



Australian
Human Rights
Commission

everyone, everywhere, everyday

Indigenous Peoples' Organisations Network of Australia

.....
Submission to the Special Rapporteur on the
situation of human rights and fundamental
freedoms of indigenous people – Australian
mission

17-28 August 2009

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1 Introduction

1. The Australian Human Rights and Commission (the Commission)¹ makes this submission on behalf of the Indigenous Peoples Organisation Network (IPON) of Australia to the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people for his Mission to Australia, 17-28 August 2009. Additional information supplied by the National Indigenous Youth Movement of Australia is included as Appendix 3 of the submission.

2 Summary

2. This submission outlines the IPON's assessment of the current status of Indigenous human rights in Australia.
3. There continues to be a significant gap in the realisation of Aboriginal and Torres Strait Islander peoples' human rights and fundamental freedoms in comparison with non-Indigenous peoples. Indigenous peoples face a comparative disadvantage and discrimination across a range of indicators including life expectancy and health, housing and homelessness, education, welfare, employment, incarceration rates and child abuse and family violence.
4. There is also a lack of recognition of Indigenous rights through formal protection mechanisms including in the Constitution, in legislation and in representative institutions.
5. The Australian Government formally supports the *UN Declaration on the Rights of Indigenous Peoples*, which provides a set of internationally endorsed objective standards to guide the government's relationship with Indigenous peoples, and to promote actions that respect and protect Indigenous cultures.
6. The Declaration is used as the framework for this submission to inform the Special Rapporteur of the current status of Indigenous rights in Australia.

3 Recommendations

7. The IPON recommends the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people invite the Australian Governments to consider the following:

(i) Framework for protection of Indigenous rights

- Implement the *UN Declaration on the Rights of Indigenous Peoples*;

¹ See Appendix A for an overview of the role of the Australian Human Rights Commission's role.

- Enact a national Human Rights Act that includes protection of Indigenous rights;
- Initiate Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination;
- Establish a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making;
- Establish a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation;
- Progress human rights education and the building of a culture of human rights recognition and respect;
- The Joint Standing Committee on Treaties conduct consultations, including with Indigenous peoples, on the desirability of ratifying *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*;

(ii) Health

- Develop a comprehensive, long-term plan of action for health, that is targeted to need, evidence-based to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non- Indigenous Australians by 2030;

(iii) Criminal Justice

- Continue implementing the recommendations of the Report of the Royal Commission into Aboriginal Deaths in Custody and monitor their implementation;
- Support ongoing community justice mechanisms which recognise Indigenous governance models and return control and decision-making processes to Aboriginal and Torres Strait Islander communities;
- Develop measures, such as justice reinvestment, to address the impact of Indigenous marginalisation and socio-economic disadvantage on Indigenous peoples' contact with the criminal justice system;
- Repeal its mandatory detention provisions;
- Increase funding to Aboriginal Legal Services, to provide proper access to justice for Indigenous people;

(iv) Family Violence

- Support Indigenous community initiatives and networks to address family violence;
- Provide human rights education to address family violence, such as training for community legal education workers in Family Violence Prevention Legal Services;

(v) Stolen Generations and Healing

- Implement the recommendations of the *Bringing them home report*, including the provision of monetary compensation to the Stolen Generations and their families;
- Establish an independent, Indigenous controlled national Indigenous healing body following extensive consultation, which is responsible for developing and then implementing a coordinated National Indigenous Healing Framework. The Framework should be developed in conjunction with the Commonwealth and state/ territory governments and Indigenous organisations and communities;

(vi) Indigenous languages

- Strengthen efforts to preserve traditional languages;

(vii) Education

- Commit to providing education services in remote communities that are comparable in quality and availability to those in all other Australian communities;
- Develop a remote education strategy and accountability framework to be embedded in the National Indigenous Reform Agreement and in the relevant National Partnership Agreements;
- Initiate an audit of populations and projected populations of remote preschool and school-aged children by statistical sub-division to be measured against the relevant education infrastructure and services, and funding accordingly;
- Develop a strategy and accountability framework including monitoring and assessment processes for remote Indigenous education;
- Preserve and promote bilingual education at schools;

