the broad use of trigger payments may have unintended consequences. Sentiments such as the following expressed by



a Ceduna resident must also be considered:

This to me is going back to [old] days. I can remember I used to live out where I was born; 37 kilometres from here. Koonibba Mission. I was eight, nine years old watching my mother. This is what this card reminds me of: going from here, walking 50 yards to this little building and getting the rations: your flour, sugar and tea leaves. I can remember those days. This for me is just as the way. We're going backwards.<sup>132</sup>

Another community member from Kununurra stated that:

I don't think the process was adopted the proper way with the mob, there should have been another approach used, a community development approach, an educational approach.<sup>133</sup>

Accounts of other concerns include:

- mixed reports about the extent to which some retailers, online merchants and transport providers accept the card
- community members trading cards, both willingly and as a result of pressure, for cash to avoid the system
- concerns about the security of personal information held by the card operator, and
- reports of residents who receive trigger payments leaving the area to avoid being included in the trial.<sup>134</sup>

Again, the Commission is concerned that the mandatory use of trigger payments may be too broad and is of the view that an opt-in approach would be more consistent with human rights principles. The mandatory approach is often recommended to avoid the risk of vulnerable participants being pressured to surrender their cash. If reports about pressure to trade or surrender cards for cash are correct, the mandatory approach does not solve this issue.<sup>135</sup>

## (g) Other proposed communities for Cashless Debit Card Trials

There are troubling reports that the Halls Creek Shire in the East Kimberley was receiving pressure from the state Regional Development Minister to become a Cashless Debit Card Trial community.<sup>136</sup> Reportedly, the Shire was advised this would 'strongly influence' the level of investment in regional service provision under the regional service reform program discussed in Chapter one.<sup>137</sup>

Following the refusal of the Halls Creek Shire to undertake the trial, the townships of Leonora and Laverton in the Goldfields region and thereafter, Geraldton in Western Australia were said to be interested but a third trial site is yet to be confirmed.<sup>138</sup>

Within all abovementioned confirmed and potential trial sites, some community members have expressed their opposition to the Cashless Debit Card Trial. Their reasons include:

- Lack of confidence in the effectiveness of income management alone to deal with alcohol and drug misuse and associated criminal activities, gambling and mental health issues.
- Scepticism about the willingness or capacity of government to deliver services that would support the trial and address the underlying social issues behind the misuse of social security payments.<sup>139</sup>
- The absence of positive results coming from evaluations of income management in the Northern Territory.
- The practical impact of the measures on people who need cash for everyday transactions.

- Deficiencies in the consultation process.<sup>140</sup>

## (h) The need for evidence based evaluation

A full independent evaluation of the Cashless Debit Card Trial will be conducted in the coming months. The Commission will examine the results which are expected in mid 2017 and will monitor how those results influence future policy.<sup>141</sup>

The potential benefits of the Cashless Debit Card must be weighed against the restrictions placed on the rights of Aboriginal and Torres Strait Islander peoples.<sup>142</sup>

Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda states that the Cashless Debit Card:

is not identical to the regimes that stole our peoples' wages and social security payments, but with those regimes still fresh in our collective memories it is no wonder that this card concept reopens old wounds and forces many of our people to revisit that past trauma.<sup>143</sup>

## (i) Community Development Programme in remote areas

During the reporting period the Community Development Programme (CDP) commenced, affecting unemployed people in remote areas of Australia. The CDP is a revised version of the Remote Jobs and Communities Program (RJCP).<sup>144</sup>

Under the CDP, all adults between 18 and 49 years who are not in work or study are required to undertake activities for up to 25 hours per week, 48 weeks of the year, depending on their assessed capacity to work.<sup>145</sup>

The CDP operates in 60 regions. As at 26 June 2016, there were 36,803 people on the CDP caseload and, of this number, 30,498 identified as Aboriginal or Torres Strait Islander.<sup>146</sup>

An evaluation of the CDP is currently underway. The Commission understands a range of views are being sought from people about their experience of the CDP in the remote communities of Amata (South Australia), Galiwinku and Tennant Creek (Northern Territory), Coen and Normanton (Queensland), Tennant Creek (Northern Territory), Badu (Torres Strait Islands), Bourke (New South Wales), Normanton (Queensland) and Bidyadanga (Western Australia).<sup>147</sup>

The Commission looks forward to the evaluation report on the CDP. In particular, it will be paying close attention to analysis and feedback about the application of the Job Seeker Compliance Framework.<sup>148</sup>

Possible changes to the CDP and relevant concerns are detailed below.

## (j) Social Security Legislation Amendment (Community Development Program) Bill 2015 (Cth)

On 2 December 2015 the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, introduced the Social Security Legislation Amendment (Community Development Program) Bill 2015 (Cth) (CDP Bill). Following the dissolution of both houses of Parliament on 8 May 2016, the Bill lapsed and has not been re-introduced at the time of writing this report.

If passed as it was in 2015, the CDP Bill would give the Minister the power to determine by legislative instrument the details of a new obligation and compliance scheme for remote income support recipients, including:

- the content of the scheme obligations
- the consequences of failing to comply with those obligations (including the reduction of income support payments, non-payment of income support payments and the imposition of further obligations)
- any exemptions or reasonable excuses for failing to comply with the obligations, and
- review mechanisms for decisions of CDP providers.<sup>149</sup>

Following the introduction of the CDP Bill, the government released a consultation paper (CDP Consultation Paper) to gain feedback from stakeholders 'to support and inform the development of the legislative instruments' to be made under the CDP Bill, once passed.<sup>150</sup>

An exposure draft of the relevant legislative instrument was proposed for mid May 2016. However, as at the time of writing, no exposure draft had been released.

### (k) Concerns about the CDP Bill

On 3 December 2015 the CDP Bill was referred to the Senate Finance and Public Administration Legislation Committee (Finance and Public Administration Committee) for inquiry. The Finance and Public Administration Committee reported in March 2016 and noted that submissions on the CDP Bill raised three key issues:

- The structure of the CDP Bill enabling substantial matters to be dealt with through legislative instruments and therefore avoid parliamentary scrutiny prior to passage.
- Lack of consultation with communities, CDP providers and other stakeholders prior to the introduction of the CDP Bill.
- Whether the remote income support scheme discriminates against Aboriginal and Torres Strait Islander peoples.<sup>151</sup>

A number of other issues were also raised, including the lack of community control over CDP provision, the complexity of the scheme requirements and whether the CDP has the capacity to create long term employment opportunities for participants.

#### (i) Need for adequate consultation

Ultimately the Finance and Public Administration Committee recommended that the Senate pass the CDP Bill, but emphasised that:

Clearly, the success of the measures in the bill, and the reforms to be introduced through legislative instruments pursuant to the bill, depend on the Minister [for Indigenous Affairs] and the Department of Prime Minister and Cabinet undertaking genuine consultation with communities and CDP providers.<sup>152</sup>

The Commission emphasises that Aboriginal and Torres Strait Islander people who will be affected by the proposed changes to the social security system contained in the CDP Bill should have meaningful and effective consultation, applying the standard of free, prior and informed consent.

A consultation process of this nature should occur before the Minister for Indigenous Affairs determines a

community to be part of a remote income support region. The Minister should only make a determination that a community is part of a remote income support region where that community has consented to the determination.

## **(ii) Non-discrimination and other concerns**

The Parliamentary Joint Committee on Human Rights (PJCHR) assessed the CDP Bill, and raised concerns that it treats the compliance arrangements for remote income support recipients differently than other income support recipients:

by enabling the creation of a different system of obligations and penalty arrangements for remote job seekers, the Bill engages and may limit the right to social security and the right to an adequate standard of living, and the right to equality and non-discrimination.<sup>153</sup>

As noted earlier, over 80% of CDP participants are Aboriginal and Torres Strait Islander people.<sup>154</sup> This figure gives rise to concerns about potential discrimination, including indirect discrimination, under section 9 of the *Racial Discrimination Act 1975* (Cth) (RDA) and in breach of the right to equality before the law under section 10 of the RDA.<sup>155</sup>

Section 9(1A) of the RDA is designed to deal with the imposition of terms, conditions or requirements which impact in a disproportionately adverse way on members of protected groups as defined by race, colour etc.<sup>156</sup> Such terms, conditions or requirements may amount to indirect discrimination and be unlawful if they are not reasonable in all the circumstances.<sup>157</sup>

Section 10 of the RDA provides for a right to equality before the law. If by reason of the provisions of the CDP Bill, Aboriginal and Torres Strait Islander people do not enjoy a right (e.g social security) that is enjoyed by persons of another race, or enjoy a right to a more limited extent than persons of another race, section 10 of the RDA may operate to override the effect of those provisions.

Additional information about the proposed compliance arrangements is required in order to determine whether the limitations imposed by the scheme on the right to social security are justifiable and not in breach of the RDA.

In addition, the Commission has concerns that the CDP Bill creates a scheme that is more complex, rather than less. This issue was raised in the Jobs Australia submission in response to the CDP Consultation Paper:

The proposed new arrangements are not simple and easy to understand for job seekers. The new complexities include:

different agencies being responsible for paying different types or categories of assistance. If a job seeker finds that they are paid less than they expected it could be unclear whether this is because of a decision by DHS, a decision by the provider, or both. We expect that providers will need to spend a lot more time communicating with DHS, trying to unravel payment issues for job seekers. This issue will be exacerbated for some providers where people travel regularly between remote and non-remote areas and change payment eligibility.<sup>158</sup>

## 2.5 Conclusion and recommendations

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Income is fundamental to the wellbeing and ability of Aboriginal and Torres Strait Islander people to realise other economic, social and cultural rights.

The legislative and administrative control of Aboriginal and Torres Strait Islander peoples' lives for generations has limited their ability to fully participate in the Australian economy.

This chapter has detailed positive efforts and initiatives to provide reparations to Aboriginal and Torres Strait Islander peoples to gain control over their wages and savings since the late 1800s. However, all stolen wages reparation schemes acknowledge that the full value and extent of monies held will never be known and will never fully compensate for the detrimental impacts that practices of state control have had on Aboriginal and Torres Strait Islander peoples.

The Commission echoes the statement in last year's *Social Justice and Native Title Report* that the causes of social disadvantage are complex, and that policies targeting disadvantage require a multidimensional approach in collaboration with those people affected.<sup>159</sup> If we have learnt anything from the past, it is that the only way to improve the social and economic wellbeing of Aboriginal and Torres Strait Islander peoples is to involve them in this process, every step of the way.

The Commission fully supports Indigenous peoples' rights to meaningful work and freedom to manage their own income. For cases in which people are struggling to manage their income, the Commission agrees that tailored support needs to be in place which supports the ability of Aboriginal and Torres Strait Islander people to live in freedom, equality and dignity.<sup>160</sup>

The Commission awaits the scheduled independent evaluations of the CDP and Cashless Debit Card Trials to fully understand the impact these programs are having on individuals and communities.

### Recommendations:

**Recommendation 11:** The Australian Government encourage state and territory governments to consult with Indigenous peoples about the need to establish or re-establish stolen wages reparation schemes.

**Recommendation 12:** The Australian Government should make the Cashless Debit Card and the Community Development Program in remote communities voluntary, opt-in schemes (See *Social Justice and Native Title Report 2015*, Recommendation 5).

**Recommendation 13:** The Australian Government conduct independent evaluations of the Cashless Debit Card trials and Community Development Program which involve participation and feedback from Aboriginal and Torres Strait Islander peoples directly affected and make these evaluations publically available.

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# Chapter 3:

## Native Title

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## 3.1 Introduction

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Each year the Aboriginal and Torres Strait Islander Social Justice Commissioner is required to report on the operation of the *Native Title Act 1993* (Cth) (Native Title Act) and the effect of that act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples in accordance with section 209 of the *Native Title Act 1993* (Cth) (Native Title Act).

This chapter will explore the significant events in relation to native title during the reporting period from 1 July 2015 to 30 June 2016.

In this time, a key focus of the Commission has been facilitation of the Indigenous Property Rights Project (Project) led by the Indigenous Strategy Group (ISG) and Indigenous Property Rights Network (Network). The ISG and Network are in the process of developing a reform agenda to address challenges to self-determined economic development on the Indigenous Estate. The Indigenous Estate includes the rights and interests of Aboriginal and Torres Strait Islander peoples to land, sea, waters and resources held under native title law, state and territory land rights regimes, and extending to land held for the benefit of Indigenous peoples by government and other bodies.

One outcome of the Indigenous Property Rights Project is a report containing a series of recommendations for legislative and policy reform that will be issued in late 2016. This chapter of the *Social Justice and Native Title Report* outlines the progress and key findings of the Project at the time of writing in September 2016.

As usual, and as part of the Commission's statutory responsibility to report to Parliament on native title issues annually, this Chapter will also give an overview of key cases, legislation and native title determinations and agreements during the reporting period.

## 3.2 Determinations and native title agreements

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The following tables provide an overview of native title determinations, Indigenous Land Use Agreements (ILUAs) and future act determination applications in the period 1 July 2015 to 30 June 2016.<sup>1</sup>

<b>Native title determinations for the period 1 July 2015 to 30 June 2016</b>	
Native title consent determinations	42
Litigated native title determinations	5
Native title claims referred to mediation	22

<b>ILUA registration for the period 1 July 2015 to 30 June 2016</b>	
Alternative procedure	0
Area agreement	74
Body corporate	31
Total	105

<b>Future act determination applications (FADAs) in the period 1 July 2015 to 30 June 2016</b>	
FADAs lodged	26
FADAs resolved by agreement (application withdrawn)	3
FADA decisions	9



## 3.3 Case law

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### (a) Unrestricted native title rights to take resources

There were two important judgements during the reporting period which have built on native title holders' rights to take resources for unrestricted - including commercial - purposes. Whilst these rights were previously recognised in the Torres Strait by the High Court in *Akiba v Commonwealth* (2013) 250 CLR 209, it is encouraging to see them being recognised for other peoples, particularly in circumstances where there is less direct evidence of trade and specific commercial use prior to colonisation.

The exercise of commercial rights was raised by participants in the Indigenous Property Rights Project, particularly the ways in which native title holders can benefit from unrestricted rights to take resources and create economic prosperity.

#### (i) *Western Australia v Willis* (2015) 239 FCR 175

Following a decision in the Federal Court in July 2014, the Pilki people received their determination of native title in December 2014 over an area in the Western Desert region in Western Australia between the Nullarbor Plain and the Great Victoria Desert surrounding Jubilee Lake.

The existence of native title in the claim area was not disputed by the State of Western Australia (the State), but the nature and extent of the right to take resources was a point of contention. The 2014 Federal Court decision affirmed that the Pilki people's native title determination should include 'the right to access and take for any purpose the resources of the land and waters' within the claim area.<sup>2</sup>

The Full Federal Court dismissed an appeal by the State against the 2014 Federal Court decision. The State in its appeal argued that the Pilki people had not proved a right to take resources for commercial purposes on the evidence provided.

The relevant evidence included statements from Pilki witnesses of activities including the sale of necklaces made of seeds, the sale of artefacts, baskets and clapsticks and of young people shooting and selling rabbits, and expert anthropological evidence of vast trade routes near the determination area.<sup>3</sup>

The judges of the Full Court found it was open to the primary judge to determine the claimed native title right to access and take for any purpose resources of the determination area, despite the lack of 'direct evidence' of commercial usage pre and post sovereignty.<sup>4</sup>

Importantly the Court confirmed it was not critical to the claim that the Pilki people prove that resources were taken for commercial purposes.<sup>5</sup> Rather, the relevant question was whether the evidence satisfied the Court that the claimed right or interest was recognised by traditional law and custom and had not been abandoned.<sup>6</sup> The evidence presented to the Court was found to satisfy that criteria.

On the issue of making a distinction between commercial/non-commercial use of resources, Justice Dowsett said:

... too great a focus on the question whether certain activities could properly be characterised as "commercial" or "trading" in nature tends to draw attention away from the question whether, under their traditional laws and customs, the Pilki were entitled, as of right, opportunistically to use the resources of their country (subject to any traditional proscriptions) for any purpose. As stated above, care must be taken not to cast for too narrow an expression of what "commercial" activity is, as a common lawyer or a person from outside the indigenous system in question might tend to do.<sup>7</sup>

This is a positive outcome for the Pilki people who fought for over 12 years to have their native title rights recognised by the Australian legal system. The Commission looks forward to hearing about the work of their prescribed body corporate, the Kaltupakal Aboriginal Corporation, in the future.<sup>8</sup>

**(ii) *Rrumburriya Borroloola Claim Group v Northern Territory* [2016] FCA 776**

This case concerned applications for a determination of native title over land and waters in the township of Borroloola on the part of the Rrumburriya Borroloola claim group, comprising the traditional owners of Borroloola and members of the wider Yanyuwa group.

The claim group argued that the right to take resources over the application area was an unconfined right to access and take resources for any purpose, including commercial purposes, such as the trepang (sea cucumber) trade that occurred with Macassans from at least 1780.<sup>9</sup> This was disputed by the Northern Territory, which argued that the right to take resources was not exercisable for any purpose other than personal or communal purposes of a domestic or subsistence nature.<sup>10</sup> This position was also adopted by the Commonwealth.<sup>11</sup>

Justice Mansfield framed the issue of the nature and extent of the native title rights and interests of the claim group as a question of fact to be decided in light of the evidence. He noted that the existence of a right under traditional laws and customs is logically separate from the fact of its exercise.<sup>12</sup> Whilst the nature and extent of an activity may inform the existence of the right it is based in, the correct question for the Court is whether the claimed right exists in accordance with traditional laws and customs, not whether or how it is exercised.<sup>13</sup>

Evidence was provided to the Court of the regular exchange, barter or trade of the resources of the land and waters with the Macassans of Indonesia prior to 'sovereignty' as the Court referred to the colonial acquisition of Australia.<sup>14</sup> It was therefore found to be an exercise of the claim group's rights under traditional laws and customs to allow the Macassans access to the resources of the land and waters of the area.<sup>15</sup> Justice Mansfield considered that the evidence showed the extent of these rights was not confined to taking for personal or communal purposes of a domestic, ceremonial or subsistence nature.<sup>16</sup> Importantly, the use of the resources by the Macassans was reported to be permitted by the ancestors of the claim group in exchange for material benefits, therefore being 'sensibly described as transactions of a commercial kind'.<sup>17</sup>

Justice Mansfield also rejected a 'frozen-in-time' approach to the right to access and take the resources of the area, allowing native title holders to exercise their rights in order to take a variety of resources in their claim areas, not just those resources used at the time of colonial acquisition.<sup>18</sup>

This decision represents an important milestone, not just as the first decision of its kind in the Northern Territory, but as a movement away from narrow definitions of the native title right to take resources.

The Commission hopes that this jurisprudence can encourage an approach by the Northern Territory and the Commonwealth which is consistent with their rhetoric of support for economic development on the Indigenous Estate.

## (b) Execution requirements for Indigenous land use agreements

### **(i) *Mingli Wanjurri McGlade (formerly Wanjurri-Nungala) v Registrar Native Title Tribunal & Ors* WAD137/2016**

The Full Federal Court is yet to hand down judgement in a matter that addresses the execution requirements of 'area agreement' Indigenous Land Use Agreements (ILUAs). An 'area agreement' ILUA is a type of contract about native title issues that is usually made over an area where no native title determination exists. The decision has the potential to impact the validity of hundreds of existing area agreement ILUAs across the country.