(viii) Northern Territory Emergency Response (NTER)

- Remove formal discrimination under the NTER legislation;
- Transition the NTER from an emergency approach to a community development approach through ensuring participatory processes, the

creation of community development plans and rigorous participatory based monitoring and reviews;

- Re-design the NTER measures in consultation with the Indigenous peoples concerned, to ensure that they are consistent with the *Race Discrimination Act* and international human rights agreements;

(ix) Income management

- Review income management schemes to be compatible with human rights obligations, to be voluntary or appropriately targeted to achieve their stated purpose and to ensure that adequate protections are provided to protect the privacy of individuals in the handling of personal information;

(x) Child protection

- Adopt a human rights-based approach to the national child protection framework that upholds the 'best interests of the child', 'non-discrimination', and the child's 'right to life' and 'right to participation';

(xi) Homelands

- Employ a flexible model for determining eligibility for Homeland support which allows for:
 - new Homelands which may be established in future;
 - a resource model which allocates municipal and essential service funds to regions on a per-capita basis with additional funds on a needs basis;
 - allocating municipal and essential service funds to regions to be managed by leaders of existing clan leadership groups in association with Outstation Resource Agencies;

(xii) Native Title

- Undertake any further review or amendment to the native title system with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples;
- Review the native title system with a focus on:
 - delivering the objects of the Native Title Act in accordance with the preamble;
 - seeking significant simplification of the legislation and structures;
 - having wide input from all stakeholders in native title, especially the voice of Indigenous peoples;

- Amend the *Native Title Act* to provide a presumption of continuity;

(xiii) *Environmental Management, Cultural Heritage and Climate Change*

- Increase Indigenous participation in the development and implementation of government policies and programs in environmental, cultural heritage and climate change Indigenous Australians that impacts on Indigenous peoples' lands, natural environment and their means of subsistence; and

(xiv) *Indigenous knowledge*

- Engage Indigenous peoples to develop a national legislative framework that provides for protection of Indigenous knowledge's and a protocol for the use of this knowledge.

4 Australian Government supports the *UN Declaration the Rights of Indigenous Peoples*

8. The *UN Declaration on the Rights of Indigenous Peoples* (Declaration) was adopted by the General Assembly of the United Nations on 13 September 2007. It was adopted with 143 countries voting in favour, 11 abstaining and 4 voting against. Australia was one of the four countries who voted against the Declaration.
9. On 3 April 2009, the Australian Government changed its position and formally supported the Declaration.

Today, Australia joins the international community to affirm the aspirations of all Indigenous peoples.

Today, Australia gives our support to the Declaration.

We do this in the spirit of re-setting the relationship between Indigenous and non-Indigenous Australians and building trust.²

10. The Declaration provides a set of internationally endorsed objective standards to guide the government's relationship with Indigenous peoples, and to promote actions that respect and protect Indigenous cultures.
11. The challenge for government is to build understanding of the Declaration among government officials, Aboriginal and Torres Strait Islander communities and the general community, in order to give meaning and content to its provisions.

² J Macklin, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At: http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf

5 Indigenous Disadvantage

5.1 Statistical overview of Indigenous disadvantage

12. The estimated resident Indigenous population of Australia is 517 000, out of a total population of 21 million people (2.5% of the Australian population). In the Indigenous population, 463 700 (90%) were of Aboriginal origin only, 33 300 (6%) were of Torres Strait Islander origin only. 37% of the Indigenous population is aged 14 years and under.³
13. In 2006, over half of the total Indigenous population lived in New South Wales and Queensland (29% and 28% of the total Indigenous population respectively). Almost one third of the estimated Indigenous population reside in Major Cities (32%); 21% live in Inner Regional areas; 22% in Outer Regional areas; 10% in Remote areas and 16% in Very Remote areas.⁴
14. The Productivity Commission's Report *Overcoming Indigenous Disadvantage: Key Indicators 2009*⁵ highlights the continuing high levels of disadvantage faced by Indigenous communities in Australia, across a range of indicators.⁶ Some of the indicators of disadvantage noted include:

Life expectancy and health

- The gap between Indigenous and non-Indigenous life expectancy at birth was 12 years for males and 10 years for females;⁷
- Indigenous perinatal and infant (within one year) mortality rates remain two to three times the non-Indigenous rates;
- Indigenous children under five were twice as likely to be hospitalised for potentially preventable diseases and injuries as non-Indigenous children (195 per 1000 compared to 105 per 1000)
- In 2004–05, rates of otitis media were three times as high among Indigenous children aged 0–14 years as non-Indigenous children⁸

³ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009), p5. At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009> (viewed 20 July 2009).

⁴ 'Appendix 2 – A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia' in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009) pp 283-312. At http://humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html (viewed 20 July 2009).

⁵ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009). At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009> (viewed 20 July 2009).

⁶ See also 'Appendix 2 – A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia' in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009) pp 283-312. At http://humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html (viewed 20 July 2009).

⁷ This indicator was developed using different methods to calculate the life expectancy to previous reports which recorded the life expectancy gap at 17 years. The difference arises as a result of the lack of reliable available for Indigenous deaths.

⁸ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009) pp 283-312. At http://humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html (viewed 20 July 2009).

- Suicide death rates were higher for Indigenous people (between 11 and 42 per 100 000 population) than non-Indigenous people (between 8 and 15 per 100 000 population)

Housing

- Indigenous people were 5 times as likely as non-Indigenous people to live in overcrowded housing in 2006
- 35% of Indigenous households live in dwellings that have structural problems (e.g. rising damp, major cracks in floors or walls, major electrical/ plumbing problems and roof defects). 55% of Indigenous households renting mainstream or community housing reported that their dwellings had structural problems.⁹

Income

- Indigenous households' gross weekly equivalised (adjusted) incomes (\$398) were 65% of those of non-Indigenous households (\$612) in 2006.

Education and employment

- The proportion of Indigenous 19 year olds who had completed year 12 or equivalent (36%) was half that of non-Indigenous 19 year olds (74%);
- The employment to population ratio increased for Indigenous peoples is 48%, compared to non-Indigenous people, which is 68%; similar levels of disparity are present in the labour participation rates.
- Indigenous people aged 15 to 24 years were more than three times as likely as non-Indigenous people to be neither employed nor studying in 2006

Child abuse

- Indigenous children were more than six times as likely as non-Indigenous children to be the subject of a substantiation of abuse or neglect in 2007-08
- 41 out of every 1000 Indigenous children were on care and protection orders, compared to 5 per 1000 non-Indigenous children at 30 June 2008

Criminal justice

- Indigenous people were 13 times as likely as non-Indigenous people to be imprisoned in 2008
- The imprisonment rate increased by 46% for Indigenous women and by 27% for Indigenous men between 2000 and 2008
- Indigenous juveniles were 28 times as likely to be detained as non-Indigenous juveniles at 30 June 2007.

⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009) pp 283-312. At http://humanrights.gov.au/social_justice/sj_report/sjreport08/app2.html (viewed 20 July 2009).

5.2 Government's strategy to address Indigenous disadvantage

15. In July 2009, the Council of Australian Government (COAG) affirmed the need to progress its *National Integrated Strategy for Closing the Gap in Indigenous Disadvantage*, which includes:
- the specific outputs under each COAG agreement which contribute to meeting the six Closing the Gap targets to:
 - Close the gap in life expectancy within a generation;
 - Halve the gap in mortality rates for Indigenous children under five within a decade;
 - Halve the gap for Indigenous students in reading, writing and numeracy within a decade;
 - At least halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020;
 - Halve the gap in employment outcomes between Indigenous and non Indigenous Australians within a decade;
 - Ensure all four-year-olds, including those in remote communities, have access to early childhood education, within five years;¹⁰
 - the commitment of governments to develop clear trajectories for each target and each jurisdiction, setting State and Territory-level benchmarks for monitoring performance against the targets agreed by COAG;
 - areas identified for further COAG work including: food security in remote communities, overcoming data gaps, continued welfare reform, infrastructure in remote communities and Indigenous economic development; and
 - case studies of best-practice programs and initiatives by governments, the private and community sectors which contribute to meeting the Closing the Gap targets.¹¹