During the reporting period, parties to the six claimant groups to the single Noongar claim in southwest Western Australia sought to register six separate ILUAs with the National Native Title Tribunal (NNTT) Registrar.

Four of the six area agreement ILUAs have not been signed by all of the members of the 'named applicant' for the relevant claim groups. The 'named applicant' for a claim group is the person or persons authorised by the broader claim group to be named on the application for a native title or compensation determination, and who has certain powers and responsibilities in relation to the claim.

Objections against the lodgement of the area agreement ILUAs were submitted to the NNTT Registrar on that basis.

At the same time as the registration process, four writs of prohibition were issued in the High Court of Australia against the Native Title Registrar and the parties to the disputed four ILUAs, seeking to prohibit their registration.

The matters were remitted to the Full Federal Court for hearing and judgement is currently reserved.

The judgement will consider the validity of the decision of Reeves J in *QGC v Bygrave (No. 2)* 2010 189 FCR 412 which has been relied upon by native title practitioners and the NNTT to register area ILUAs that have not been unanimously signed by all members of the named applicant for a registered native title claim.

Recommendations for reform of the *Native Title Act 1993* (Cth) (Native Title Act) addressing this issue have been identified in the Australian Law Reform Commission's *Connection to Country* report,<sup>19</sup> and the *Investigation into Indigenous Land Administration and Use* report to the Council of Australian Governments (COAG). This reform was supported in principle by the COAG Expert Indigenous Working Group.<sup>20</sup> The Commission understands COAG has endorsed the recommendation and will be monitoring its implementation.<sup>21</sup>

## 3.4 Legislation

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### (a) Cultural heritage legislation

Last year's report discussed the importance of cultural heritage both to Aboriginal and Torres Strait Islander peoples and the broader Australian community. The former Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda was critical of proposed changes to Western Australia's heritage legislation contained in the Aboriginal Heritage Amendment Bill 2014. The Bill is yet to be passed but worryingly remains on the Legislative Assembly's Notice Paper as at the time of writing.<sup>22</sup> This Bill should be withdrawn entirely.

It is very disappointing to see state governments continue to minimise Indigenous involvement in decision making regarding cultural heritage. The recurring nature of these practices demonstrates the need for a human rights approach to heritage protection in which Aboriginal and Torres Strait Islander people are the primary decision makers. This is addressed in more detail later in the chapter.

#### (i) *Aboriginal Heritage (Miscellaneous) Amendment Act 2016 (SA)*

The Aboriginal Heritage (Miscellaneous) Amendment Bill 2016 was passed by the South Australian Parliament in March 2016. The Bill amends the *Aboriginal Heritage Act 1988* (SA) (Heritage Act).

The Bill had been in development for some years, with community consultation in response to a discussion paper taking place in 2008-9, then consultation on a draft Bill released in 2013. The final version of the Bill was introduced into Parliament only two weeks after it had been finalised.<sup>23</sup> The final Bill contained changes which were not the subject of consultation and are not supported by peak bodies including South Australian Native Title Services.<sup>24</sup>

Particular aspects of concern with the legislative amendments include:

- the repeal of section 6(2) of the Heritage Act;
- the lack of any detail about the Aboriginal Heritage Guidelines which the Minister may issue, substitute, vary or revoke in relation to the operation of the Act under the new section 19A (yet to come into operation);
- the broad, discretionary powers given to:
  - o the Aboriginal Heritage Committee to refuse to approve registered native title body corporates, from being Recognised Aboriginal Representative Bodies in respect of their determination areas; and
  - o the Minister to strip registered native title body corporates of their status as Recognised Aboriginal Representative Bodies in respect of their determination areas.<sup>25</sup>

A key feature of the legislative amendments is the creation of corporate bodies called Recognised Aboriginal Representative Bodies (RARBs) for specific areas, Aboriginal sites, objects or remains.<sup>26</sup> RARBs may enter into local heritage agreements with project proponents in respect of the matters and areas for which they are responsible.<sup>27</sup>

RARBs are also responsible for advising the Minister in relation to matters affecting Aboriginal heritage in the area for which the RARB is appointed, and for carrying out other functions assigned to the RARB under any other Act or by the Minister.<sup>28</sup>

Whilst the registered native title body corporate in respect of an area is presumed to be the RARB for that area, the amendments confer unduly broad, discretionary powers to the (Ministerially appointed) Aboriginal Heritage Committee and the Minister to respectively refuse to approve PBCs and to strip PBCs of their status as RARBs for their determination areas.

This is a very concerning feature of the legislation. Native title holders have often fought for years for recognition of their pre-existing rights over their lands and waters, including rights to care for country and fulfil cultural heritage obligations. The way in which these responsibilities can be removed from native title holders under the new legislation is inconsistent with the principles of free, prior and informed consent, of self-determination for Indigenous peoples, with articles 31 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and with article 27 of the *International Covenant on Civil and Political Rights* (ICCPR).

The repeal of section 6(2) of the Heritage Act is also troubling. That section required the Minister to delegate certain decision making powers to the Traditional Owners of a site or object at their request. Now delegations under the Heritage Act are at the discretion of the Minister and revocable at will.<sup>29</sup> The transitional provisions also specify that existing requests for delegation under section 6(2) will 'be taken to be void and of no effect' and/or 'be taken to be revoked'.<sup>30</sup>

The Commission will be closely monitoring how this legislation is implemented over the next reporting period.

# 3.5 Processes relating to native title and Indigenous land

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## (a) COAG Investigation into Indigenous land administration and use

Last year's report noted that in October 2014, COAG announced it would conduct an urgent investigation into Indigenous land administration and use.<sup>31</sup>

The COAG investigation was conducted by a Senior Officers Working Group (SOWG) comprised of officials from the Commonwealth, NSW, NT, Qld, SA and Vic governments. The Senior Officers Working Group were advised by an Expert Indigenous Working Group made up of Mr Wayne Bergmann (Chair), Mr Brian Wyatt (Deputy Chair), Mr Djawa Yunupingu, Ms Shirley McPherson, Dr Valerie Coombs, Mr Craig Cromelin and Mr Murradoo Yanner.

In late 2015 the *Investigation into Indigenous Land Administration and Use* report (COAG Investigation Report) authored by the Senior Officers Working Group was handed to COAG. The report contained a series of recommendations from the Senior Officers Working Group, some of which were endorsed by the Expert Indigenous Working Group. The Expert Indigenous Working Group also provided commentary and its own recommendations. Both groups recommendations centred around five key topics, being:

1. Gaining efficiencies and improving effectiveness in the process of recognising rights
2. Supporting bankable interests in land
3. Improving the process for doing business on Indigenous land and land subject to native title
4. Investing in the building blocks of land administration; and
5. Building capable and accountable land holding and representative bodies

Notably, recommendation six of the Senior Officers Working Group was that 'All governments note the principles articulated by the Expert Indigenous Working Group in this report when taking forward reforms that affect Indigenous land owners and native title holders.'<sup>32</sup>

The principles articulated by the Expert Indigenous Working Group provide a guide to government on how reform that affects Indigenous peoples' rights is pursued in the future, in accordance with Indigenous core principles.<sup>33</sup>

COAG agreed that 'jurisdictions will implement the recommendations of the report subject to their unique circumstances and resource constraints'.<sup>34</sup>

The Commission looks forward to the follow up report by the Department of the Prime Minister and Cabinet to COAG on progress of the implementation of the SOWG recommendations in late 2016, and particularly the extent to which the principles and recommendations formulated by the Expert Indigenous Working Group have been considered and integrated into the reform agendas of the states and territories.

The SOWG report also noted the benefit of the Commission's Indigenous Property Rights Project and identified opportunities for partnership with the Commission in relation to certain recommendations, in particular:

- creating bankable interests on exclusive possession native title land, while retaining underlying native title
- the most beneficial use of unrestricted native title rights to take resources for commercial purposes.<sup>35</sup>

This important work of the Indigenous Property Rights Project facilitated by the Commission is underway and progressing well, as outlined later in the Chapter.

The Commission is pleased to report that the Australian Government is supporting it to continue discussions at a national level on land issues with Indigenous leaders and representative bodies, in accordance with the COAG Investigation Report recommendation 5(b)(ii).<sup>36</sup>

The Indigenous Property Rights Project is a valuable opportunity to facilitate Indigenous led discussion and engage with stakeholders and technical experts about the challenges for economic development and consider solutions which are rights based, realistic and practical.

## 3.6 The Indigenous Property Rights Project – background and framework

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Many Aboriginal and Torres Strait Islander people, are entering into a ‘post-determination’ period where governance, economic development and benefit sharing are the urgent challenges.

However, many remain engaged in claims for land, sea and waters across the country. They may be awaiting determinations of native title or land claims, or may have been denied recognition of their connection to land by the Australian legal system due to inflexible evidentiary requirements or the legitimisation of Crown extinguishment. Others are pursuing compensation for losses.

For those who have been able to achieve outcomes through these processes, the challenges are not over. There are significant issues in relation to maintenance of land including the costs, challenges to ensuring the rights are respected by planning authorities and proponents of development as well as many obstacles to financing Indigenous led economic development.

For the past eighteen months the Commission has facilitated the Indigenous Property Rights Project (Project) which provides a forum for a national dialogue between Aboriginal and Torres Strait Islander peoples, government and other stakeholders about ways to leverage the economic potential of the Indigenous Estate with the consent and guidance of Traditional Owners.

The Project aims to:

- understand the opportunities and challenges for economic development on the Indigenous Estate, building on the work of other Indigenous property rights related processes
- facilitate dialogue that considers development of legislative and policy reform affecting the Indigenous Estate, led by Aboriginal and Torres Strait Islander peoples
- facilitate engagement between Aboriginal and Torres Strait Islander peoples, government, industry and other stakeholders that recognise development on Indigenous land and waters will only be successful and sustainable where Aboriginal and Torres Strait Islander peoples are provided with the opportunity to:
  - o be partners in development
  - o give their free, prior and informed consent, and
  - o benefit economically and socially from the development.

This focus on post determination and post claim issues is urgent for many who strive to deliver real outcomes and benefits to claimants who have fought for recognition over many years. The Commission hopes that it will also be useful for the many still pursuing their claims.

### (a) Concurrent processes

A number of concurrent processes have informed the work of the Project and have implications for the rights of Aboriginal and Torres Strait Islander peoples in relation to their land, seas, waters and resources.



These include:

- the *Our North, Our Future: White Paper on Developing Northern Australia* (White Paper) released in June 2015, followed by the *Northern Australia Infrastructure Facility consultation paper* in November 2015
- the 2015 Australian Law Reform Commission (ALRC) Native Title Inquiry resulting in the report *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report) released in June 2015
- recent native title cases including *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900, *Western Australia v Willis* (2015) 239 FCR 175 and *Rrumburriya Borroloola v Northern Territory of Australia* [2016] FCA 776.

## (b) Process and structure

In May 2015 the then Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda and then Human Rights Commissioner Tim Wilson convened the Broome roundtable on Indigenous property rights on Yawuru country in Broome, Western Australia.

Participants at the Broome meeting tasked the Commission with facilitating a process for Aboriginal and Torres Strait Islander peoples to consider ways to reform law and policy, in order to increase opportunities to undertake self-determined economic development on the Indigenous Estate.

The first meeting after Broome was held in Sydney in December 2015 with the support of KPMG. Participants at the Sydney meeting settled the project governance and design as follows:

- *Indigenous Strategy Group* - an Indigenous Strategy Group directs priorities. This includes oversight of the process; setting the scope of the work, assisting with identifying technical expertise, developing a package of reforms and communicating with government, the media and the broader community.
- *Indigenous Property Rights Network* - Indigenous and non-Indigenous technical and design experts in land, native title, resources, environmental protection and cultural heritage form a broader network group to provide leadership, guidance and expertise to an agreed program of work. Participation in the Network is opt in, and includes community organisations, government, industry, statutory authorities, research institutions and others.
- *Secretariat* - the Commission provides secretariat support to the Indigenous Strategy Group and the Indigenous Property Rights Network.

The Commission has since facilitated a series of meetings with the Indigenous Strategy Group to set the direction of the Project. It also held roundtables in Canberra, Minjerribah (North Stradbroke Island), Darwin and East Arnhem Land addressing the commercial and social potential of rights and interests in lands, seas, waters and resources (the Indigenous Estate), Indigenous banking and finance, tenure, business and benefit sharing. Attendance at roundtables has been open to all Indigenous Property Rights Network members and communiques have been issued after each meeting to update the Network.

Further roundtables may take place to pursue this reform agenda in 2017.

## (c) Guiding principles and the human rights framework

A set of Guiding Principles were approved by the Indigenous Property Rights Network at the Sydney meeting and are set out in full in Appendix 6. The following Guiding Principles were approved:

1. Application of international human rights and principles
2. Indigenous led
3. Inclusive process
4. Experience, advice, research and evidence based
5. Self-determination
6. Secure and protect the Indigenous Estate
7. Right to make decisions
8. Respect for and protection of culture

The Guiding Principles include standards and principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* and the *United Nations Declaration on the Right to Development*.<sup>37</sup>

### **Text Box 3.1:**

Snapshot - the United Nations Declaration on the Rights of Indigenous Peoples – extract from ‘The Declaration Dialogue Series’ by the Australian Human Rights Commission<sup>38</sup>

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The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) contains 46 articles that articulate how existing international human rights principles and standards apply to the situation of Indigenous peoples. It applies them, giving specific consideration to the unique cultural, historical, social and economic circumstances of Indigenous peoples.

The fundamental foundational human rights of the UNDRIP can be categorised into four key sets of principles:

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

These four principles provide guidance on how Aboriginal and Torres Strait Islander communities, governments, civil society and the private sector can apply the UNDRIP to fully realise the human rights of Aboriginal and Torres Strait Islander peoples. These principles will also provide benchmarks against which the effectiveness of the implementation can be measured.

**Text Box 3.2:**

Snapshot - the United Nations Declaration on the Right to Development – extract from ‘Realising the Right to Development’ by the United Nations<sup>39</sup>

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Like all human rights, the right to development also contains a specific entitlement—in this case the right ‘*to participate in, contribute to, and enjoy economic, social, cultural and political development*’. This basic entitlement, set out with perfect clarity in article 1 of the Declaration, includes a number of constituent elements, enumerated subsequently in the Declaration. Among them are:

- People-centred development. The Declaration identifies ‘the human person’ as the central subject, participant and beneficiary of development
- A human rights-based approach. The Declaration specifically requires that development be carried out in a manner ‘in which all human rights and fundamental freedoms can be fully realized’
- Participation. The Declaration calls for the ‘active, free and meaningful participation’ of people in development
- Equity. The Declaration underlines the need for ‘the fair distribution of the benefits’ of development
- Non-discrimination. The Declaration permits ‘no distinction as to race, sex, language or religion’
- Self-determination. The Declaration integrates self-determination, including full sovereignty over natural resources, as a constituent element of the right to development.

## (d) Relationships and engagement

Without Aboriginal involvement, you will fail. It’s their story; it can’t just be imposed on them... If you don’t have a respectful relationship, any talk of consultation is a fiction. If you don’t have adequate time, any talk of consultation is a fiction. You are simply the latest missionary telling them what to do.<sup>40</sup>

- Fred Chaney, Chair of Desert Knowledge Australia, 20 May 2014.

The governance structure of the Project reflects the Commission’s commitment to proper engagement with the Aboriginal and Torres Strait Islander peoples whose rights are affected and their leaders. As Australia’s national human rights institution the Commission is an independent statutory agency, not a representative body. It engages with Aboriginal and Torres Strait Islander peak bodies including native title representative bodies and service providers, native title prescribed bodies corporate, land councils, regional authorities, unique research and advisory bodies including the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), as well as individual specialists for their expertise and their mandate to represent members and Traditional Owners.

This kind of governance is critical to really hearing the voices of people with the right knowledge, because they are the experts in this field. They are also the people who will be impacted by any implementation of recommendations coming out of the Project.

In addition to consultations with Indigenous land and sea organisations, the Project has engaged with the banking sector in a two way learning process. The banking forum on Minjerrabah (North Stradbroke Island) gave all participants an opportunity to gain insights into the reality of outcomes and challenges for native title holders. Together, Aboriginal and Torres Strait Islander land holders and their representatives met with bankers to talk about their experiences and aspirations, and to gain a deeper understanding of the dynamics and drivers of their sectors. These were early conversations in what should be an ongoing dialogue deepening the relationships between the finance sector and Aboriginal and Torres Strait Islander communities and their businesses.

While proper engagement with government and business is a priority for Indigenous peoples across the entire country, it has a particular urgency in northern Australia given the significant amount of Aboriginal land in the region, and in light of the fact the current government has committed five billion dollars to the Northern Australian Infrastructure Facility (NAIF) as part of its plans for the development of the north.<sup>41</sup>

## (e) Direction of the dialogue

Throughout the Project the direction and focus of the conversation has expanded as people have shared their experiences and knowledge about the challenges and possibilities involved with creating opportunities on country.

Participants at the Broome roundtable called for dialogue about five sets of issues to better enable economic development on the Indigenous Estate:

1. **Fungibility and native title** – enabling communities to build on their underlying communal title to create opportunities for economic development.
2. **Business development support and succession planning** – ensuring that Aboriginal and Torres Strait Islander peoples have the governance and risk management skills and capacity to successfully engage in business and manage their estates.
3. **Financing economic development within the Indigenous Estate** – developing financial products, such as bonds, to underwrite economic development through engaging the financial services sector and organisations including the Indigenous Land Corporation (ILC) and Indigenous Business Australia (IBA).
4. **Compensation** – rectifying the existing unfair processes for compensation for extinguishment of native title and considering how addressing unfinished business could leverage economic development opportunities.
5. **Promoting Indigenous peoples right to development** – promoting opportunities for development on Indigenous land including identifying options to provide greater access to resources on the Indigenous Estate.

Though these issues remain an important focus of the Project, other equally important themes and questions have arisen, including quantifying and managing risk, and building on the gains of native title and land rights.

## (f) Risk and the Indigenous Estate

Whilst Indigenous peoples have much to gain from economic development, the Principles developed by the Network emphasise that culture, heritage and rights must not be compromised in the process. Self-determined development is not development at all costs. In particular, a human rights approach to pursuing economic opportunity requires careful thought about risk.

Indigenous people are assessing their risk appetite in relation to potential opportunities, often for the first time. They are considering a new risk framework which balances their cultural responsibilities to past and future generations with the risks inherent in business ventures and the potential economic and social benefits when ventures are successful.

Financial institutions are also considering ways they assess risk for projects on the Indigenous Estate. They see value in exploring ways to lend for a variety of projects without having to take a charge on Indigenous interests (e.g. freehold parcels of land) for a number of reasons, including reputational risk and corporate social responsibility. Financial institutions and Indigenous organisations are realistic about the economies in rural and remote areas where secondary markets are limited. Engaging in business ventures and economic development requires a clear view of these challenges, but those involved in the Project are also excited by the options emerging for the future.

Developing risk frameworks for Indigenous corporations and organisations engaging in economic development on the Indigenous Estate is something that the Project will be looking at in more depth in the next reporting period. Ensuring that development occurs in accordance with the free, prior and informed consent of communities affected is one crucial way in which risk must be managed and for truly self-determined development to succeed.