¹⁰ For further information on COAG's National Agreements and National Partnership Agreements for meeting COAG's objectives see the COAG website. At <http://www.coag.gov.au/>.

¹¹ Council of Australian Governments, COAG Communiqué, 2 July 2009 (2009). At http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/index.cfm?CFID=14181&CFTOKEN=44314052&jsessionid=043027fb6725fe92f2055b27453d47e80206#closing_the_gap (viewed 20 July 2009).

6 Foundational rights

Foundational rights are contained in articles 1-6 of the Declaration: individual and collective enjoyment of all human rights; the right to equality; the right to self-determination; the right to autonomy or self-government in internal or local indigenous affairs; the right to distinct legal, political, economic, social, and cultural institutions, and the right to nationality.

6.1 Formal recognition of Indigenous peoples' human rights

16. Human rights of Indigenous peoples in Australia remain largely unrecognised and unprotected under Australian law. Recommendations for constitutional and legislative protection of Indigenous rights have been made by: Final Report of the Constitution Commission (1988)¹²; Royal Commission into Aboriginal Deaths in Custody (1991)¹³; *Bringing them home report* (1997)¹⁴; Council for Aboriginal Reconciliation (2000)¹⁵; and the 2020 Summit (2008)¹⁶.
17. Several UN human rights committees have noted that the lack of formal protections for human rights in Australia means that Australia is not fulfilling its legal obligations to incorporate international human rights standards into domestic law:
 - The UN Committee on the Elimination of Racial Discrimination has expressed concern 'over the absence from Australian law of any entrenched guarantee against racial discrimination that would override subsequent law of the Commonwealth, states and territories';¹⁷
 - The UN Committee on the Elimination of Discrimination Against Women has questioned the absence of any 'entrenched guarantee prohibiting discrimination against women and providing for the principle of equality between women and men';¹⁸

¹² Australian Constitutional Reform, *Final Report of the Constitutional Commission: Summary 1988* (1988). At <http://www.ausconstitution.info/ConComm88/start.shtml> (viewed 26 November 2008).

¹³ Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). See in particular, Volume 5, chs 36-38.

¹⁴ Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the national Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

¹⁵ Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/pg3.htm> (viewed 2 December 2008).

¹⁶ Australia 2020, *The future of Australian governance* (2008). At http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc (viewed 26 November 2008).

¹⁷ Committee on the Elimination of Racial Discrimination, *Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/304/Add.101 (2000) par 6.

¹⁸ Committee on the Elimination of Discrimination against Women, *Concluding comments of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006) pars 12-13.

- The UN Committee on the Rights of the Child has noted its concerns that the Convention 'cannot be used by the judiciary to override inconsistent provisions of domestic law';¹⁹ and
 - The UN Human Rights Committee,²⁰ the UN Committee Against Torture²¹ and the UN Committee on Economic Social and Cultural Rights²² have all recently expressed concerns about the absence of entrenched protections of human rights, such as constitutional or legislative protection of human rights at the national level, and the absence of remedies for breaches of a range of human rights.
18. In his *Social Justice Report 2007*²³, the Social Justice Commissioner recommended the following measures be undertaken to address the lack of formal protection of Indigenous rights in Australia:
- Commonwealth Government formally support and implement the *UN Declaration on the Rights of Indigenous Peoples*;
 - A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights;
 - Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination;
 - The establishment of a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making that affects our interests;
 - The establishment of a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation; and
 - A focus on human rights education and the building of a culture of human rights recognition and respect.
 - That the Joint Standing Committee on Treaties conduct consultations, including with Indigenous peoples, on the desirability of ratifying *ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries*.