## 3.7 The Indigenous Property Rights Project – reform priorities

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The Indigenous Strategy Group and Indigenous Property Rights Network have identified priorities for reform based on the Guiding Principles set out at Appendix 6.

The key areas for reform are broadly grouped as follows:

- Tools for securing, sustaining and optimising the Indigenous Estate
- Sustainable business
- Managing the financial benefits of economic development
- Compensation

### (a) Tools for securing, sustaining and optimising the Indigenous Estate

Over the course of this Project, the Indigenous Strategy Group and Indigenous Property Rights Network have identified key threats to economic development and the security of the Indigenous Estate. They also identified a series of practical actions, tools and reforms necessary to ensure that Aboriginal and Torres Strait Islander peoples are in a position to drive economic development of their choosing and to respond to development proposals from a position of strength where the Indigenous Estate is not compromised from the outset.

Leveraging the Indigenous Estate for economic development that does not compromise land and waters also requires careful thought about sustainable land use. This is a concept inherent in the Guiding Principles developed by the Indigenous Strategy Group.

Indigenous Property Rights roundtable discussions revealed that sustainability is more than just an environmental concept to Aboriginal and Torres Strait Islander peoples. It includes considerations varying from meeting the financial obligations associated with land, (such as rates and maintenance costs), to considering ways in which land may contribute to honouring and meeting the needs of both current and future generations.

These considerations will inform and influence the particular commercial projects and legislative and policy reform options chosen and endorsed by Indigenous groups.

### (i) Mapping the Indigenous Estate

One of the first issues raised by Indigenous members of the Network was the need to understand the extent and nature of the Indigenous Estate in order to exercise free, prior and informed consent in relation to external development proposals, and to generate economic opportunities.

Aboriginal and Torres Strait Islander peoples need a clear picture of the full extent of their rights and interests in land and waters in order to facilitate effective planning and decision making. The rights and interests in land and waters of Aboriginal and Torres Strait Islander peoples that are recognised by Australian law arise from over 18 different Commonwealth, state and territory statutes as well as case law, as identified by a desktop scan undertaken by the Commission. Maintenance of a current, accurate record requires targeted attention so the extent of these interests can be ascertained.

The National Native Title Tribunal (NNTT) conducts geospatial mapping and has recently developed a tool which creates an aggregated national view of areas created through specified acts or grants and which supports generation of geospatial statistics and future planning. This mapping project was initiated by the Department of Prime Minister and Cabinet (PM&C) and incorporates available data in relation to rights and interests to land and waters held pursuant to the following statutes:

<b>Jurisdiction</b>	<b>Instrument</b>
<b>Commonwealth</b>	<i>Native Title Act 1993</i>
<b>Jervis Bay Territory</b>	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>
<b>New South Wales</b>	<i>Aboriginal Land Rights Act 1983</i>
<b>Northern Territory</b>	<i>Aboriginal Land Rights Act (Northern Territory) 1976</i>
	<i>Crown Lands Act 1992</i>
	<i>Special Purposes Leases Act 1953 (NT)</i>
<b>Queensland</b>	<i>Aboriginal Land Act 1991</i>
	<i>Torres Strait Islander Land Act 1991</i>
	<i>Aboriginal and Torres Strait Islander Land Holding Act 2013</i>
<b>South Australia</b>	<i>Aboriginal Lands Trust Act 1966</i>
	<i>Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981</i>
	<i>Maralinga Tjarutja Land Rights Act 1984</i>
<b>Tasmania</b>	<i>Aboriginal Lands Act 1995</i>
<b>Victoria</b>	<i>Aboriginal Lands Act 1970</i>
	<i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987</i>
<b>Western Australia</b>	<i>Aboriginal Affairs Planning Authority Act 1972</i>

A number of Indigenous groups have also requested the NNTT map their areas (retaining the ability to exclude sensitive information) in order to allow members to make properly informed decisions about their land, including decisions about economic development.

Geospatial mapping technology can be used by Indigenous peoples to provide a visual representation of land, sea and waters subject to rights and interests under a variety of land tenures and regulations, including native title land, freehold land, pastoral leases and local government zonings.

This type of tool can be used as a starting point for discussions about development opportunities in an area, and as the basis for exercising free, prior and informed consent and self-determination over land, sea and waters.

### **(ii) Accurate recording and accessible registration**

Project proponents rely on searches of state and territory land registers when formulating development plans, many of which do not identify native title land or land held under statutory land rights regimes. Though this information is available elsewhere (primarily the NNTT website), it can be overlooked at the early stages of project planning if it is not readily available.

All proponents of development on the Indigenous Estate need to be able to identify existing rights and interests in the early stages of projects by searching government registers. An effective system of registering, updating and integrating this information so that it is accessible is essential to ensure that proponents have the benefit of

'notice' of Indigenous rights and interests, and the holders of such rights and interests are engaged.

These issues were identified and the subject of recommendations in the COAG Investigation Report, and their importance was reiterated by participants in the Project roundtables.<sup>42</sup>

Integrating native title and land rights information into state and territory land registers is a big task that will require a coordinated and sustained approach. In some cases, information will need to be restricted for cultural reasons. It will also often not be necessary or appropriate to comprehensively describe the nature of the rights and interests held with respect to particular land or waters due to the developing nature of native title jurisprudence.

The Commission understands suggestions have been made to provide a link from state and territory land registers to the NNTT database along with text directing project proponents to check this database as part of their due diligence. Though this is a good initial step, it should only be used as a temporary fix until a more comprehensive integration of the systems is achieved.

### **(iii) Long term lease arrangements**

The concept of sustainable land use is particularly pertinent to the discussions around fungibility and options for temporary transferability of title to land.

The fact that native title and other Indigenous land is inalienable and generally communally held is often referred to as a barrier to economic development. However, the Project's work indicates that it is the lack of familiarity with these aspects of the Indigenous Estate that is often a bigger problem than the features themselves, and they do not necessarily prevent land being used for economic gain.

Indigenous peoples' interests in land generally come from their deep connection to particular areas and to some extent this has been translated to the legal framework of native title and Aboriginal land rights. For example, native title legislation renders native title land inalienable from its Indigenous owners, except by surrender to the Crown, meaning it is unable to be sold or transferred.<sup>43</sup> The Native Title Act also protects native title land from debt recovery processes so it cannot be used by native title holders as security against a loan.<sup>44</sup>

In the state and territory land rights sphere, most legislation allows leasehold interests created on Indigenous land to be used as security for a borrowing, but often subject to ministerial consent or other conditions, and some regimes prohibit it altogether.<sup>45</sup> Restrictions on alienation vary across the states and territories.<sup>46</sup>

Native title and land rights land therefore doesn't have the quality of fungibility in the sense that, for example, blocks of freehold land or commercial leases bought or negotiated in the real property market do. Fungibility refers to the idea that commodities like goods or property are easily exchangeable with other commodities of the same kind and so are suitable for buying and selling in markets.

Native title rights and interests are also generally communal or group rights held for the use and enjoyment of an identifiable community or group with a connection with the land and waters, but they may in rare cases be held by individuals alone.<sup>47</sup>

Communally held rights and interests require decision making to follow particular rules. But this approach is not completely dissimilar to the kinds of decision making processes for companies dealing with property where a board resolution would generally be required. It does require a more collective style of decision making which is commonly, but perhaps incorrectly, regarded as a constraint on business.

While Aboriginal and Torres Strait Islander peoples are committed to pursuing economic opportunities, they are also determined to ensure the hard won rights derived from their ancestors are used for the benefit of future generations and not surrendered. The Indigenous Property Rights Project has therefore focused on



exploring options for registrable land titles over the Indigenous Estate which can increase prospects for economic development without permanent diminution of the underlying rights.

Long term leasing over Indigenous land has consistently been identified as a method of achieving a registrable and transferrable title that does not compromise the underlying form of inalienable tenure.<sup>48</sup> Long term leasing is already achievable under most state and territory land rights legislation, and so the focus of the Indigenous Strategy Group to date has been on native title land. Two options in particular have been identified in respect of native title land and are being carefully considered by the Indigenous Strategy Group. They are set out in Text Box 3.3 below.

**Text Box 3.3:**

Reform options for creating registrable/commercial interests on native title land

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Two potential options for creating registrable/commercial interests for native title holders in a manner that does not diminish native title:

- long term leasing of native title land under existing state and territory legislation (Dr L.Strelein model)
- amending the Native Title Act to allow for leasing of exclusive possession native title land without requiring Crown consent under an Indigenous Land Use Agreement (ILUA)

**(iv) Land use planning reform**

Statutory land use planning processes have been slow to recognise and integrate Indigenous rights and interests across jurisdictions as these have progressively achieved recognition by the Australian legal system.

The majority of state and territory planning regimes do not explicitly recognise native title holders and other Indigenous landowners under land rights regimes as key stakeholders in land-use planning.<sup>49</sup> There are no specific legislative obligations to involve native title holders and Indigenous landowners at the planning stage, though this does occur at times as a matter of policy, particularly in areas with high Indigenous populations.

Indigenous Land Use Agreements are utilised by some native title groups to have a greater involvement in planning decisions, but these are negotiated on an ad hoc basis.

Registered native title holders and claimants are generally only legally required to be notified of projects on native title land at the development stage though the future acts regime under the Native Title Act. For example, this usually occurs when a project proponent applies for a licence or tenure in relation to a project.<sup>50</sup> By this stage development plans are often well advanced. This can leave Aboriginal and Torres Strait Islander peoples at a disadvantage in negotiations and lobbying under pressure to make decisions within tight time frames.

Project proponents are commonly unaware of the existence or extent of native title and other Indigenous interests on land identified in planning documents for development. Therefore, they can hold expectations of an unrealistically streamlined approach to development consents, not allowing sufficient time for traditional decision making processes and adequate consultation to occur.

An issue that was raised in the COAG Investigation Report is that some Indigenous land is vulnerable to being designated as having heritage or environmental value without the free, prior and informed consent of the relevant Indigenous peoples, creating a significant barrier to using the land for economic purposes. This has particularly been an issue with land granted to Local Aboriginal Land Councils under the *Aboriginal Land Rights Act 1983* (NSW).<sup>51</sup>

While specific issues can differ across the states and territories, Aboriginal and Torres Strait Islander peoples across all jurisdictions must be involved in land use planning processes affecting their lands and waters from an earlier stage if they are to have the control necessary to be true leaders and partners in economic development. Further work is required to identify ways to ensure this occurs routinely as a matter of practice, as outlined in Text Box 3.4 below.

**Text Box 3.4:**

Extract from 'The Commonwealth's Indigenous land tenure reform agenda: Whose aspirations, and for what outcomes' by Ed Wensing<sup>52</sup>

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Land use planning systems and the practices through which they are made operational must also undergo fundamental change. Everyday planning practice must involve a habitual engagement with Aboriginal and Torres Strait Islander peoples about their country, about proposals that affect their lands and waters, and in a manner that acknowledges and respects the parity of two co-existing land ownership and governance approaches...It is about recognising the parity of Indigenous governance authority with Western systems to seek agreements on matters of mutual concern.

**(v) Strong heritage protection**

At each Indigenous Property Rights roundtable, participants raised serious concerns about the effectiveness of laws for the protection and management of Indigenous heritage sites and knowledge.

A crucial element of facilitating self-determined development for Indigenous peoples is ensuring that final decisions about the preservation and protection of cultural heritage, Indigenous knowledge and traditional cultural expressions are made by the peoples that heritage belongs to, not by governments or developers or after merely seeking 'comment' from the affected peoples.

Article 31 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)<sup>53</sup> states that Indigenous peoples have the right to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'. This also extends to the right to maintain, control, protect and develop intellectual property over such heritage. Unfortunately, these rights are unevenly and often inadequately protected throughout the states and territories.

Heritage protection in Australia is primarily the legislative responsibility of the states and territories, with Commonwealth heritage protection legislation designed to operate as a 'last resort' protection in the event that state and territory regimes do not deliver adequate security.<sup>54</sup>

The National Native Title Council is clear that current heritage laws 'tend to undermine the capacity of Traditional Owners to adequately protect their cultural heritage as they have been developed with the expediency of development assessments and approvals in mind'.<sup>55</sup> This is evident in the recent proposed

changes to the *Aboriginal Heritage Act 1972* (WA), and the recent reforms to the *Aboriginal Heritage Act 1988* (SA) discussed earlier in this Chapter.<sup>56</sup>

In the White Paper on Developing Northern Australia, the Commonwealth Government committed to consult with Indigenous and industry stakeholders on developing a new accreditation system.<sup>57</sup> Indigenous people understand consultations with the Minister for the Environment's Indigenous Advisory Committee and the Australian Heritage Council are at an advanced stage. A public discussion paper is anticipated for early 2017 to be followed by consultations with stakeholders.

Proposals for effective heritage protection laws, potentially including national uniform minimum standards should be based on rights articulated in the UNDRIP and *International Covenant on Civil and Political Rights* (Art 27 ICCPR)<sup>58</sup> as well as extensive consultation with the Aboriginal and Torres Strait Islander peoples of Australia. Importantly, the rights of free, prior and informed consent and effective participation should be fundamental to both the development of any legislation as well as its procedures.

It is important that any reform related to heritage is designed from a human rights perspective, and not with the objective of fast-tracking development approvals at the expense of Indigenous peoples' cultural heritage.

The Commission will be monitoring the development of these standards closely. The consultation and reform process is an opportunity for the Commonwealth to demonstrate its commitment to ensuring decisions affecting Indigenous cultural heritage are returned to the hands of Aboriginal and Torres Strait Islander peoples.

#### **(vi) Proper resourcing for Indigenous organisations**

Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Registered Native Title Bodies Corporate/Prescribed Bodies Corporate (PBCs) are the key organisations involved in economic development with Aboriginal and Torres Strait Islander peoples in addition to performing their vital statutory functions.

Both NTRB/SPs and PBCs are vital pieces of this puzzle, and neither should be resourced at the expense of the other. They each require sufficient and sustained funding to maintain an effective role in this process, enabling their members and clients to respond to threats, identify opportunities and optimise the assets of the Indigenous Estate.

In particular, PBCs have suffered from a lack of ongoing funding certainty for their core functions. A successful determination is just the start of the costs of pursuing legal entitlements. PBCs are rarely sufficiently resourced to meet the costs of:

- compensation claims over areas that have been excluded from native title determinations due to extinguishment
- litigation to enforce the terms of Indigenous Land Use Agreements
- other negotiations, dispute resolution or litigation, e.g. in relation to membership disputes or future act matters.

NTRB/SPs are ideally geographically situated and equipped with skilled staff and institutional knowledge to assist with these issues. Dealing with the Indigenous Estate is part of their core operations and crucially they have ongoing relationships with many PBCs and Indigenous communities from years of working together for native title and land rights claims.

Some NTRB/SPs are in the process of shifting away from predominantly pursuing land claims towards providing support for PBCs and other Indigenous groups to make the most of their rights and interests,

though this is certainly not the case for all. The particular circumstances of each NTRB/SP and the Indigenous peoples they represent in their region must be acknowledged in the decision making process around funding.

Unfortunately, the recent implementation by the Australian Government of an outcome based funding model for NTRB/SPs under the Indigenous Advancement Strategy does the exact opposite of this. NTRB/SPs are being subject to government-set priorities without sufficient regard to their statutory functions or individual circumstances and then being assessed against those external priorities to determine whether they receive their full allocation of funding.<sup>59</sup>

This outcome based funding model does not have sufficient regard for the fact that NTRB/SPs are obliged by Part 11 of the Native Title Act to perform certain functions relating to land justice and require an adequate and stable resource base in order to do so. Those NTRB/SPs who encounter problems achieving the milestones imposed by government risk being financially punished for doing so, even if those problems are outside of their control. Not only does this have the potential to compromise the fulfilment of their statutory obligations, it may also prevent them from capitalising on their existing strengths in order to support economic development for their Indigenous clients.

Aboriginal and Torres Strait Islander people are very concerned about the impact of these funding arrangements to NTRB/SPs and particularly how this may affect their own interests.

Ongoing, adequate funding of PBCs and NTRB/SPs is vital to ensuring a strong, supportive framework within which self-determined economic development on the Indigenous Estate can occur.

In addition, organisations like the North Australian Indigenous Land and Sea Management Alliance (NAILSMA) provide unique and specialised services and advice in relation to culture based economies. Their longstanding knowledge base and expertise in the cultural and economic activities suited to northern Australia needs to be supported by adequate funding, particularly in the context of the proposed northern development agenda.

## **(b) Sustainable business**

Aboriginal and Torres Strait Islander peoples are eager to initiate and participate in commercial ventures that provide ongoing economic benefits, produce local employment and/or financial returns to the local community, and do not compromise hard-earned native title and land rights.

The fact that Indigenous people have specific goals for economic development should not be mistaken for a reluctance or lack of commitment to business on land, sea and waters. Too often there is an assumption that Indigenous people are either not interested in business opportunities, or not proficient in commercial enterprise.

Indigenous people need a shift away from this 'deficit' view of their people in business and towards an acknowledgement of people's capabilities, without ignoring the crucial benefits that governance training and business education provides to all people engaged in commercial enterprise.

There is no doubt that business needs innovators and a resilient, entrepreneurial spirit to get going and ride the ups and downs, but sustainable business ideas must also be adapted to the many and varied conditions across the country and based on realistic and sustainable propositions.

Debates about economic challenges in Indigenous communities and a lack of commercially tradeable land tenure have been overemphasised. However, they have avoided discussions about the impact of slowing mining activity, drought and the relatively small labour force required for employers like pastoralists. In other words, the economic realities faced by farmers and small town economies and the extent to which

the mainstream agricultural sector has received government subsidies tends to get lost in a push for land reform that compromises Aboriginal and Torres Strait Islander land rights in order to encourage economic development for Indigenous peoples.

Clearly further economic modelling is required to build on previous work on effective economic development models by the Centre for Aboriginal Economic Policy Research (CAEPR) and others. The Productivity Commission, universities and specialists in urban, rural and remote economic development and land and water management are best placed to undertake this work in different locations.

The Minjerribah (North Stradbroke Island) roundtable focused on building closer relationships between Aboriginal and Torres Strait Islander land holders and their representatives with the banking sector and Indigenous Business Australia (IBA). This sector is already engaged with many Indigenous business people, and brings a wealth of experience and practical thinking to this Project. This has contributed to the development of the priorities related to finance and business development skills and planning outlined below.

#### **(i) A new risk framework for financing development**

Financing development on the Indigenous Estate raises a set of unique challenges for Aboriginal and Torres Strait Islander peoples. In an ideal world, Indigenous peoples would face the same hurdles to financing economic development as non-Indigenous people. However, we know that this isn't the case.

Indigenous peoples face structural barriers including remoteness and poor or absent infrastructure, a lack of familiarity by some lenders and developers with native title and other Indigenous forms of land holdings, and ingrained attitudes towards their capabilities and aspirations.

The challenge remains to create a level playing field for Indigenous and non-Indigenous economic development by enabling access to finance that matches the risk appetite of communities and organisations.

Often assumptions are made about the willingness of financial institutions to lend for projects on the Indigenous Estate. But discussions at the Project roundtables has revealed many of these to be often overstated. Five key factors influencing finance eligibility for projects on the Indigenous Estate were identified by lenders at the Minjerribah (North Stradbroke Island) roundtable. The threshold question of loan serviceability must be answered in the affirmative to get across the line, but then banks will consider the following factors:

1. Governance and financial acumen of the Indigenous community
2. Valuation in rural and remote Australia (the secondary market)
3. Reputational risk to lenders
4. Tenure of land used as collateral

The financial services sector is ideally placed to assess borrowers and their business propositions. They will ask the threshold question about loan serviceability, and may work with Indigenous businesses to improve the prospects of success where possible, or provide realistic feedback on the limits of the proposition.

In any case, there is no doubt that banks want to be engaged in Indigenous business. What is needed is innovative support to manage risk.

Indigenous people are also considering risk. There are few guarantees in business, and most Traditional Owners would be extremely reluctant to surrender rights to land in exchange for economic development alone. People have surrendered native title for some very specific purposes, but this should not be the default model for development. Conversion and permanent surrender of title is generally thought to be an

unacceptable price for economic development.

In addition to private finance, economic development on the Indigenous Estate is also suitable for government investment, being nation-building and innovative. Non-cash financial support by government to create urban, rural and regional development by Australia's Indigenous peoples would provide long term economic and social benefits to the nation.

Government support for such business propositions is not new. A variety of mechanisms are possible, for example:

- a development fund which underwrites loans and investment in projects that meet the serviceability threshold would satisfy this emerging risk framework. This would not be dissimilar to the government's current Northern Australia Infrastructure Facility, or the Clean Energy Finance Corporation which invests in new non-coal energy projects
- tax incentives, similar to those provided by government in the 1990's for venture capitalists investing in bio-medical start-up companies, would assist Indigenous businesses to get across the serviceability threshold question.

The Indigenous Strategy Group is actively working with financial institutions, Indigenous peak bodies and government to develop detailed reform options around financial risk and business support mechanisms.

As an outcome of the COAG Investigation Report, the Commonwealth has also committed to facilitating an annual forum for Indigenous stakeholders and the banking sector to better understand opportunities for private investment on Indigenous land and land subject to native title. The first of these forums will occur in the next reporting period.

## **(ii) Business development skills and planning**

Fundamental to assessment and management of business opportunities in the early years of this shift towards a post determination and post land claim phase, is sound governance and business planning.

At the Broome roundtable participants identified a number of skill sets that need to be developed in order for people to create and manage successful, sustainable businesses. These include business, governance, risk management, investment and succession planning skills.

A significant proportion of all new business enterprises in Australia terminate within the first few years.<sup>60</sup> Conducting a commercial enterprise requires a set of skills that most people require assistance with and Aboriginal and Torres Strait Islander peoples face a specific set of challenges when planning and conducting business enterprises, necessitating tailored training and investment. Such focused support could be in the form of business development and financial training for PBC directors and executive staff, ensuring people have the support and skills necessary to make considered decisions.

### **(iii) Options for incorporation**

For some time now, native title holders have raised their frustrations with the mandatory requirement that PBCs incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (CATSI Act) rather than having the flexibility to choose to incorporate under the *Corporations Act 2001 (Cth)* (Corporations Act).<sup>61</sup> The CATSI Act has lower thresholds for 'small', 'medium' and 'large' corporations which has the effect of increasing the reporting requirements of PBCs, and restricting the freedom to decide upon internal governance rules without the approval of the regulator.<sup>62</sup>

Just as businesses are able to choose a corporate structure tailored to their requirements, PBCs as self-determining organisations engaged in business and land management, should have the option of choosing the incorporation method that best suits their aims and needs. This includes incorporation under the Corporations Act and regulation by the Australian Securities & Investments Commission (ASIC) rather than the Office of the Registrar of Indigenous Corporations (ORIC).

### **(iv) Supporting a cultural economy**

For many Aboriginal and Torres Strait Islander peoples, cultural enterprise is a way of achieving economic development congruent with community values, enabling the exercise of native title rights and ensuring financial sustainability of cultural practices like natural resource management, healthcare, art and farming. Cultural enterprise is one type of sustainable business model that has been highly successful producing economic, and equally importantly, strong social and cultural benefits.

The Indigenous Rangers - Working on Country and associated Indigenous Protected Areas programs supported by the Department of Prime Minister and Cabinet (PM&C) are highly successful examples of Indigenous communities using traditional knowledge to provide economically, environmentally and socially valuable services, resulting in increased job opportunities on-country and positive environmental outcomes. This was confirmed in the *Consolidated report on Indigenous Protected Areas following Social Return on Investment analyses* by Social Ventures Australia, commissioned by PM&C and published in May 2016. The report studied five Indigenous Protected Areas over a period of six years and found:

over the period between the 2009 and 2015 financial years, an investment of \$35.2m from Government and a range of third party investors generated social, economic, cultural and environmental outcomes with an adjusted value of \$96.5m.<sup>63</sup>

These remarkable findings confirm the positive impact of the Indigenous Protected Areas and ranger programs. In light of such evidence, the expansion of these programs is warranted and would deliver even greater benefits to Indigenous peoples, to country, and to the nation in general.<sup>64</sup>

Another example of native title holders employed in important resource management on country is the multitude of Indigenous led carbon-offset projects running across Australia, including in the Kimberley, Arnhem Land and Cape York.<sup>65</sup>

Native title holders are engaging in the traditional practice of deliberate burning on savannah lands during the cooler months of the year to minimise the fuel load on the landscape, reducing the greenhouse gas emissions that would otherwise be generated in later-season wildfires. This is a recognised abatement practice that generates carbon credits under the Carbon Farming Initiative legislated offsets scheme.<sup>66</sup>

Fire management projects, ranger programs and Indigenous Protected Areas are world class examples of 'the hybrid economy' model in action, providing excellent public investment value returns and a way for people to live and work sustainably on country.

Although some of this work is fee for service or may generate financial profits, this is not always possible and the important resource management work of Indigenous peoples should not be devalued for this reason. Work that enables people to stay on country and practice their culture has value in its own right and is essential from a human rights perspective.

More research in this exciting area is needed to identify opportunities for Traditional Owners and their communities to be engaged in and benefit from the hybrid economy.

**Text Box 3.5:**

Extract from 2016 Mabo Lecture by Melissa George<sup>67</sup>

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For me much of my fight has been focused on ... ensuring that the role of Aboriginal and Torres Strait Islander land and sea managers – the doers - is recognised, supported and valued.

Now let's face it, this is not an easy task and it is an issue that is multifaceted in its application. Looking after Country is not just about protecting and managing plants and animals or working with weeds and ferals. It's also and more importantly about people. People's ability to keep their culture strong, derive an income from their Country, which would create opportunities for their children, and - within all of this - developing the capability of their community organisations to enable them to facilitate strategic long term outcomes.

In essence it is about reclaiming our sovereignty; the capacity for Aboriginal and Torres Strait people to live on our traditional country on our terms and not at the behest of government.

**Text Box 3.6:**

Extract from 'Land rights and development in Australia' by J.C Altman<sup>68</sup>

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The options facing the owners of the indigenous estate can be understood if we acknowledge the hybrid character of indigenous economies. 'The hybrid economy' combines customary, state and market sector to deliver livelihoods based on non-market wildlife harvesting, production of art for global sale and public and private sector employment and enterprise development alongside normal citizenship entitlements. This form of economy combines capitalist with non-capitalist relations of production and restricted common and private forms of property...

The hybrid economy is dependent on the state sector for much of its cash income (welfare benefits, wages and salaries) and essential infrastructure, and yet it is also fully encapsulated in the global market economy, with opportunities to sell art and craft and to make commercial agreements for access to resources...

It is important to understand that customary productive activity may include using guaranteed native title property rights, most evident in the exploitation of wildlife for domestic consumption. The concept of economic hybridity makes sense of the empirical reality that indigenous people make their livelihoods both diversely and flexibly, depending on local opportunities and aspirations.'



### **(v) Commercial use of native title rights**

Enabling native title holders to exercise their native title rights for commercial purposes is a key factor in ensuring economic development and providing a platform for sustainable business.

Native title holders currently face challenges in asserting and exercising these rights in a commercial context. In particular, state and territory governments often require native title holders to acknowledge the non-commercial nature of their non-exclusive rights to hunt, fish and gather resources as part of consent determinations or negotiated settlements. The form of orders frequently made in relation to these rights are that they are only used for personal, domestic and non-commercial communal purposes only.

The decisions in *Akiba v Commonwealth* (2013) 250 CLR 209 (*Akiba*), *Western Australia v Brown* (2014) 253 CLR 507 (*Brown*), *State of Western Australia v Willis* (2015) 239 FCR 175 (*Willis*) and *Rrumburriya Borrooloola v Northern Territory of Australia* [2016] FCA 776 (*Borrooloola*) require revision of these limitations. Even after the decisions in *Akiba* and *Brown*, state and territory governments have continued to resist omission of this limitation prior to determination, often claiming it is on an evidentiary basis, and due to complex land administration requirements after determination.

The outcomes in *Akiba*, *Brown*, *Willis* and *Borrooloola* show the courts are moving away from narrow interpretations. An absence of the limitations formerly imposed may lead to recognition of commercial rights by states which would give real meaning to their rhetoric about support for Indigenous economic development.

### **(c) Managing the financial benefits of economic development**

The *United Nations Declaration on the Right to Development* underlines the need for the 'fair distribution of the benefits' of development.<sup>69</sup> However, the issue of holding and sharing the financial benefit of any successful development opportunities within the Indigenous Estate is one of the most neglected elements of the property rights discussion and requires further exploration. That is, how do communities manage the wealth created from either acquisition of an interest in land, or any economic activity carried out on that land, so that tangible benefits flow back to Traditional Owners?

It is almost as if not much consideration goes into what will happen in the event of a particular claim or enterprise succeeding. Indigenous Australians have struggled for many years to achieve recognition of their rights to land, sea, waters and resources. The purpose of pursuing claims and related economic activity should be a successful outcome in which all those connected with it discernibly improve their standard of living and are able to live on and look after country.

The issue of good governance is central to ensuring that any benefit accrues to those with a right to benefit. In accordance with the Indigenous Strategy Group's Guiding Principles, it is crucial those with the right to participate in decisions around benefit sharing are central to the development of any benefit sharing regime, that benefits are shared equally, and that all processes around benefit sharing are transparent.

Some important work has been done in this area by organisations such as Indigenous Business Australia (IBA) and the National Native Title Council (NNTC) to try to develop tools and mechanisms for Aboriginal and Torres Strait Islander peoples to manage and grow their wealth.

For example, a problem has been identified with the existing mechanisms for holding and distributing financial benefits received as a result of future act agreements, native title settlements and other land related agreements. In order to try and achieve a tailored solution, some groups resort to highly complex legal and

governance arrangements that can be expensive to administer and are not always well understood by the people they serve, contributing to tensions and conflicts.

In 2013 the NNTC in collaboration with the Minerals Council of Australia proposed a new corporate vehicle - the Indigenous Community Development Corporation (ICDC) - designed to meet the task of holding benefits from native title agreements and supporting Indigenous business.<sup>70</sup> Although the ICDC is envisaged as a not-for-profit mechanism which essentially holds, manages and distributes funds, its purpose is wider than that of a charity and so can be used to foster social enterprise and for-profit businesses. Importantly, the ICDC envisages that decisions about the ways funds are used, invested and distributed are to be made in accordance with the free, prior and informed consent of the relevant Indigenous community. The Commission encourages the Government to continue to explore options such as the ICDC.

Another positive initiative has been the launch of the Indigenous Investment Principles (IIPs) during the reporting period in December 2015.<sup>71</sup> The development of the IIPs was facilitated by IBA and involved representatives from over 40 Aboriginal and Torres Strait Islander organisations.

The IIPs provide excellent guidance to all organisations making decisions about monies they hold. They set out principles to guide governance, development of the mandate and spending rules for investment and a sound investment strategy, based on the Santiago Principles for Sovereign Wealth Funds. The Commission supports the adoption of the IIPs by Indigenous groups seeking a culturally suitable framework for investment.

Although the Commission is encouraged by work done so far, more collaboration between government, the private sector and Indigenous organisations is needed to implement tools and mechanisms that ensure a fair distribution of benefits and better financial outcomes for Aboriginal and Torres Strait Islander peoples. This will be a focus of the Indigenous Property Rights Project over the next reporting period.

## (d) Compensation

Compensation for impairment or extinguishment of native title rights and interests remains one of the biggest pieces of unfinished business for Indigenous peoples that must be addressed as a matter of justice and reconciliation. The Indigenous Estate of many groups has already been radically compromised and in many cases lost for good. These groups have less options for pursuing economic development and have suffered enormously from the loss of their land and waters. Though money can never make up for this loss, it can assist groups to achieve their economic goals. It is also required as a matter of justice.

*De Rose v State of South Australia* [2013] FCA 988 (*De Rose*) was the first case in Australia in which a party (the South Australian Government) was ordered to pay compensation to native title holders for the extinguishment of native title rights and interests. The amount of compensation paid was settled between the parties on a confidential basis.

Outside of the reporting period the Federal Court of Australia handed down judgement in *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 (Timber Creek), the first judicial assessment of compensation payable in relation to the extinguishment and impairment of native title rights and interests. The Ngaliwuru and Nungali peoples were awarded \$3,300,261 covering compensation for economic loss (plus interest) and solatium for loss of cultural and spiritual relationship with the land affected.

Prescribed Bodies Corporates (PBCs) and other groups are actively investigating options for pursuing native title compensation in relation to native title areas that have been extinguished or impaired and this is only likely to increase following the Timber Creek judgement. However, this is a costly and time consuming process, as addressed in the COAG Investigation Report.<sup>72</sup>

The ISG/Network endorse the Expert Indigenous Working Group's recommendations in that report:

- to support comprehensive settlement of compensation for extinguishment, importantly including for extinguishment occurring prior to the introduction of the Racial Discrimination Act in 1975; and
- for further investigation into how the process for claiming compensation can be made more accessible.<sup>73</sup>

Simplifying the process for applying for compensation, as well as funding PBCs and other groups to claim their rights to compensation should be an important priority for the Australian Government.

**Text Box 3.7:**

Extract from Investigation into Indigenous Land Administration and Use – Report to the Council of Australian Governments<sup>74</sup>

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The Expert Indigenous Working Group supports initiatives and policies that incentivise and resource the settlement of native title claims by agreement and directing resources to post-determination outcomes, rather than focusing on the mere existence of native title. This should include assistance with strategic planning and establishment of PBCs, the grant of commercially and culturally valuable land to PBCs and Indigenous land holding entities and the comprehensive settlement of compensation for extinguishment (including for pre-1975 extinguishment).

Noting that the question of compensation has generally been deferred, the Expert Indigenous Working Group also recommends that there be further investigation into how the process for claiming compensation for extinguishment and impairment of native title can be made more accessible and streamlined for native title claimants, to reduce litigation costs and assist PBCs build an economic base.

## 3.8 Conclusions and recommendations

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At the Canberra roundtable the necessary elements for the successful implementation of the property rights agenda were discussed.

In particular, in line with calls from other sectors there needs to be a meaningful relationship between those who are working on both property rights and economic development and the highest level of government.

The Commission is pleased at the commitment shown by the Australian Government and the majority of the states and territories through COAG to these issues over the past 18 months. However, this is only the beginning of this reform process. The test will be in the implementation of the reforms identified. Indigenous people are used to endless reports and new policy directions being launched by politicians. For real change to occur, what is required is a relationship with government at all levels based on trust and consistency. The reform process for meaningful economic development must be Indigenous led and government supported.

### Recommendations

**Recommendation 14:** The Australian Government work with the states, territories and relevant stakeholders including the National Native Title Tribunal, to ensure the integration of key information about the Indigenous Estate on state and territory land title information systems.

**Recommendation 15:** The Australian Government support Indigenous land holders to more comprehensively map the extent of their Indigenous Estate.

**Recommendation 16:** The Australian Government support the Indigenous Strategy Group's endorsed model(s) for long-term leasing.

**Recommendation 17:** The Australian Government support the review of state and territory land use planning regimes in consultation with Indigenous organisations to ensure the Traditional Owners of the Indigenous Estate can exercise the right to free, prior and informed consent regarding land use planning decisions.

**Recommendation 18:** The Australian Government:

- recognise the key roles that native title Prescribed Bodies Corporate (PBCs), Native Title Representative Bodies and Service Providers (NTRB/SPs), the National Native Title Council and locally based, Indigenous-led specialist cultural and economic development organisations play in driving and supporting economic development on the Indigenous Estate; and
- ensure these Indigenous-led organisations are properly funded and supported to carry out this important work, in addition to any statutory duties they may have.

**Recommendation 19:** The Australian Government support locally based research and scoping initiatives to identify Indigenous-led economic development opportunities suited to the unique land holdings and strengths of Traditional Owner groups, including opportunities to develop the cultural economy, partner with local operations and 'tap in' to industry initiatives in the broader region.

**Recommendation 20:** The Australian Government fund effective, applied training in business and other skills to build the capacity of Aboriginal and Torres Strait Islander directors and managers.

**Recommendation 21:** The Australian Government support the analysis of risks for both Indigenous land holders and financial institutions with the objective of developing a new risk framework to underpin decision making, investment and business practices regarding the Indigenous Estate in partnership with Indigenous people and financial institutions.

**Recommendation 22:** The Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.

**Recommendation 23:** The Australian government continue to support and resource locally designed employment programs including ranger and other culturally based land management programs beyond the current 2020 commitment.

**Recommendation 24:** The Australian Government support the development of tailored governance arrangements and other tools to support effective benefit sharing and wealth management strategies.

**Recommendation 25:** The Australian Government work with the states and territories to avoid limiting recognition of native title rights to take resources in consent determinations.

**Recommendation 26:** The Australian Government prioritise funding Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) to pursue native title compensation claims on behalf of their clients through litigation or agreement making.

**Recommendation 27:** The Australian Government continue to support and resource the Australian Human Rights Commission to facilitate the Indigenous Property Rights Project with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, in order for the agenda developed by the Indigenous Strategy Group to be further advanced and achieved.

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# Chapter 4: Universal Periodic Review

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## 4.1 Introduction

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Every four and a half years, Australia appears before the United Nations Human Rights Council to have its human rights record reviewed by other countries.

The Universal Periodic Review (UPR) is still a relatively new process – about 9 years old. It is a peer review process, government to government, with the input of United Nations (UN) agencies as well as non-government organisations and national human rights institutions such as the Commission.

Countries who choose to participate in the UPR can make statements – expressing their concerns and making recommendations for action. The government must respond to all recommendations, indicating whether they accept them or simply note them when they do not agree (or do not intend to address them). The government then reports periodically to the UN Human Rights Council on how it is implementing the recommendations, and reports formally on this when it next appears under the UPR four and a half years later.

Australia's second UPR occurred in November 2015. 104 countries spoke and made a total of 290 recommendations. There was significant interest in the UPR about the human rights issues faced by Aboriginal and Torres Strait Islander peoples.

This chapter explains the UPR process and provides information on Australia's recent appearance before the Human Rights Council. The chapter also provides information on the recommendations coming out of UPR and proposes how the recommendations should be implemented and what monitoring should be put in place.

It is more important than ever that constructive and practical monitoring tools are in place to provide Aboriginal and Torres Strait Islander peoples with confidence that outcomes will be delivered and commitments honoured.