6.2 National Human Rights Act

19. On 10 December 2008 the Commonwealth government announced that national community consultations will be held on the protection and promotion of human rights in Australia. An independent committee was

¹⁹ Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/15/Add.268 (2005) par 9.

²⁰ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (2000).

²¹ Committee against Torture, *Concluding observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008), par 9.

²² Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), par 11.

²³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 2.

appointed to conduct the national consultation, consult broadly with the community, and report to the government by end of August 2009.²⁴

20. The Australian Human Rights Commission in its submission²⁵ to the Committee supported the enactment of a national Human Rights Act that protects and promotes all human rights in the international human rights treaties to which Australia is a party and the international human rights declarations Australia supports. It further supported the need for:
- strengthened and streamlined federal anti-discrimination laws which extend the grounds of prohibited discrimination and promote equality
 - constitutional reform to
 - recognise Indigenous peoples in the preamble to the Australian Constitution
 - remove racially discriminatory provisions from the Australian Constitution
 - replace discriminatory provisions with a guarantee of equality and non-discrimination
 - a significantly enhanced national program of human rights education ; and
 - enhancing the role of the Australian Human Rights Commission to support the better promotion and protection of human rights, and ensuring adequate funding for the Commission to fulfil that role.
21. In addition the Social Justice Commissioner has noted the support in previous State and Territory consultations for recognising Indigenous peoples in the preambles of Human Rights Acts.²⁶

6.3 Right to equality and non-discrimination

22. A major concern of Indigenous peoples is the ability of the Commonwealth Parliament to validly enact racially discriminatory laws under the powers vested in it by the *Constitution* and authorise the states and territories to enact racially discriminatory laws.
- Section 25 of the *Constitution* contemplates the exclusion of voters on racial lines;

²⁴ National Human Rights Consultation, <http://www.humanrightsconsultation.gov.au> (viewed 20 July 2009).

²⁵ Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009). At http://10.1.1.248:8080/ProgressMessages/NHRC_Submission.doc?proxy=10.1.1.248&action=complete&index=31&id=1154538&filename=NHRC_Submission.doc (viewed 20 July 2009).

²⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), pp 52-53.

- The amended section 51(xxvi) of the *Constitution* (the 'racism power') has been interpreted by the High Court to allow for the Commonwealth to make both beneficial and adverse laws for Aboriginal people.²⁷
 - The High Court has also interpreted Section 122 of the *Constitution* (the 'Territories power'), which provides for the Commonwealth Parliament to make laws for the northern territory, to be unfettered by a general requirement of equality before the law and other express or implied rights in the *Constitution*.²⁸
23. There are several examples of where racially discriminatory laws have been passed consistently with the *Constitution* (e.g. the *Native Title Amendment Act 1998*, the Northern Territory Emergency Response legislation). The prime issue, therefore, is how to ensure that the *Constitution* protects against racially discriminatory laws being enacted in the future.
24. A constitutional guarantee of equality before the law and freedom from discrimination that is intended to bind the exercise of all Australian legislative, administrative and judicial powers could be drafted in order to provide comprehensive protection against racial discrimination. This option was positively canvassed by the Council for Aboriginal Reconciliation²⁹ and in the *Social Justice Report 2000*.³⁰
25. It is also widely considered part of the 'unfinished business' of reconciliation to provide recognition of the first nations status of Indigenous peoples in the preamble to the *Constitution*. Such a change would be of great symbolic importance to Indigenous peoples. There is currently bipartisan support for this to occur. The Prime Minister stated, 'we will also give attention to detailed, sensitive consultation with Indigenous communities about the most appropriate form and timing of constitutional recognition'³¹ and this was supported in the Government's response to the 2020 Summit.³²

²⁷ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 411

²⁸ *Kruger v Commonwealth* (1997) 190 CLR 1

²⁹ Council for Aboriginal Reconciliation, *Roadmap to Reconciliation* (2000) available online at <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/pg3.htm> (accessed 2 December 2008).

³⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Human Rights and Equal Opportunity Commission (2000) ch 4.

³¹ 'Rudd pledges Indigenous recognition in the *Constitution*', *ABC PM*, 23 July 2008. At <http://www.abc.net.au/pm/content/2008/s2312531.htm> (viewed 2 December 2008); Prime Minister, 'Joint Press Conference with the Chief Minister of the Northern Territory, Paul Henderson' (transcript of media conference, 24 July 2008). At http://www.pm.gov.au/media/Interview/2008/interview_0378.cfm (viewed 20 January 2009).

³² Commonwealth of Australia, *Responding to the Australia 2020 Summit: Options for the future of Indigenous Australia* (2009) p187. At http://www.australia2020.gov.au/docs/government_response/2020_summit_response_7_indigenous.pdf (viewed 20 July 2009).

26. The Commonwealth Government should begin a constitutional process for the removal of section 25 of the *Constitution* and its replacement with a clause guaranteeing equality before the law and non-discrimination.
27. A crucial component for the legitimacy of any future constitutional change will be the active engagement of Indigenous peoples in the reform process.

6.4 Right to self-determination

28. In articulating what the right to self-determination means in the context of indigenous peoples, Professor Erica-Irene Daes, a Former Chair of the United Nations Working Group on Indigenous Populations spoke of it in terms of:

[s]elf-determination means *the freedom for indigenous peoples to live well*, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours... [Indigenous peoples'] goal has been achieving the freedom to live well and humanly - and to determine what it means to live humanly. In my view, no government has grounds for fearing that.³³

29. Given the history of lack of consultation, lack of participation and lack of engagement in government policy making and program development to date, the recognition of the right to self-determination in a Human Rights Act would provide an important foundation that would promote Indigenous peoples' democratic inclusion and improved accountability.
30. The Council for Aboriginal Reconciliation supported self-determination as the guiding principle for government policy in Indigenous affairs.³⁴ Incorporating the right to self-determination within a Human Rights Act provides a strong legislative basis for the right to self-determination informing government policy.
31. In drafting the right to self-determination for a Human Rights Act, the *Declaration* should be used as the benchmark for articulating the right to self-determination in ways that are meaningful for Indigenous peoples.

7 Life and security

Life and security rights are contained in articles 7-10 of the Declaration: right to life, physical and mental integrity, right not to be subjected to assimilation or destruction of their culture, right to belong to an indigenous community or nation, and right not to be forcibly removed from their lands or territories.

³³ E Daes 'Striving for self-determination for Indigenous peoples' in Y Kly and D Kly (eds), *In pursuit of the right to self-determination* (2000), p 58.

³⁴ Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander rights - Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights*, (2000). At: www.austlii.edu.au/au/other/IndigLRes/car/2000/9/ (viewed 31 January 2009).

7.1 Gap in life expectancy and Indigenous health equality

a) The Close the Gap Campaign on Indigenous health inequality

32. The adoption of targeted approaches to Indigenous health equality was substantially progressed by the establishment of the Close the Gap Campaign for Indigenous Health Equality.³⁵ This is a historic event, being the first time that such authoritative and influential peak bodies and key organisations from Australian civil society have worked together in partnership in such a sustained manner towards a single goal - Indigenous health equality.
33. Indigenous leadership, and the leadership of the Indigenous health peak bodies in particular, has also been a hallmark of the Close the Gap Campaign. Through these members in particular, the Campaign draws on a support base from within the Indigenous community.
34. In March 2008, the Australian Government also signed a historic *Close the Gap Statement of Intent* in which it committed with the Campaign partners:
 - To developing a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non- Indigenous Australians by 2030.
 - To ensuring primary health care services and health infrastructure for Aboriginal and Torres Strait Islander peoples which are capable of bridging the gap in health standards by 2018.
 - To ensuring the full participation of Aboriginal and Torres Strait Islander peoples and their representative bodies in all aspects of addressing their health needs.
 - To working collectively to systematically address the social determinants that impact on achieving health equality for Aboriginal and Torres Strait Islander peoples.