This chapter also reflects on the role of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) as the compass to guide the future of Aboriginal and Torres Strait Islander communities.<sup>1</sup> The UNDRIP provides a rights framework for considering any action that affects Aboriginal and Torres Strait Islander peoples, including those actions that constitute implementation of the UPR recommendations.

The Australian Government has committed to work with the Commission to develop a publicly accessible monitoring process for UPR recommendations. In this context, the Commission believes such a monitoring mechanism can be of great value to Aboriginal and Torres Strait Islander peoples to leverage policy and implementation.

The synergy between the UNDRIP and the UPR can be used to develop subject specific indicators that are practical tools to measure implementation. These tools will be useful to the Aboriginal and Torres Strait Islander community, particularly in a time of significant funding and capacity constraints and uncertainty. Additionally, the establishment of the UPR measuring process is particularly important given Australia's bid for a seat on the Human Rights Council.<sup>2</sup>

# 4.2 UPR in context

## (a) Background

The UPR is a process undertaken at the UN Human Rights Council in which the human rights record of a country is reviewed every four and a half years. The review process is a way of taking stock of how well the Australian Government is protecting the human rights of all people in Australia.

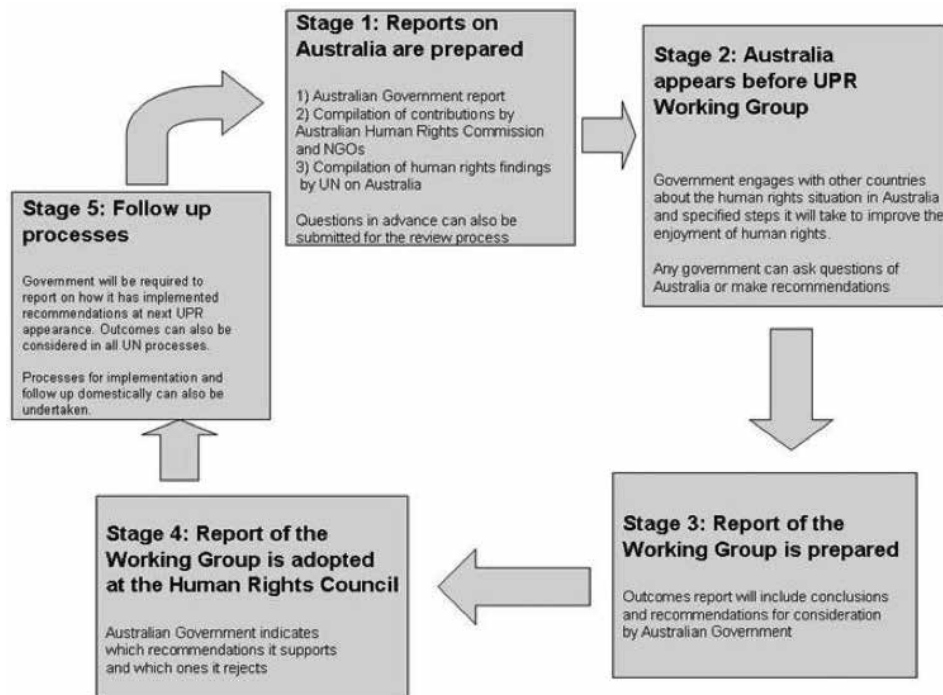
Australia has undergone two reviews, the first occurring in 2011 and the second in 2015. Australia's third cycle review is scheduled for 2020. In the two UPR appearances to date, many countries have taken a specific interest in the rights of Aboriginal and Torres Strait Islander peoples.

The UPR is a peer review process: a dialogue occurs between countries rather than between a country and a body of experts. In this way, the UPR is different to the UN treaty committees that operate under human rights treaties that Australia has ratified.

In practice, the Commission has found the UPR dialogue process to be a very constructive method of informing the international community on human rights issues in Australia while also encouraging the Australian Government to respond to concerns that have been raised.

The dialogue session at the Human Rights Council is only one component of the overall UPR process. Critically, monitoring and reporting is expected to occur throughout the cycle, both prior to and following the actual appearance of the Australian Government at the Human Rights Council.

### Stages of the UPR



Prior to the session, multiple reports are prepared about the enjoyment of human rights in Australia:

- National Report - An Australian Government report on human rights issues in Australia.
- Compilation of UN Information Report – A report reflecting consideration of Australia by human rights treaty committees, complaints procedures and other UN mechanisms.
- Summary of Stakeholders' Information Report – A compilation of the submissions from the Australian Human Rights Commission and non-government organisations (NGOs).

These reports form the UN documentation that other countries draw upon during Australia's appearance. In practice, further lobbying efforts are made by the Commission and NGOs to inform countries of significant human rights issues. This is a key component of ensuring that countries are properly briefed on issues facing Aboriginal and Torres Strait Islander peoples.

During the UPR appearance, the Australian Government engages in a dialogue process with other countries in a three and a half hour question and answer session. Any country can submit questions that they wish to make about Australia in advance giving the Australian Government time to prepare responses.

During the dialogue session the Australian Government reports on how it will improve the enjoyment of human rights in Australia. Other countries comment on progress that has been made since the last UPR and make recommendations on specific human rights issues still facing Australia.

The Australian Government may also make voluntary commitments about actions they intend to take to better protect human rights back home.

Following the session, a UPR Outcomes Report is prepared, which summarises the discussions and sets out all recommendations and voluntary commitments. The UPR Outcomes Report is formally adopted in a plenary session of the Human Rights Council usually one to three months later. At this time the Australian Government, in an addendum report, indicates which recommendations Australia will accept (adopt and implement) and which ones it will note (reject with or without reasons). Opportunities are given during this plenary session for the Commission, NGOs and other countries to comment on the UPR Outcomes Report.

The final and most crucial component of the UPR is the follow-up process. Over the four-year cycle until the next UPR, the Australian Government is expected to implement the accepted recommendations. This implementation process occurs at the federal, state and local levels to ensure Australia is meeting its human rights obligations. The Australian Government will submit a mid-term report to the Human Rights Council part way through the cycle – with the next report due in 2017.

## (b) The first UPR

Australia's first UPR appearance at the Human Rights Council occurred on 27 January 2011. During the first UPR, 53 countries asked Australia about its human rights record and made 145 recommendations. These covered a wide range of human rights issues including the treatment of asylum seekers, Aboriginal and Torres Strait Islander peoples, multiculturalism and racism, and the status of Australia's obligations under international human rights law.<sup>3</sup>

Over 90 percent of recommendations were accepted in full or in part by the Australian Government at the time. Australia also made a number of voluntary commitments during the dialogue, including the appointment of a full-time Race Discrimination Commissioner and a commitment to tabling the UPR recommendations in Parliament.<sup>4</sup>

During the dialogue process there was a strong focus on Indigenous issues. Many countries raised concerns around the health inequalities between Indigenous and non-Indigenous Australians. The dialogue also emphasised the need to combat racial discrimination, particularly against Aboriginal and Torres Strait Islander peoples.<sup>5</sup>

In response to these questions, the Australian delegation reaffirmed support for the UNDRIP, referred to the establishment of National Congress of Australia's First Peoples (National Congress) and stated the Australian Government's intent to pursue constitutional recognition of Indigenous Australians. The Australian delegation also acknowledged the significant disadvantages facing Aboriginal and Torres Strait Islander peoples and reaffirmed the Close the Gap agenda.<sup>6</sup>

A total of 39 recommendations were made by other countries relating to Aboriginal and Torres Strait Islander peoples. This included recommendations to reduce inequalities between Indigenous and non-Indigenous Australians, constitutional recognition, reducing racial discrimination and combatting violence against Indigenous women. Six countries also made recommendations that Australia make greater efforts to consult with Aboriginal and Torres Strait Islander peoples and ensure greater participation in decision making.<sup>7</sup>

The Commission was pleased to see that the Australian Government at the time made efforts to engage with the UPR process and showed an intent to implement the recommendations. The Australian Government accepted 38 of the 39 recommendations that focused on Aboriginal and Torres Strait Islander peoples.<sup>8</sup> In 2012, the Australian Government released a National Human Rights Action Plan, which mapped many of these recommendations, linking them to specific government actions.<sup>9</sup>

Notably, in accepting recommendations the government indicated that it would consult with the National Congress in determining how to implement the recommendations.

In 2013, the incoming government did not continue to use the National Action Plan as a basis for implementing UPR recommendations. An alternative approach to implementation was not developed.

The effect of this is that policies arising from these recommendations, targeted at improving the human rights of Indigenous Australians, were not effectively implemented or monitored by the Australian Government.

This is one of the reasons why the Commission developed annual implementation progress reports, for the four years since Australia's first UPR appearance.<sup>10</sup> These reports, developed in consultation with state and territory human rights agencies, were submitted each year to the Human Rights Council. The reports contain information on the progress made in addressing UPR commitments and raised emerging human rights concerns.

The progress reports document the disjointed and ad hoc approach taken by the Australian Government towards issues facing Aboriginal and Torres Strait Islander peoples. While steps have been taken in certain areas such as constitutional recognition and through the Close the Gap Campaign, there has been a lack of concerted action by government to follow through on broader policy areas. The progress reports also consistently raise concerns around the lack of efforts to promote the inclusion and participation of Aboriginal and Torres Strait Islander peoples in consultation and decision making processes.<sup>11</sup>

The lack of action and clarity, combined with the funding cuts facing many Aboriginal and Torres Strait Islander representative bodies is deeply concerning and has caused widespread uncertainty in the community. Mr Mick Gooda, former Aboriginal and Torres Strait Islander Social Justice Commissioner, consistently raised these issues during his six year term.<sup>12</sup>

In the final progress report before the second UPR, the Commission submitted that of the 38 accepted recommendations that relate to Aboriginal and Torres Strait Islander peoples, none had been fully implemented. Though some action had been taken since the first UPR, these actions were not sufficient to substantially address the underlying human rights concerns.



The Commission reported that 29 recommendations relating to Aboriginal and Torres Strait Islander peoples had been partly implemented. None of the six recommendations relating to participation and decision making had been implemented.<sup>13</sup> A summary of the implementation status of these recommendations is provided in Text Box 4.1 below.

**Text Box 4.1:**

Implementation status of first UPR (2011 – 2014) recommendations that relate to Aboriginal and Torres Strait Islander peoples<sup>14</sup>

Total accepted recommendations	38
Recommendations that were fully implemented	0
Recommendations that were partly implemented	29
Recommendations that were not implemented	9
Recommendations that were not implemented specific to decision making and participation	6

These statistics reaffirm concerns of the Aboriginal and Torres Strait Islander community that there has not been sufficient progress towards realising their rights. Though there were a number of reasons for this lack of progress, the fact remains that many of the issues raised in 2011 were insufficiently addressed by the end of the cycle in 2015.

By actively reporting on the poor level of implementation of the 2011 UPR recommendations, these ongoing concerns were presented in a context that drew the attention of other countries in the 2015 cycle of the UPR.

## 4.3 UPR in 2015

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### (a) Pre-sessional advocacy

The UPR was designed to provide information on a country's human rights record in order to motivate governments to fulfil their human rights obligations.<sup>15</sup> Despite the hopes of the Commission, the first UPR did not achieve this goal, as demonstrated by the poor level of full implementation of recommendations. It was evident that more sustained action needed to be taken by the Australian Government to ensure that the second UPR was a more effective mechanism.

For this reason, the Commission and a coalition of Australian NGOs (NGO Coalition), coordinated their advocacy efforts for the second UPR. The goal of these efforts was to engage with the Australian Government and representatives from member states, so that future recommendations address the human rights issues facing Australia.

Importantly, the NGO Coalition coordinated the contributions of over 190 organisations and included input from key Aboriginal and Torres Strait Islander representative bodies including the National Congress.<sup>16</sup> This collaborative approach ensured that the issues facing the Aboriginal and Torres Strait Islander community were integrated into advocacy efforts.

The pre-sessional advocacy for the second UPR consisted of three parts:

- submissions to the Human Rights Council;
- a UPR briefing event in Canberra for representatives from other countries; and
- briefings in Geneva for representatives from other countries.

Submissions by the Commission and by the NGO Coalition were transmitted to the Human Rights Council and formed a part of the UN stakeholder report.<sup>17</sup> The Commission's submission included the following recommendations:

- **The UNDRIP:** Government develop, in partnership with Indigenous peoples, a National Strategy to give effect to the UNDRIP; include the UNDRIP in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); and review existing legislation, policies and programmes for conformity with the UNDRIP.
- **Supporting representative bodies:** Government provide adequate funding to the National Congress and to Indigenous legal aid.
- **Constitutional recognition:** Government finalise a model for constitutional recognition, following engagement of Indigenous peoples.
- **Equality and closing the gap:** Government, working with Indigenous peoples, redouble efforts to achieve the Closing the Gap targets, and implement the recommendations of the Close the Gap Campaign's *Progress and Priorities Report 2015*.
- **Violence against Indigenous women:** Government implement the National Plan to Reduce Violence Against Women and their Children with a consideration of the needs of Aboriginal and Torres Strait Islander women; include adequate and sustained funding for appropriate programs and services; and include adequate funding for independent monitoring and evaluation.
- **Access to justice:** Government adopt targets and introduce justice reinvestment trials to reduce Indigenous incarceration rates; adopt measures to improve access to justice for people with disabilities; develop alternative care arrangements where people are found unfit to plead for reasons including



cognitive impairment or acquired brain injury; expand the use of diversionary programs for juveniles; raise the minimum age of criminal responsibility; and cease detention of children in adult facilities.<sup>18</sup>

The NGO Coalition raised similar issues in their submission and reported on native title, the Northern Territory intervention, stolen generations and stolen wages.<sup>19</sup> These submissions provided a useful snapshot of the human rights issues facing Aboriginal and Torres Strait Islander peoples.

On 2 July 2015, the Commission and the NGO Coalition hosted a UPR briefing event for ambassadors and other heads of missions in Canberra. Over 80 countries attended the event, showing strong international interest in the human rights record of Australia.

The briefing provided an opportunity for these countries to receive information on specific issues including the human rights concerns of Aboriginal Torres Strait Islander peoples.<sup>20</sup> Les Malezer from National Congress spoke of the significant gap in health and living standards facing the Indigenous community and the need for greater engagement with representative bodies to achieve constitutional recognition. Following the event, country representatives who had particular topics of interest were able to organise individual briefings.



**Photo: UPR briefing event in Canberra including President Gillian Triggs and Les Malezer from National Congress, 2 July 2015**

The successful engagement in Canberra was supported with further lobbying efforts in Geneva, Switzerland. Representatives from the Commission and the NGO Coalition travelled to Geneva and held a further 35 meetings with representatives from member states. Additionally, the Commission and the NGO Coalition participated in a pre-sessional briefing hosted by the Geneva based NGO, 'UPR Info' which approximately 100 people attended.<sup>21</sup>

The overall efforts resulted in the Commission and the NGO Coalition briefing over 100 countries. Many of these countries showed an interest in issues facing the Aboriginal and Torres Strait Islander community. The Commission believes that these lobbying efforts were crucial in ensuring that member states were informed on the issues prior to Australia's second UPR appearance.

## (b) Appearance and adoption of recommendations

Three reports were made available to other UN member states prior to Australia's appearance: the National Report, the Compilation of UN Information Report and the Summary of Stakeholders' Information Report.<sup>22</sup> Additionally, ten member states prepared a list of questions which were submitted to Australia in advance.<sup>23</sup>

Australia's second UPR appearance at the Human Rights Council occurred on 9 November 2015. The Commission was privileged to attend the session and see first-hand this unique and interactive dialogue process.

During the session the Australian delegation provided a statement on Australia's human rights record and engaged in an interactive dialogue with countries that wished to participate. Each other country was provided an equal amount of time to provide a statement and to make recommendations to Australia.



**Photo: President Gillian Triggs and former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda at the Human Rights Council for Australia's second UPR, 9 November 2015**

The Commission was encouraged at the level of interest in Australia, with 104 countries taking part in the dialogue process.<sup>24</sup> The session was highly constructive and covered a wide range of human rights issues. A

total of 290 recommendations were made by countries during the session.<sup>25</sup> The Commission noted that only six other countries have received more recommendations during their UPR.<sup>26</sup>

During the dialogue, the Australian delegation committed to engaging with the Commission and civil society organisations on human rights issues in Australia. The Australian delegation also announced a number of voluntary commitments:

- Committing to a referendum on constitutional recognition of Indigenous peoples in the next term of parliament [45th parliament] and committing to a national consultation process
- Committing to a humanitarian intake of 12,000 Syrian and Iraqi refugees and additional funding to the Syrian humanitarian crisis
- Funding of \$100million to combat family violence, including front line services and specific measures for Indigenous women
- Improving the criminal justice system in its treatment of people with disabilities that are unfit to plead, including an effort to analyse data and develop best practice
- Advocating globally for the abolition of the death penalty
- Promoting the rights of older persons through existing human rights mechanisms including UPR and human rights treaty reporting
- Removing exemptions for states and territories from the operation of anti-discrimination laws on the grounds of sexual orientation, gender identity and intersex status
- Promoting human rights through foreign aid programmes including a commitment to the international Indigenous Peoples Strategy 2015-2019
- Cooperating with the Australian Human Rights Commission to develop a public and accessible process for monitoring Australia's progress against the UPR recommendations and to develop a standing national mechanism to strengthen Australia's overall engagement with UN human rights reporting.<sup>27</sup>

Although some of these voluntary commitments had been announced previously, the Commission was encouraged that the government delegation was willing to make some new firm commitments particularly around consultation and cooperation.

During the dialogue, many human rights issues were raised, focussing heavily on asylum seeker policies and the rights of Aboriginal and Torres Strait Islander peoples. Many countries applauded the commitment to constitutional recognition but also raised their concerns around racial discrimination and the disparity in health outcomes.<sup>28</sup>

In response, the Australian delegation reaffirmed its commitment to closing the gap and stated that the 'Government is committed to building a partnership with Indigenous Australians and consulting on decisions that affect them'.<sup>29</sup> The Australian delegation also discussed the Indigenous Advancement Strategy, initiatives to improve school attendance and initiatives to tackle Indigenous incarceration rates.<sup>30</sup>

Overall, 54 recommendations were made relating to Aboriginal and Torres Strait Islander peoples.<sup>31</sup> These recommendations reflected a wide range of issues, and addressed many of the concerns that were raised by the Commission and the NGO Coalition during their advocacy. A full list of these recommendations and the countries that made them are provided in Appendix 5.

Following the session, former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda

provided an address on the UPR in an event hosted by the Australian mission in Geneva. The event provided another opportunity to reiterate the importance of the UPR in giving a practical effect to human rights and the importance of using the UNDRIP to further these rights within the Aboriginal and Torres Strait Islander community.

Following the UPR, the Australian Government was given a period of time to consider all of the recommendations and decide which ones they would choose to implement over the next four years. On 17 March 2016, the final report on Australia's UPR was presented to the Human Rights Council.<sup>32</sup> The government response to the recommendations relating to Aboriginal and Torres Strait Islanders are summarised below in Text Box 4.2. A full list of these recommendations and the government response is provided in Appendix 5.