35 The Close the Gap Campaign partners are: Australian General Practice Network; Australian Human Rights Commission; Australian Indigenous Doctors' Association; Australian Medical Association; Australians for Native Title and Reconciliation; Congress of Aboriginal and Torres Strait Islander Nurses; Cooperative Research Centre for Aboriginal Health; Fred Hollows Foundation; Heart Foundation; Indigenous Dentists' Association of Australia; Menzies School of Health Research; National Aboriginal Community Controlled Health Organisation; Oxfam Australia; Royal Australasian College of Physicians; Royal Australian College of General Practitioners; and Torres Strait Island and Northern Peninsula District Health Service.

- To building on the evidence base and supporting what works in Aboriginal and Torres Strait Islander health, and relevant international experience.
 - To supporting and developing Aboriginal and Torres Strait Islander community-controlled health services in urban, rural and remote areas in order to achieve lasting improvements in Aboriginal and Torres Strait Islander health and wellbeing.
 - To achieving improved access to, and outcomes from, mainstream services for Aboriginal and Torres Strait Islander peoples.
 - To respect and promote the rights of Aboriginal and Torres Strait Islander peoples, including by ensuring that health services are available, appropriate, accessible, affordable, and of good quality.
 - To measure, monitor, and report on our joint efforts, in accordance with benchmarks and targets, to ensure that we are progressively realising our shared ambitions.³⁶
35. Since then, the *Close the Gap Statement of Intent* has received bi-partisan support from the Parliaments of Victoria and Queensland. Efforts are underway for every Australian government to have signed the Statement of Intent in 2009 – Western Australia and the Australian Capital Territory have indicated that they intend to sign.
36. The *Close the Gap Statement of Intent* is one of the most significant compacts between Australian governments and civil society in Australian history. There was substantial support given it by the health peak professional bodies whose members play a central role in the delivery of primary health care services.

b) National Indigenous Health Equality Targets

37. *National Indigenous Health Equality Targets* were also developed by the Close the Gap Campaign partners over a period of six months by three working groups. A notable Indigenous person with extensive health experience led each working group.³⁷ The targets working groups drew on

36 Close the Gap National Indigenous Health Equality Summit Statement of Intent, 20 March 2008
http://humanrights.gov.au/social_justice/health/statement_intent.html.

37 Dr Mick Adams, Chair, National Aboriginal Community Controlled Health Organisation; Associate Professor Dr Noel Hayman, Indigenous Health Committee of the Royal Australasian College of Physicians; and Dr Ngjare Brown, then at the Menzies School of Health Research.

the expertise of a wide range of health experts, and, in particular, Indigenous health experts.³⁸

38. The following considerations framed the thinking of the Steering Committee and the assisting experts when developing targets:
- What targets (if achieved) will reduce disparity to the greatest degree?
 - What targets (if achieved) will improve health outcomes to the greatest degree? What is the disease-specific burden experienced by Indigenous populations?
 - Can the current/future indicators adequately measure whether or not the target has been reached, or if significant additional investment, infrastructure or capacity required?
 - To what targets can government be held to account for as their primary responsibility?
39. The targets represent the 'industry perspective' on what needs to be done and the time frame for doing so in relation to achieving Indigenous health. As noted, this unprecedented body of work is intended to be the basis of negotiations with Australian governments as to the main elements and time frames of a national plan to achieve Indigenous health equality by 2030.