**Text Box 4.2:**

UPR recommendations relating to Aboriginal and Torres Strait Islander peoples<sup>33</sup>

Category	Accepted	Noted but to be considered further	Noted rejected	Total
Equality and closing the gap	16	1	0	17
The UNDRIP	4	0	5	9
Access to justice	7	2	0	9
Consulting and supporting representative bodies	3	1	1	5
Constitutional recognition	1	2	1	4
Property rights	4	0	0	4
Racial discrimination	2	0	1	3
Birth registrations	3	0	0	3
Remote communities	3	1	0	4
Indigenous languages and culture	2	0	0	2
Indigenous women and domestic violence	2	0	0	2
Total	40	6	8	54

The government accepted 40 out of the 54 recommendations relating to Aboriginal and Torres Strait Islander peoples. In their response, the government stated its support of existing laws, policies and programmes in particular the position of the Aboriginal and Torres Strait Islander Social Justice Commissioner, the implementation of the Indigenous Advancement Strategy and work being done to reduce health and other inequalities.<sup>34</sup> The government also affirmed its continued support of the preservation and protection of Aboriginal and Torres Strait Islander arts, language and culture.<sup>35</sup> Regarding the UNDRIP, the government stated:

Australia supports the promotion of, and respect for, the principles of the Declaration on the Rights of Indigenous Peoples. Australia aims to ensure that laws and practical actions give effect to the aims of the Declaration.<sup>36</sup>

Though Indigenous people are encouraged by this message, it is important to note that the government rejected recommendations to develop strategies that give effect to the UNDRIP. The government also rejected a recommendation relating to the removal of race provisions in the Constitution and a recommendation relating to the harmonisation of legislation with the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD). A list of the rejected recommendations is provided in Appendix 5.

Overall, the government was supportive of the UPR recommendations, indicating a clear and public commitment to address the human rights concerns of Aboriginal and Torres Strait Islander peoples. It is important that this commitment translates into meaningful implementation of policies that delivers real outcomes to the Aboriginal and Torres Strait Islander community.

## 4.4 Monitoring and implementation

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The 40 UPR recommendations on Aboriginal and Torres Strait Islander peoples that were accepted were done so on the ‘basis of existing law, policy and action’.<sup>37</sup> This is a troubling sentiment that suggests that current policies and action are sufficient to address all of these human rights concerns.

Over the next four years, action must be taken to address the commitments made by the government during the UPR. It is vital, that this process is not seen merely as a box ticking exercise. Additionally, the Australian Government must consider mechanisms to ensure that states and territories fulfil their human rights obligations under the UPR. It is therefore imperative that a monitoring system is in place to identify the effectiveness of existing policy, and to provide an evidence base where further action is needed.

Ultimately, while the government is responsible for implementing recommendations, in practice it will fall to Aboriginal and Torres Strait Islander representative bodies to monitor and hold government to account. In a period of significant resource constraints, it is vital that this monitoring process is both practical and feasible.

The previous Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda has said that the UNDRIP is an empowering document that provides a framework for the realisation of the rights of Aboriginal and Torres Strait Islander peoples.<sup>38</sup> The Commission endorses this view. By applying the UNDRIP directly to the UPR recommendations Aboriginal and Torres Strait Islander peoples can develop indicators that are both practical and constructive.

Connecting the UPR process with the UNDRIP, creates a system that entrenches the rights of Aboriginal and Torres Strait Islander peoples within human rights processes. This synergy has been raised by the former Special Rapporteur on the rights of indigenous peoples:

the Universal Periodic Review (UPR) of the Human Rights Council is an important tool in promoting the rights affirmed in the Declaration. Given the complementary and interrelated character of international human rights law, as well as the existing and developing jurisprudence on various human rights treaties by international bodies and mechanisms, it is clear that the provisions of the Declaration should factor into the interpretation of States’ international human rights obligations and the evaluation of the positive developments and challenges faced when implementing them.

It is foreseeable that, as the Declaration is gradually mainstreamed and operationalized in the practice of both States and human rights bodies and mechanisms, it will become entrenched in the UPR process, contributing to defining the human rights obligations of the States under review and guiding the recommendations of the Human Rights Council’s Working Group on the Universal Periodic Review with regard to indigenous peoples.<sup>39</sup>

The complementary functions of the UPR and the UNDRIP, mean that much of the monitoring and implementation of recommendations could be a very useful means of helping to realise the rights that are reaffirmed in the UNDRIP.

As raised in the *Social Justice and Native Title Report 2013*, the ‘principled’ approach, can be a useful method of giving effect to the UNDRIP.<sup>40</sup> Under this approach, the underlying principles of the UNDRIP are used to create practical guidance on how human rights can be brought into effect. The four main principles of the UNDRIP are:

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

While the UNDRIP is directly mentioned in some recommendations,<sup>41</sup> the Commission believe that all of the accepted recommendations can be linked to these principles. For example, the following recommendations are directly linked to the principle of effective participation:

No.	Recommendation	Final response	Explanatory response
87	Continue to support indigenous institutions that bring cohesion to communities, such as the National Congress of the First Peoples of Australia (Peru);	Accepts	On the basis of existing law, policy and action
88	Take necessary measure to ensure consultation and participation of indigenous peoples in the processes of the elaboration of public policies that is of interest to them (Paraguay);	Accepts	On the basis of existing law, policy and action
89	Ensure adequate consultations with indigenous peoples in the formulation of policies affecting them (India);	Accepts	On the basis of existing law, policy and action
90	Take all necessary measures to ensure Aboriginal and Torres Strait Islander Peoples give their consent to the development and implementation of policies and programmes that impact upon their communities and futures (Namibia);	Notes	
91	Ensure that indigenous peoples are consulted when considering the viability of remote communities, and that those affected by closures of communities receive transitional support and unimpeded access to ancestral lands (United States of America);	Notes	Will further consider

By applying the principles of the UNDRIP to the UPR recommendations, it is possible to develop subject specific indicators that are practical measuring tools for Aboriginal and Torres Strait Islander representative bodies.

Measuring these indicators will support advocacy by providing an evidence base where policies and actions are not achieving their stated objectives. This evidence base can also be used by representative bodies to identify their own strategic priorities, which is of particular importance given funding and capacity constraints.

The following case studies show how subject specific indicators can be developed and how they can form part of the monitoring process. The Commission encourage representative bodies to use these examples as a guide to develop their own indicators for the other relevant UPR recommendations. These indicators can form the basis for the UPR monitoring system over the next four years.

### (a) Case Study – Equality and closing the gap

The disparity between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians in health, education and economic outcomes is one of the most significant human rights issues facing Australia. It was encouraging to see many countries raise these issues during the interactive dialogue. 17 countries made recommendations on closing the gap in relation to health, education, employment opportunity, housing and access to justice.<sup>42</sup>

No.	Recommendation	Final response	Explanatory response
93	Continue to work towards closing the existing gaps in the protection of human rights and the promotion of welfare for indigenous peoples in order to achieve sustainable economic and social development (Thailand);	Accepts	On the basis of existing law, policy and action
94	Continue ongoing efforts to close the gaps in opportunities between indigenous and non-indigenous Australians (Italy);	Accepts	On the basis of existing law, policy and action
96	Continue efforts to close the gap in opportunities and life outcomes between Indigenous and non-Indigenous Australians, according to the Close the Gap Campaign and its Progress and Priorities report 2015 (Croatia);	Notes	Will further consider
97	Continue making progress in the implementation of the Indigenous Advancement Strategy to promote better opportunities in the areas of education, health and employment for indigenous communities (Colombia);	Accepts	On the basis of existing law, policy and action
98	Continue its efforts in closing the gap between indigenous and non-indigenous Australians in health, education, employment opportunities and access to justice (Malaysia);	Accepts	On the basis of existing law, policy and action
99	Make further efforts to protect and promote the human rights of indigenous people, including the taking of measures to address the issue of poverty among them (Japan);	Accepts	On the basis of existing law, policy and action
100	Take effective legislative and practical measures for the comprehensive protection and promotion of civil, social, economic and cultural rights of indigenous peoples (Uzbekistan);	Accepts	On the basis of existing law, policy and action
103	Step up efforts to address the economic and social inequalities affecting the indigenous peoples (Luxembourg);	Accepts	On the basis of existing law, policy and action
105	Continue strengthening the access mechanisms to social services for the Aboriginal and Torres Strait Islander children (Timor-Leste);	Accepts	On the basis of existing law, policy and action
107	Take immediate measures to ensure that the indigenous people of Australia have access to health services, education, and to full employment opportunities (Maldives);	Accepts	On the basis of existing law, policy and action
108	Continue strengthening measures to address disparities in the access to education and health services for aboriginal and islander children and their families (Ecuador);	Accepts	On the basis of existing law, policy and action



109	Continue to implement the necessary measures to ensure indigenous children access to quality education (Lao People's Democratic Republic);	Accepts	On the basis of existing law, policy and action
110	Continue to implement indigenous education reforms (Slovakia);	Accepts	On the basis of existing law, policy and action
111	Ensure access to good-quality education, including postgraduate education and vocational training, for indigenous women (United Arab Emirates);	Accepts	On the basis of existing law, policy and action
112	Intensify efforts in enhancing the rights of Indigenous Australians: by addressing the underlying causes of their plight, by providing opportunities in health, education, housing and employment; and addressing the high rate of their incarceration in prison (Kenya);	Accepts	On the basis of existing law, policy and action
127	Continue to address inequalities affecting human rights in the areas of health, education, employment and income that disproportionately affect indigenous peoples and other minority groups (New Zealand);	Accepts	On the basis of existing law, policy and action
210	Take measures to ensure the universal access to healthcare services, paying particular attention to the needs of persons living in rural and remote areas (Portugal);	Accepts	On the basis of existing law, policy and action

The Australian Government accepted 16 recommendations on the basis of existing law, policy and action. One recommendation was noted for further consideration.<sup>43</sup>

Government policies to close the gap, demonstrate clear and targeted action being taken that will implement the above UPR recommendations. The Closing the Gap targets set out indicators in health, education and economic participation. These targets are measured annually and reported on by government.<sup>44</sup> These indicators are then used to develop government policy and encourage consistent implementation over the long-term. As stated in last year's *Social Justice and Native Title Report*, the implementation of the *National Aboriginal and Torres Strait Islander Health Plan 2013-2023* is an encouraging sign of effective government action.<sup>45</sup>

In the ten years since the Closing the Gap targets were developed, progress has been mixed. As of 2016, targets to halve the gap in child mortality and Year 12 attainment are on track. Progress to close the gap in reading and numeracy standards has also been mixed and new targets have been developed in relation to enrolment in early childhood education and school attendance. While these are long term goals, the targets to close the gap on life expectancy and in employment have not been met.<sup>46</sup>

These indicators provide the basis for Aboriginal and Torres Strait Islander representative bodies to advocate for changes where needed, or provide support to existing policies that require a sustained approach. Australia's peak Aboriginal and Torres Strait Islander and non-Indigenous health bodies, health professional bodies and human rights organisations comprise the Steering Committee of the Close the Gap Campaign. The Steering Committee has consistently reported on the lack of success in closing the gap on life expectancy.<sup>47</sup> While the Steering Committee has called for adequate and sustained resources towards Aboriginal and Torres Strait Islander health, there has also been an acknowledgement that improvements of life expectancy take time and will require a long-term approach.<sup>48</sup>

The Steering Committee has also raised underlying factors that affect health outcomes, including the overrepresentation of Aboriginal and Torres Strait Islander peoples within the criminal justice system.<sup>49</sup> By advocating for a new Closing the Gap target on incarceration rates, the Steering Committee compels government to consider additional actions that can help achieve the other Closing the Gap targets.<sup>50</sup>

By linking back to the underlying principles of the UNDRIP, Aboriginal and Torres Strait Islander people can see how effective participation by representative bodies and a commitment to equality and non-discrimination underlie much of the Close the Gap Campaign. Aboriginal and Torres Strait Islander people acknowledge, that while progress has been mixed, the Close the Gap Campaign is a great example of how targeted indicators and a monitoring mechanism can engage the government and promote policy and implementation.

Aboriginal and Torres Strait Islander people are hopeful, that this sort of mechanism will help implement all of the UPR recommendations over the coming years.

## (b) Case Study – Access to justice

The overrepresentation of Aboriginal and Torres Strait Islander peoples as both victims and offenders remains one of the most glaring disparities between Indigenous and non-Indigenous Australians.

The importance of this human rights issue was raised during the UPR dialogue. Nine countries made recommendations to address the need for greater access to justice.<sup>51</sup>

No.	Recommendation	Australian response	Explanatory response
98	Continue its efforts in closing the gap between indigenous and non-indigenous Australians in health, education, employment opportunities and access to justice (Malaysia);	Accepts	On the basis of existing law, policy and action
104	Ensure that Aboriginal and other indigenous communities are accorded equal access to services including to judicial remedies for discrimination and racism (Rwanda);	Accepts	On the basis of existing law, policy and action
112	Intensify efforts in enhancing the rights of Indigenous Australians: by addressing the underlying causes of their plight, by providing opportunities in health, education, housing and employment; and addressing the high rate of their incarceration in prison (Kenya);	Accepts	On the basis of existing law, policy and action
113	Reduce the rate of family separation of indigenous peoples caused, among others, by the removal of babies and children from their families and the imprisonment of juveniles and adults (Paraguay);	Accepts	On the basis of existing law, policy and action
194	Prevent the indefinite detention of persons with mental disabilities (Spain);	Notes	Will further consider
196	Guarantee the end of the unwarranted use of prisons for the management of persons with disabilities (Islamic Republic of Iran);	Notes	Will further consider

203	Continue efforts to train authorities involved in the administration and handling of justice in cases that affect indigenous peoples on the human rights of this group of society and review the cases of indigenous detainees, in particular children and women, with a view to providing them adequate assistance (Mexico);	Accepts	On the basis of existing law, policy and action
204	Continue to work, in partnership with Aboriginal and Torres Strait Islander communities, to reduce indigenous incarceration rates (Ireland);	Accepts	On the basis of existing law, policy and action
205	Increase efforts to reduce the imprisonment of indigenous Australians (Uruguay);	Accepts	On the basis of existing law, policy and action

The Australian Government accepted seven recommendations on the basis of existing law, policy and action. A further two recommendations relating to the indefinite detention of people with disability were noted for further consideration.<sup>52</sup>

The Commission strongly challenges the assumption that existing laws, policy and action are sufficient to address the high rates of incarceration and re-incarceration of Aboriginal and Torres Strait Islander peoples.

The paperless arrest powers in the Northern Territory that were raised in both this and last year's *Social Justice and Native Title Report*, have disproportionately impacted Aboriginal and Torres Strait Islander peoples.<sup>53</sup> These sorts of laws entrench the disadvantage experienced by Indigenous peoples within the criminal justice system.

For many years, government policy and actions in addressing incarceration rates have been poorly implemented or disregarded. For example, the National Indigenous Law and Justice Framework 2009-2015 was a policy framework developed by the Standing Committee of Attorneys-General Working Group. The framework contained many actions aimed at creating safer communities, addressing alcohol and substance abuse, and strengthening Indigenous communities through partnerships.<sup>54</sup> In 2016, there is no indication that the Framework has been used for its intended purpose, with little or no action taken.

Current statistics indicate that the number of Aboriginal and Torres Strait Islander people in prison has increased by nearly 84% over the last decade. Aboriginal and Torres Strait Islander adults are 15 times more likely to be imprisoned than non-Indigenous Australian's.<sup>55</sup> Additionally, Aboriginal and Torres Strait Islander prisoners had their first contact with police 3.4 years earlier than non-Indigenous inmates and were 2.4 times more likely to have spent time in juvenile justice custody than non-Indigenous inmates.<sup>56</sup>

Furthermore, the detention of Aboriginal Torres Strait Islander persons with cognitive or mental disabilities remains a significant concern. A recent report found that:

Indigenous people in the MHDCD (mental health disorders and cognitive disabilities) cohort are significantly more likely to have experienced earlier and more frequent contact with the criminal justice system and greater disadvantage than non-Indigenous people. Indigenous people in the cohort were significantly more likely to: have been in out-of-home-care, to come into contact with police at a younger age and at a higher rate as a victim and offender, to have higher numbers and rates of convictions, more episodes of remand, and higher rates of homelessness than non-Indigenous people.<sup>57</sup>

These statistics suggest that a 'business as usual' approach to implementing these recommendations will be inadequate. It is therefore vital, the monitoring and implementation of recommendations occurs through the

lens of the UNDRIP. Self-determination and participation in decision making processes are key to improving the rights and wellbeing of Aboriginal and Torres Strait Islander people within the criminal justice system.

Since the *Social Justice Report 2009*, the Australian Government has been continually urged to include justice as a Closing the Gap target and to consider the use of justice reinvestment strategies. This call has been echoed by the National Congress.<sup>58</sup> These are the sorts of measures that engage Aboriginal and Torres Strait Islander communities and provide an opportunity to embed participation and monitoring processes within government policy.

A greater focus on engaging with Aboriginal and Torres Strait Islander representative bodies will allow the development of further indicators. It is vital that government provide an opportunity for these bodies to participate in the UPR implementation process as they are ideally placed to both monitor and give effect to government actions. Therefore, a clear action for government is to ensure that Aboriginal and Torres Strait Islander representative bodies, including Indigenous legal services and National Congress, are adequately funded.<sup>59</sup>

These sorts of actions developed using the framework of the UNDRIP, will not only help implement the UPR recommendations, but will also help protect the rights contained with the UNDRIP. In this way, government actions that are developed in consultation with representative bodies, will effectively implement UPR recommendations and improve the lives of Aboriginal and Torres Strait Islander peoples.

### (c) Case Study – Remote communities

Cultural heritage is an integral part of the lives of Aboriginal and Torres Strait Islander peoples. To the Aboriginal and Torres Strait Islander community, culture is inherent to connection to land and identity, which is why the closure of remote communities remains such a contentious issue. The rights of Aboriginal and Torres Strait Islander peoples living in remote communities were raised by four member states during the UPR.<sup>60</sup>

No.	Recommendation	Final response	Explanatory response
91	Ensure that indigenous peoples are consulted when considering the viability of remote communities, and that those affected by closures of communities receive transitional support and unimpeded access to ancestral lands (United States of America);	Notes	Will further consider
97	Continue making progress in the implementation of the Indigenous Advancement Strategy to promote better opportunities in the areas of education, health and employment for indigenous communities (Colombia);	Accepts	On the basis of existing law, policy and action
136	Protect the rights of indigenous peoples, peasants and other people working in rural areas (Bolivia (Plurinational State of));	Accepts	On the basis of existing law, policy and action
210	Take measures to ensure the universal access to healthcare services, paying particular attention to the needs of persons living in rural and remote areas (Portugal);	Accepts	On the basis of existing law, policy and action

The Australian Government accepted three of these recommendations on the basis of existing law, policy and action. A recommendation that called for consultations and transitional support when considering the closure of remote communities was noted for further consideration.<sup>61</sup>

Existing policies and action in this area have been mixed. The Remote Australia Strategies Programme (RAS), is administered by the Australian Government and was established to improve education, employment and community safety in remote areas.<sup>62</sup> \$290.6 million has been dedicated to the RAS from 2014 to 2018. However, in 2014, the Australian Government reached agreements with the Queensland, Western Australian, Victorian and Tasmanian governments that would see these states assume responsibility for essential services in remote Indigenous communities. In Western Australia, there has been widespread concerns around proposals to close or defund services to remote communities that are not considered viable.<sup>63</sup>

One of the underlying principles of the UNDRIP, is ensuring the protection and promotion of cultures. At the heart of the identity of Aboriginal and Torres Strait Islander peoples is their distinct culture, deeply rooted in tradition, knowledge and the land of which they are a part.<sup>64</sup> Aboriginal and Torres Strait Islander peoples though 3% of the Australian population, make up 15% of the population in remote areas and 49% in very remote areas.<sup>65</sup> The Commission is wary of the assumption that the above government actions and policies will sufficiently protect cultural rights if Aboriginal and Torres Strait Islander people are forced to leave their communities.

As stated in last year's *Social Justice and Native Title Report*, governments should not close or defund services to remote Aboriginal communities (particularly those in Western Australia) without proper consultation and the free, prior and informed consent of the communities concerned.<sup>66</sup> Using the UNDRIP principle of effective participation, Aboriginal and Torres Strait Islander people can develop indicators to track consultations, noting whether they have occurred in each remote community and who was involved in the process. It falls to Aboriginal and Torres Strait Islander representative bodies to track this progress and to ensure the specific concerns of the community have been properly addressed. As such, this process requires that Aboriginal and Torres Strait Islander representative bodies are properly funded to engage in the process.

By developing and tracking these indicators, representative bodies can use the UPR monitoring process as a tool to improve the rights of Aboriginal and Torres Strait Islander peoples living in these remote communities.

## 4.5 Further Discussion

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The UPR is a means of impacting on policy and its implementation, by holding the government to its human rights commitments in international fora. Alongside the UNDRIP, there are other tools and approaches that can be used to develop a monitoring mechanism that can easily be used by representative bodies.

The UN Sustainable Development Goals (SDGs) are an adopted set of targets and indicators that member states are expected to meet by 2030.<sup>67</sup> The Australian Government has made a firm commitment to advance the SDGs.<sup>68</sup> The SDGs cover a range of issues, but have goals that are directly relevant to the rights of Aboriginal and Torres Strait Islander peoples including:

- Goal 1: No poverty
- Goal 2: Zero hunger
- Goal 3: Good-health and well-being
- Goal 4: Quality education
- Goal 8: Decent work and economic growth
- Goal 10: Reduced inequalities
- Goal 16: Peace, justice and strong institutions

By mapping these goals against the UPR recommendations, Aboriginal and Torres Strait Islander people can use the SDG indicators as a means of monitoring UPR implementation. The Danish Institute for Human Rights has developed a guide that links the SDGs with UN human rights instruments, including the UNDRIP.<sup>69</sup> The Commission believes this guide, can be of great use to the government and representative bodies when choosing indicators for monitoring UPR implementation.

The government's commitment to the UPR recommendations, is also reinforced by Australia's bid for a seat on the Human Rights Council.<sup>70</sup> Australian candidacy will be campaigned on five pillars including the 'rights of Indigenous peoples'.<sup>71</sup> Australia's commitment to indigenous people globally, must be matched by progress in protecting the rights of Aboriginal and Torres Strait Islander peoples. The implementation of the UPR recommendations is a clear method of demonstrating the government commitment to human rights, and will be a useful platform for the government to lobby for the position on the Human Rights Council.

## 4.6 Conclusions and Recommendations

The UPR provides a clear and transparent means of holding governments to account on their human rights record. The government commitments made through the UPR provide the foundation on which to advocate for a human rights based approach to the affairs of Aboriginal and Torres Strait Islander peoples. Additionally, the sustained and practical monitoring of implementation of recommendations provides the evidence base to promote accountability of government.

The Commission is optimistic that the development of indicators using the framework of the UNDRIP, can provide representative bodies with a practical means of monitoring progress. The monitoring process will also reinforce government engagement with the Aboriginal and Torres Strait Islander community.

In saying this, the Australian Government must ensure that the next four years are not wasted, and that clear and measurable actions are taken to implement the UPR recommendations through the framework of the UNDRIP. The Commission encourages all parties to leverage the UPR to help realise the rights of Aboriginal and Torres Strait Islander peoples.

### Recommendations:

**Recommendation 28:** The Australian Government, in cooperation with representative bodies, use the UNDRIP to develop subject specific indicators and work with the Australian Human Rights Commission to monitor the implementation of UPR recommendations relating to Aboriginal and Torres Strait Islander peoples.

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# Appendix 1

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**Damian Griffis, Chief Executive Officer**

First Peoples Disability Network

**Scott Avery, Policy and Research Director**

First Peoples Disability Network

Goldfields Land and Sea Council

**Greg Marks**

Indigenous Law Centre, UNSW Law

**Leon Terrill, Research Director**

Indigenous Law Centre, UNSW Law

Indigenous Strategy Group and Indigenous Property Rights Network members

Kimberley Land Council

**Rob Houston**

Lawyer

**Louise Glanville, Deputy Chief Officer Stakeholder Relations and Organisational Capability Group**

National Disability Insurance Agency

**Glen Kelly, Chief Executive Officer**

National Native Title Council

**Raelene Webb, President**

National Native Title Tribunal

**Melissa George, Chief Executive Officer**  
North Australian Indigenous Land and Sea  
Management Alliance Ltd

**Susan Phillips, Barrister**  
Sydney Bar

**Tony McAvoy, SC**  
Sydney Bar

**Angus Frith, Barrister**  
Victorian Bar

# Appendix 2

## Australian Human Rights Commission complaints

The Australian Human Rights Commission (the Commission) fulfils a number of roles, including around human rights awareness, policy and advocacy and the investigation and conciliation of complaints made under federal human rights and discrimination law.

The Commission receives a wide variety of complaints, including from Aboriginal and Torres Strait Islander peoples concerning individual and systemic discrimination. The nature of these complaints help to inform the policy and advocacy work of the Commission.

As was the case in 2014-15, the majority of complaints made by Aboriginal and Torres Strait Islander peoples in 2015-16 were about racial discrimination, as seen in Table 1.1.

We thank the Commission's Investigation and Conciliation Service for providing these details for the purposes of this report and for their significant contribution to the work of the Commission in performing their conciliatory functions to resolve complaints of discrimination and breaches of human rights.

### (a) Complaints by Aboriginal and Torres Strait Islander peoples in 2015-16

Table 1.1 below provides the number and percentage of complaints by Aboriginal and Torres Strait Islander peoples received in the last financial year under all relevant legislation. Table 1.2 provides the outcomes of finalised complaints during the reporting period.

**Table 1.1:**

Number and percentage of complaints by Aboriginal and Torres Strait Islander peoples received in 2015-16\*

	Racial Discrimination Act		Sex Discrimination Act		Disability Discrimination Act		Age Discrimination Act		Australian Human Rights Commission Act (AHRCA)		Total	
	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Aboriginal	211	54%	10	3%	15	2%	3	2%	7	2%	246	13%
Torres Strait Islander	0	-	0	-	1	-	0	-	0	-	1	-
Both of the above	0	-	1	-	0	-	0	-	1	-	2	-
None of the above or unknown	179	46%	389	97%	693	98%	154	98%	311	98%	1726	87%
TOTAL	390	100%	400	100%	709	100%	157	100%	319	100%	1975	100%

\* Please note: Due to different reporting sources, the raw number of complaints received by Act in this table will not necessarily match the number recorded in the Commission's Annual Report.

**Table 1.2:**

Outcome of complaints from Aboriginal and Torres Strait Islander peoples finalised in 2015-16

Outcome	Number of finalised complaints by ATSI peoples	Percentage of finalised complaints by ATSI peoples	Percentage of all finalised complaints
Conciliated	196	79%	52%
Terminated/declined*	26	11%	19%
Withdrawn**	11	4%	17%
Discontinued***	16	6%	9%
Reported (AHRCA only)	-	-%	3%
Total	249	100%	100%

\*This category includes where the complaint is terminated on the ground that there is no reasonable prospect of the matter being settled by conciliation.

\*\*This category includes where a complainant withdraws due to personal circumstances or where they decide not to proceed after reviewing information from the respondent or being provided with information about the law and/or a preliminary assessment of the complaint.

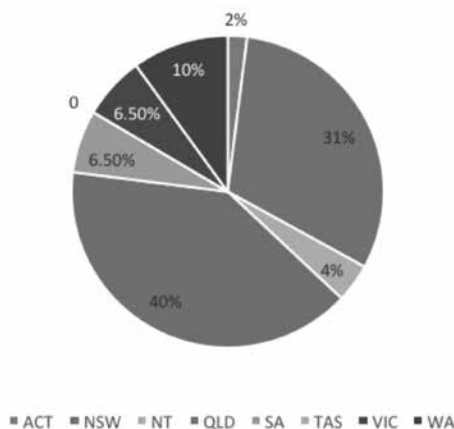
\*\*\*A complaint may be discontinued where a complainant does not respond to the Commission's attempts to contact them, including after being provided with an assessment of the complaint.

Figure 1.1 provides the geographic origin of Aboriginal and Torres Strait Islander complainants for the year 2015-16

**Figure 1.1:**

Complaints received from ATSI peoples in 2015-16 by State/Territory of complainant\*

\* The percentage of complaints received from QLD in this reporting year is comparatively very high due to receipt of a number of individual complaints relating to the same issue.





## (b) Examples of complaints from Aboriginal and Torres Strait Islander peoples

The following are examples of complaints from Aboriginal and Torres Strait Islander peoples conciliated by the Commission in 2015-16:

### (i) Complaint about discrimination when shopping

The complainants alleged that staff at the respondent retail outlet followed them around the store and checked their bags because they are Aboriginal. They claimed this happened again on a subsequent visit to the outlet after a complaint had been lodged with the Commission.

The retailer claimed all bags of a certain size are searched and denied the complainants were targeted because of their race. The retailer also claimed the person who searched the complainants' bags on their second visit was unaware that they had lodged a complaint with the Commission.

The complaint was resolved with an agreement that the retailer pay the complainants \$3,000 as general damages, offer them two \$100 gift vouchers and meet with them to apologise for their experience in person and discuss the retailer's cultural awareness training.

### (ii) Complaint about discrimination in employment

The complainant is Aboriginal and worked for the respondent company. He claimed colleagues wrote racist comments on the toilet door and walls, including *'I wish it was back in the day when we could still hang niggers!'*, *'White man can't jump, black man can't work'* and *'One nigger down, one to go'*. The complainant claimed he told a manager about these comments but his concerns were not taken seriously.

When the complaint was lodged with the Commission, the complainant was no longer employed with the company. The complaint was resolved with an agreement that the company pay the complainant \$36,000 as general damages, write to him apologising for the events giving rise to his complaint and implement staff training on discrimination and harassment.

### (iii) Complaint about discrimination in ongoing employment

The complainant is Aboriginal and was employed as a flight attendant with the respondent airline. She claimed that during a flight, colleagues made racially derogatory remarks in their conversation, including *'looking so black... looking like a nigger and boong'* within earshot of the complainant and other crew members. The complainant claimed the airline did not respond appropriately to her internal complaint about the issue.

On being advised of the complaint the airline indicated a willingness to participate in conciliation.

The complaint was resolved with an agreement that the airline pay the complainant \$5,000 and write to her acknowledging the distress and upset she experienced as a result of the events she complained about. The airline also agreed that the complainant would provide input in relation to future discrimination and cultural awareness training for staff. The complainant's colleague agreed to pay the complainant \$1,500 and meet with the complainant and other colleagues who were aware of the incident, to acknowledge that her comments were inappropriate and offensive. The complainant remained employed with the airline.

# Appendix 3

## International developments

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There have been a number of developments that have occurred at the international level during the reporting period from 1 July 2015 – 30 June 2016. Most notably, this included participation by Aboriginal and Torres Strait Islander peoples, including staff from the Australian Human Rights Commission (the Commission), in the following United Nations fora:

- the 8th session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (20 – 24 July 2015)
- Universal Periodic Review 2015 (9 November 2015)
- the 15th session of the United Nations Permanent Forum on the Rights of Indigenous Peoples (UNPFII) (9 May – 20 May 2016)

### (a) Expert Mechanism on the Rights of Indigenous Peoples

The 8th session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) was held in Geneva from the 20 – 24 July 2015.

A core focal point of this meeting was to review the effectiveness of United Nations mechanisms such as the EMRIP and how it can be enhanced to further promote the rights of Indigenous peoples from around the world. The need to undertake a review was captured by the Outcome Document from the World Conference on Indigenous Peoples (WCIP).<sup>1</sup>

Attending participants and Member States at EMRIP were therefore asked to provide feedback about how the forum could be used more effectively to promote the aims of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

The Australian Government indicated that EMRIP's role in achieving the ends of the UNDRIP could be strengthened by:

- Ensuring the continuation of their independence
- Undertaking study of progress towards the goals of the UNDRIP
- Undertaking and providing independent, multi-national reviews (not of specific member states) which provide thematic advice on shared issues relating to the achievement of the ends of the UNDRIP
- Making recommendations to assist member states working towards the ends of the UNDRIP and
- Developing and disseminating best practice, arising out of the course of their studies<sup>2</sup>

The Australian Government also submitted that greater assistance could be provided through more examples of successful activities undertaken by other states, advice regarding their own practices and support to implement recommendations such as those provided by the Universal Periodic Review (UPR) process.<sup>3</sup>

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1 *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Resolution 69/2, UN Doc A/RES/69/2 (2014) para 28.

2 Australian Government, *Response to the Review of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples*, 2 <<http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/MandateReview/States/Australia.pdf>>.

3 Final summary of responses to the questionnaire - Study of the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/30/54 at 118; Australian Government, *Response to the Review of the mandate of the Expert Mechanism on the Rights of Indigenous Peoples*, 2-3.

The Special Rapporteur on the Rights of Indigenous Peoples, Ms Victoria Tauli-Corpus also highlighted the importance of ‘complementarity’ between the work of the EMRIP, UNPFII and her role in order to maximise the effectiveness of all of these mechanisms for all Indigenous peoples.<sup>4</sup>

This included reiterating the commitments made by member states such as Australia at the World Conference on Indigenous Peoples (WCIP) 12 months earlier, towards national plans of action to operationalise the UNDRIP.<sup>5</sup>

## (b) Universal Periodic Review in 2015

Australia appeared before the 23rd session of the Universal Periodic Review (UPR) at the Human Rights Council for the second time on the 9th November 2015. During this time, member states delivered 104 statements and made 290 recommendations regarding Australia’s human rights record.<sup>6</sup> Overall, 54 of these were relevant to Aboriginal and Torres Strait Islander peoples. A more comprehensive account of the developments arising from this event is in chapter 4 of this report.

## (c) United Nations Permanent Forum on the Rights of Indigenous Peoples (UNPFII)

The 15th session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) was held in New York from 9 – 20 May 2016. The theme for this year’s session was “*Indigenous peoples: Conflict, Peace and Resolution.*” The event was also an important opportunity to consider the coordination between the three existing United Nations mechanisms pertaining to Indigenous peoples.<sup>7</sup>

With support from the Asia Pacific Forum, the Commission attended the 15th session of the UNPFII along with representatives from other National Human Rights Institutions (NHRIs) from Malaysia, Indonesia and the Philippines.

The Commission delivered an intervention regarding the implementation of the UNDRIP in Australia.<sup>8</sup> During this statement, the Commission highlighted our awareness raising efforts undertaken in partnership with National Congress of Australia’s First Peoples (National Congress) to promote the UNDRIP via the following ongoing initiatives, including:

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- 4 V Tauli-Corpus, Follow up to the World Conference on Indigenous Peoples including the review of the Mandate of the Expert Mechanism on the Rights of Indigenous peoples (*Statement to the 8th session of the Expert Mechanism on the Rights of Indigenous Peoples*, Geneva, 20 July 2015) <<http://unsr.vtaulicorpus.org/site/index.php/statements/74-emrip-2015-follow-wcip>>.
  - 5 V Tauli-Corpus, Follow up to the World Conference on Indigenous Peoples including the review of the Mandate of the Expert Mechanism on the Rights of Indigenous peoples (*Statement to the 8th session of the Expert Mechanism on the Rights of Indigenous Peoples*, Geneva, 20 July 2015) <<http://unsr.vtaulicorpus.org/site/index.php/statements/74-emrip-2015-follow-wcip>>.
  - 6 Australian Government, Attorney General Website, ‘Australia’s Universal Periodic Review’ (2015) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/Australias-Universal-Periodic-Review.aspx>>.
  - 7 *United Nations Permanent Forum on Indigenous Issues*, 15th Session, Provisional Agenda, Item 9, E/C.19/2016/1.
  - 8 A Roberts, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016).

- Undertaking a series of dialogues on the UNDIRP in locations across the country in 2014<sup>9</sup>
- Developing and distributing the community guide to the UNDIRP and other materials<sup>10</sup>

In emphasising the vital link between the Commission and Aboriginal and Torres Strait Islander peoples in their relationship with government, we also made a number of recommendations to the forum, including the need for:

- the UNPFII to ensure that A status NHRIs can fully participate in their independent capacity at the UNPFII;
- member states within UNPFII to establish an independent Indigenous Commissioner role within their NHRI, where they exist, to monitor and protect the rights of Indigenous peoples;
- member states to commit to engaging in meaningful dialogue with Indigenous peoples and their NHRIs, to design and develop national strategies to give full effect to the UNDIRP, including monitoring and evaluation and annual reporting as to the progress of such implementation<sup>11</sup>

In recalling the commitments of the Australian Government to a number of international treaties and the principles of the UNDIRP, National Congress addressed the forum, stressing the importance of their role in providing a voice for Aboriginal and Torres Strait Islander peoples. In doing this, National Congress asked:

“Why has the Australian Government abandoned this primary mechanism and refused to take advice from the chosen representatives for the Aboriginal and Torres Strait Islander Peoples? The Australian Government has also reneged on the promised funding enabling our organisation to operate.”<sup>12</sup>

As has already been highlighted at the beginning of this report, it is extremely concerning that the Australian Government has not taken action to meaningfully engage with Aboriginal and Torres Strait Islander peoples via our representative institution, National Congress, in line with Article 8 of the UNDIRP. It is the Commission’s sincere hope that this happens as a matter of priority, and that the restoration of funding that is so urgently needed is forthcoming.

The Australian Government also delivered a submission to the forum which noted the following in regards to the advancement of the rights of Aboriginal and Torres Strait Islander peoples:

- The establishment of the Indigenous Procurement Policy (IPP), introduced in July 2015 which sets targets and minimum standards regarding Indigenous employment and contracts awarded to Indigenous businesses<sup>13</sup>

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9 United Nations Declaration on the Rights of Indigenous Peoples – Talking up and living our rights: Declaration Workshop Series, Australian Human Rights Commission and National Congress of Australia’s First Peoples (2014).

10 Final summary of responses to the questionnaire - Study of the Expert Mechanism on the Rights of Indigenous Peoples, A/ HRC/30/54 at 94.

11 A Roberts, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016).

12 J Huggins, *Statement on behalf of the National Congress of Australia’s First Peoples on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016) <[http://nationalcongress.com.au/wp-content/uploads/2013/05/160509\\_UNPFII15\\_Congress\\_Item-4\\_Intervention.pdf](http://nationalcongress.com.au/wp-content/uploads/2013/05/160509_UNPFII15_Congress_Item-4_Intervention.pdf)>.

13 R O’Connor, *Statement on behalf of the Australian Government on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016).

- The importance of Indigenous rights as a pillar to Australia's campaign for the 2018-20 term of the United Nations Human Rights Council<sup>14</sup>
- The importance of NHRIs such as the Commission's participation in the United Nations system<sup>15</sup>

The EMRIP will consider the outcome of the mandate review process in the forthcoming session of the forum, which is set to take place in Geneva on the 11-15 July 2016.

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14 R O'Connor, *Statement on behalf of the Australian Government on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016).

15 R O'Connor, *Statement on behalf of the Australian Government on Agenda Item 4* (Speech delivered at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 9-20 May 2016).

# Appendix 4

## Queensland Stolen Wages Reparations Taskforce Report 'Reconciling Past Injustice' Recommendations

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### Recommendation 1

In relation to the Stolen Wages Reparations Scheme, the taskforce recommends the following.

1. Continuation of the condition that, to access the scheme, people had to be living as at 9 May 2002.
2. The age eligibility criteria continued the two tier of payments for:
  - i. people born on or before 31 December 1951, and
  - ii. between 1 January 1952 and 31 December 1959 (this extended the previous end date of 31 December 1956 by three years).
3. Priority payments to the elderly and critically ill.
4. The following payments for new eligible applicants:
  - i. \$9200 for people born on or before 31 December 1951; and
  - ii. \$4600 for people born between 1 January 1952 and 31 December 1959.

Together with the amounts paid under the previous reparations process, 'top-up' payments will ensure previous claimants have received cumulative payments of \$9200 or \$4600 respectively.

5. Top-up payments for previously successful claimants will include:
  - i. \$2200 for people born on or before 31 December 1951; or
  - ii. \$1100 for people born between 1 January 1952 to 31 December 1956 (inclusive)
6. Applications to close 16 December 2016.

### Recommendation 2

Government remove the requirement that people sign a 'Deed of Agreement' to access payment from the scheme and void the deeds signed by previous claimants.

### Recommendation 3

Government establish a Reparations Review Panel by the end of April 2016 to enable prompt consideration of relevant ineligible applications from the previous IWSR process and the current scheme to ensure as many Aboriginal and Torres Strait Islander people as possible have access to the scheme to seek justice for past wrongs.

### Recommendation 4

The Reparations Review Panel be implemented in accordance with the Reparations Review Panel Guidelines

## Recommendation 5

That the Aborigines Welfare Fund be closed immediately and that:

- a. remaining monies be committed to implementation of recommendations 6, 10 and 11; and
- b. that the Department be appropriately resourced to finalise the outstanding deceased estates by the end of the Reparations Scheme in 2018.

## Recommendation 6

Negotiation between DATSIP and the Department of Health (and other relevant agencies) to develop a strategy to formally acknowledge the financial contribution and labour of Aboriginal and Torres Strait Islander Queenslanders to the growth of Queensland. The strategy should include:

- a. formal announcement of the statewide project;
- b. development of a plaque or other monument at each location in consultation with local Aboriginal and or Torres Strait Islander people; and
- c. local events to provide public recognition, led by local Aboriginal and or Torres Strait Islander people.

## Recommendation 7

Negotiation of a document that reframes the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government, with actions including:

- a. government convene a meeting of peak Queensland Aboriginal and Torres Strait Islander organisations (including taskforce representation) to begin discussions; and
- b. government convene further discussions at the local level with Aboriginal and Torres Strait Islander peoples to identify local solutions.

## Recommendation 8

Government prioritise resolution of the 'Katter leases' to ensure affected families are justly and appropriately provided the land and housing they are entitled to.

## Recommendation 9

Government prioritise divestment of government land and housing to families that have tenancy in houses provided under the Queensland Government Aboriginal Housing Program from the 1970s.

## Recommendation 10

Government provide a scholarship for an Aboriginal person to document Aboriginal peoples' experiences and perspectives of government control of wages and savings under the 'Protection Acts'.

## Recommendation 11

Government provide a scholarship for a Torres Strait Islander person to document Torres Strait Islander peoples' experiences and perspectives of government control of wages and savings under the 'Protection Acts'.

## Recommendation 12

Government ensure QATSIF secretariat is appropriately and recurrently resourced to maintain its operation and ability to continue supporting Aboriginal and Torres Strait Islander children with their secondary education.

## Recommendation 13

In relation to taskforce oversight of the implementation of the scheme, the taskforce recommends:

- a. surveying a sample set of applicants; and
- b. targeted community consultation led by a small taskforce working group to seek community views on the Reparations Scheme.



# Appendix 5

## List of UPR recommendations relating to Aboriginal and Torres Strait Islander peoples

No.	Recommendation	Final response	Explanatory response	Category
74	Advance efforts towards the recognition of Indigenous Australians as Australia's First People in Australia's Constitution (Georgia);	Accepts	On the basis of existing law, policy and action	Constitutional recognition
75	Continue its ongoing efforts towards the promotion and protection of the rights of indigenous persons, through law and practice, including by giving constitutional recognition (Sri Lanka);	Notes	Pending the outcome of a referendum to recognise Indigenous Australians in the Constitution	Constitutional recognition
76	Implement Constitutional recognition of Indigenous Australians and continue to exert efforts to fully implement the Indigenous Advancement Strategy in order to ensure the indigenous people have sufficient access to health services, education and employment opportunities (Republic of Korea)	Notes	Pending the outcome of a referendum to recognise Indigenous Australians in the Constitution	Constitutional recognition
78	Continue to promote and strengthen the rights of Indigenous peoples (Djibouti);	Accepts	On the basis of existing law, policy and action	The Declaration
79	Continue its efforts to guarantee the human rights of Indigenous peoples (Holy See);	Accepts	On the basis of existing law, policy and action	The Declaration
80	Work towards ensuring full respect for the human rights of indigenous people, and continue the ongoing consultations and with a serious pace with the indigenous peoples, regarding the implementation of legislation entitled "Towards a better future" (Bahrain);	Notes		The Declaration
81	Strengthen measures to eliminate discrimination against persons belonging to indigenous populations (France);	Accepts	On the basis of existing law, policy and action	Racial discrimination
82	Harmonize legislation relating to the recognition of the rights of indigenous peoples, at all levels, with the International Convention on the Elimination of All Forms of Racial Discrimination (Honduras);	Notes		Racial discrimination
83	Revise laws and national, regional and local policies to fully recognize and protect the rights of indigenous peoples in domestic law uniformly throughout the nation (Cuba);	Notes		The Declaration

<b>No.</b>	<b>Recommendation</b>	<b>Final response</b>	<b>Explanatory response</b>	<b>Category</b>
84	Adhere to the United Nations Declaration on the Rights of Indigenous Peoples (Senegal);	Notes		The Declaration
85	Develop in partnership with Aboriginal and Torres Strait Islander peoples a National Strategy to give effect to the UN Declaration on the Rights of Indigenous Peoples, and to facilitate the constitutional recognition of Aboriginal Australians (Estonia);	Notes		The Declaration
86	Develop, in partnership with indigenous communities, a national strategy to implement the UN Declaration on the Rights of Indigenous Peoples (Hungary);	Notes		The Declaration
87	Continue to support indigenous institutions that bring cohesion to communities, such as the National Congress of the First Peoples of Australia (Peru);	Accepts	On the basis of existing law, policy and action	Consulting and supporting representative bodies
88	Take necessary measure to ensure consultation and participation of indigenous peoples in the processes of the elaboration of public policies that is of interest to them (Paraguay);	Accepts	On the basis of existing law, policy and action	Consulting and supporting representative bodies
89	Ensure adequate consultations with indigenous peoples in the formulation of policies affecting them (India);	Accepts	On the basis of existing law, policy and action	Consulting and supporting representative bodies
90	Take all necessary measures to ensure Aboriginal and Torres Strait Islander Peoples give their consent to the development and implementation of policies and programmes that impact upon their communities and futures (Namibia);	Notes		Consulting and supporting representative bodies
91	Ensure that indigenous peoples are consulted when considering the viability of remote communities, and that those affected by closures of communities receive transitional support and unimpeded access to ancestral lands (United States of America);	Notes	Will further consider	Remote communities Consulting and supporting representative bodies
92	Implement policies oriented to the development of remote communities and ensure the full enjoyment of economic, social and cultural rights of indigenous peoples interested in remaining in their land of origin (Mexico)	Accepts	On the basis of existing law, policy and action	Property rights

No.	Recommendation	Final response	Explanatory response	Category
93	Continue to work towards closing the existing gaps in the protection of human rights and the promotion of welfare for indigenous peoples in order to achieve sustainable economic and social development (Thailand);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap Property rights
94	Continue ongoing efforts to close the gaps in opportunities between indigenous and non-indigenous Australians (Italy);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
96	Continue efforts to close the gap in opportunities and life outcomes between Indigenous and non-Indigenous Australians, according to the Close the Gap Campaign and its Progress and Priorities report 2015 (Croatia);	Notes	Will further consider	Equality and closing the gap
97	Continue making progress in the implementation of the Indigenous Advancement Strategy to promote better opportunities in the areas of education, health and employment for indigenous communities (Colombia);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap Remote communities
98	Continue its efforts in closing the gap between indigenous and non-indigenous Australians in health, education, employment opportunities and access to justice (Malaysia);	Accepts	On the basis of existing law, policy and action	Access to justice Equality and closing the gap
99	Make further efforts to protect and promote the human rights of indigenous people, including the taking of measures to address the issue of poverty among them (Japan);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
100	Take effective legislative and practical measures for the comprehensive protection and promotion of civil, social, economic and cultural rights of indigenous peoples (Uzbekistan);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap Property rights
101	Eliminate the disparities in access to services by Aboriginal and Torres Strait Islander children and their families, especially by reviewing the Australian birth registration process in order to ensure that all children are registered at birth (Poland);	Accepts	On the basis of existing law, policy and action	Birth registrations
102	Continue strengthening the efforts in promoting and protecting non-racial discriminatory policy and specifically also ensure that Aboriginal children have access to birth registration (Timor-Leste);	Accepts	On the basis of existing law, policy and action	Birth registrations

<b>No.</b>	<b>Recommendation</b>	<b>Final response</b>	<b>Explanatory response</b>	<b>Category</b>
103	Step up efforts to address the economic and social inequalities affecting the indigenous peoples (Luxembourg);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap Property rights
104	Ensure that Aboriginal and other indigenous communities are accorded equal access to services including to judicial remedies for discrimination and racism (Rwanda);	Accepts	On the basis of existing law, policy and action	Access to justice
105	Continue strengthening the access mechanisms to social services for the Aboriginal and Torres Strait Islander children (Timor-Leste);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
106	Take legislative measures to continue to guarantee rights and equal treatment for the indigenous people in order to ensure national cohesion and social harmony (Angola);	Accepts	On the basis of existing law, policy and action	The Declaration
107	Take immediate measures to ensure that the indigenous people of Australia have access to health services, education, and to full employment opportunities (Maldives);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
108	Continue strengthening measures to address disparities in the access to education and health services for aboriginal and islander children and their families (Ecuador);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
109	Continue to implement the necessary measures to ensure indigenous children access to quality education (Lao People's Democratic Republic);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
110	Continue to implement indigenous education reforms (Slovakia);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
111	Ensure access to good-quality education, including postgraduate education and vocational training, for indigenous women (United Arab Emirates);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
112	Intensify efforts in enhancing the rights of Indigenous Australians: by addressing the underlying causes of their plight, by providing opportunities in health, education, housing and employment; and addressing the high rate of their incarceration in prison (Kenya);	Accepts	On the basis of existing law, policy and action	Access to justice Equality and closing the gap

No.	Recommendation	Final response	Explanatory response	Category
113	Reduce the rate of family separation of indigenous peoples caused, among others, by the removal of babies and children from their families and the imprisonment of juveniles and adults (Paraguay);	Accepts	On the basis of existing law, policy and action	Access to justice
114	Continue concerted efforts for the preservation of the cultural and linguistic identity of Indigenous peoples (Greece);	Accepts	On the basis of existing law, policy and action	Indigenous language and culture
115	Take further efforts to protect the special cultures of the indigenous people and enhance protection to the cultural archaeology (Iraq);	Accepts	On the basis of existing law, policy and action	Indigenous language and culture
116	Remove from the Constitution provisions allowing racial discrimination (Russian Federation);	Notes		Constitutional recognition
123	Continue paying special attention to the implementation of national policies for marginalized or vulnerable social groups, including migrant children, aboriginals and disabled persons (Nicaragua);	Accepts	On the basis of existing law, policy and action	The Declaration
125	Continue to address the problem associated with racial discrimination and policy disparities against indigenous persons (Nigeria);	Accepts	On the basis of existing law, policy and action	Racial discrimination
127	Continue to address inequalities affecting human rights in the areas of health, education, employment and income that disproportionately affect indigenous peoples and other minority groups (New Zealand);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap
136	Protect the rights of indigenous peoples, peasants and other people working in rural areas (Bolivia (Plurinational State of));	Accepts	On the basis of existing law, policy and action	Remote communities
142	Develop and implement policies to ensure gender equality throughout society and strengthen the promotion and protection of the rights of women, especially women from indigenous communities (South Africa);	Accepts	On the basis of existing law, policy and action	Indigenous women and domestic violence
162	Effectively implement the National Plan to Reduce Violence Against Women and Their Children and strengthen its actions to reduce violence and sexual abuse of women with disabilities and indigenous women (Czech Republic);	Accepts	On the basis of existing law, policy and action	Indigenous women and domestic violence
171	Further strengthen efforts towards birth regulation for all, with a view to encouraging access to relevant procedures (Turkey);	Accepts	On the basis of existing law, policy and action	Birth registrations

<b>No.</b>	<b>Recommendation</b>	<b>Final response</b>	<b>Explanatory response</b>	<b>Category</b>
194	Prevent the indefinite detention of persons with mental disabilities (Spain);	Notes	Will further consider	Access to justice
196	Guarantee the end of the unwarranted use of prisons for the management of persons with disabilities (Islamic Republic of Iran);	Notes	Will further consider	Access to justice
203	Continue efforts to train authorities involved in the administration and handling of justice in cases that affect indigenous peoples on the human rights of this group of society and review the cases of indigenous detainees, in particular children and women, with a view to providing them adequate assistance (Mexico);	Accepts	On the basis of existing law, policy and action	Access to justice
204	Continue to work, in partnership with Aboriginal and Torres Strait Islander communities, to reduce indigenous incarceration rates (Ireland);	Accepts	On the basis of existing law, policy and action	Access to justice
205	Increase efforts to reduce the imprisonment of indigenous Australians (Uruguay);	Accepts	On the basis of existing law, policy and action	Access to justice
210	Take measures to ensure the universal access to healthcare services, paying particular attention to the needs of persons living in rural and remote areas (Portugal);	Accepts	On the basis of existing law, policy and action	Equality and closing the gap Remote communities

# Appendix 6

## Indigenous Property Rights Network – Guiding Rights and Principles for Process and Outcomes

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The following Principles were approved by the Indigenous Property Rights Network (Network).

1. Application of international human rights and principles
2. Indigenous led
3. Inclusive process
4. Experience, advice, research and evidence based
5. Self-determination
6. Secure and protect the Indigenous Estate
7. Right to make decisions
8. Respect for and protection of culture

### *Definition*

The following definition of the Indigenous Estate was approved by the Network.

The Indigenous Estate includes the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples.

### *Guiding Principles – foundational rights, process and outcomes*

#### Foundational Rights

##### 1) Application of international human rights

The foundational rights which are applied by the Network in its deliberations and decision making are outlined in:

- *The United Nations Right to Development*
- *The United Nations Declaration on the Rights of Indigenous Peoples*, in particular:
  - a) self-determination<sup>1</sup>
  - b) participation in decision-making, free, prior and informed consent, and good faith<sup>2</sup>

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1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts , 4, 5, Preamble 16, 17. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 18, 19, 5, 10, 11(2), 27, 28, 29, 32(2), 41, 46. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

c) respect for and protection of culture<sup>3</sup>

d) equality and non-discrimination.<sup>4</sup>

## Process

### 2) Indigenous led

The Indigenous Strategy Group has been established to guide the Network.

Decisions by the Indigenous Strategy Group and the Network are made by consensus.

### 3) Inclusive process

The Network is open to all Aboriginal and Torres Strait Islander Peoples.

The Network will engage and build relationships with government, stakeholders and each other in ways that are:

- based on good faith, equality and non-discrimination
- collaborative
- cooperative
- inclusive
- participatory.

### 4) Experience, advice, research and evidence

The work of the Network will be grounded in the experience and advice of Aboriginal and Torres Strait Islander Peoples as well as current research and information to ensure all decisions are made using the best available evidence.

## Outcomes

### 5) Self-Determination

Self-determination is the fundamental right of Aboriginal and Torres Strait Islander Peoples to shape our own lives and be the key decision-makers in our lives.

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3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts (1), 31, 11(1), 11(2), 12(1), 13(1), 15(1), Preamble 3, 7, 10, 11. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

4 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 8(1) (e), 9, 15(2), 21(1), 22(2), 44, 46(3), Preamble 5, 9, 18, 22. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).



An essential expression of self-determination is the application of free, prior and informed consent to questions of development on Indigenous lands.

This includes the right to engage in, oppose and negotiate development on Indigenous lands.

The Network will have regard to the interests of government and industry stakeholders, but the rights of Aboriginal and Torres Strait Islander Peoples to be self-determining in regard to their interests in land will be paramount for the Network.

## 6) Secure and Protect the Indigenous Estate

Fundamental to the work of the Network is the strengthening of the inherent rights of Aboriginal and Torres Strait Islander Peoples to their land and waters and to exercise self-determination.

The Network recognises native title as a property right.

In the course of its Indigenous Property Rights work, the Network will not diminish, jeopardise or limit in any way the rights and interests of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners.

## 7) Right to make decisions

The Network respects the right for Aboriginal and Torres Strait Islander Peoples to make their own decisions on matters that affect them. As such, local decision-making about the Indigenous Estate, including questions of development, are a matter for each group with rights and interests in the relevant land or water.

The Network values the right of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to pursue, reject or negotiate development.

The Network supports and advocates for application of the principle of free, prior and informed consent when decisions are made with respect to development on the Indigenous Estate.

## 8) Respect for and protection of culture

The Network will:

- seek to strengthen state, territory and Commonwealth legislative and policy protections for the heritage of Aboriginal and Torres Strait Islander Peoples
- respect the cultural authority of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners
- recognise and respect the right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to be different
- work in ways that strengthens the inherent right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to exercise self-determination
- engage respectfully with each group of Aboriginal and Torres Strait Islander landowners, holders of native title, Traditional Owners and their representatives
- consider appropriate ways to provide education and transfer knowledge to future generations.

## Note: Terminology

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia

The word 'peoples' recognises that Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>1</sup>

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'.<sup>2</sup>

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) <[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)>.
- 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), 15, 43 <[http://www.humanrights.gov.au/social\\_justice/reppbody/report2009/index.html](http://www.humanrights.gov.au/social_justice/reppbody/report2009/index.html)>.

## Further Information

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To learn more about the *United Nations Declaration on the Rights of Indigenous Peoples*, or to order publications on the Declaration, please go to <http://declaration.humanrights.gov.au/>