38 The following assisted with the creation of the targets -- Dr Christopher Bourke, Indigenous Dentists' Association of Australia; Ms Vicki Bradford, Congress of Aboriginal and Torres Strait Islander Nurses; Mr Tom Brideson, Charles Sturt University's Djirruwang Aboriginal and Torres Strait Islander mental health program; Dr David Brockman, National Centre in HIV Epidemiology and Clinical Research; Dr Alex Brown, Baker IDI Heart and Diabetes Institute; Professor Jonathon Carapetis, Menzies School of Health Research; Dr Alan Cass, The George Institute for International Health; Professor Anne Chang, The Queensland Centre for Evidence Based Nursing and Midwifery; Dr Margaret Chirgwin, National Aboriginal Community Controlled Health Organisation; Dr John Condon, Menzies School of Health Research; Mr Henry Councillor, former National Aboriginal Community Controlled Health Organisation; Dr Sophie Couzos, National Aboriginal Community Controlled Health Organisation; Professor Sandra Eades, Sax Institute; Ms Dea Delaney Thiele, National Aboriginal Community Controlled Health Organisation; Mr Mick Gooda, Cooperative Research Centre for Aboriginal Health; Dr Sally Goold OAM, Chair, Congress of Aboriginal and Torres Strait Islander Nurses; Ms Mary Guthrie, Australian Indigenous Doctors' Association; Associate Professor Colleen Hayward, Kulunga Research Network and Curtin University; Ms Dawn Ivinson, Royal Australasian College of Physicians; Dr Kelvin Kong, Australian Indigenous Doctors' Association; Dr Marlene Kong, Australian Indigenous Doctors Association; Mr Traven Lea, Heart Foundation; Dr Tamara Mackean, Australian Indigenous Doctors' Association; Dr Naomi Mayers, National Aboriginal Community Controlled Organisation; Mr Romlie Mokak, Australian Indigenous Doctors' Association; Professor Helen Milroy, Associate Professor and Director for the Centre for Aboriginal Medical and Dental Health; Professor Kerin O'Dea, Menzies School of Health Research; Dr Katherine O'Donoghue, Indigenous Dentists' Association of Australia; Ms Mary Osborn, Royal Australasian College of Physicians; Professor Paul Pholeros AM, University of Sydney; Professor Ian Ring, Professorial Fellow, Faculty of Commerce, Centre for Health Services Development, University of Wollongong; Professor Fiona Stanley AC, Telethon Institute for Child Health Research; Professor Paul Torzillo AM, Department of Respiratory Medicine, Royal Prince Alfred Hospital; Dr James Ward, Collaborative Centre for Aboriginal Health Promotion; Ms Beth Warner, Royal Australasian College of Physicians; Associate Professor Ted Wilkes, National Indigenous Drug and Alcohol Committee of the Australian National Council on Drugs; and Dr Mark Wenitong, Australian Indigenous Doctors' Association.

40. The targets identify the following five key subject areas for target setting as priorities, and the key elements of any national plan to achieve Indigenous health equality:
- Partnership;
 - Health status;
 - Primary health care and other health services;
 - Infrastructure; and
 - Social and cultural determinants (currently under development).
41. The integration of the Close the Gap targets into policy settings remains an ongoing concern of the Campaign partners. The targets in the Statement of Intent, for example, are still not reflected in the government's *Overcoming Indigenous Disadvantage Framework*.

c) Partnership with Indigenous organisations

42. A further concern of the Campaign partners remains in relation to partnership and the achievement of Indigenous health equality. While the Campaign partners have therefore been encouraged by the commitments to partnerships including by the Prime Minister in the *Apology to Australia's Indigenous Peoples*³⁹ there are few signs that the Australian Government is otherwise embracing a partnership approach. In part, this could be because the Australian Government is waiting for the establishment of the national Indigenous representative body as a vehicle for partnership.
43. When talking of partnership, the Steering Committee see this as meaning partnership between:
- Indigenous peoples and their representatives;
 - Australian governments (with an internal, cross sectoral dimension; and at the intergovernmental level); and
 - Key players in the Indigenous and non-Indigenous health sector.
44. The Steering Committee has identified partnership as being so fundamental to the achievement of Indigenous health equality that they included partnership targets in the *National Indigenous Health Equality Targets*. These targets propose that within 2 years (meaning by the end of 2009):
- A National Framework Agreement to secure the appropriate engagement of Aboriginal people and their representative bodies in the design and delivery of accessible, culturally appropriate and quality primary health care services is established; and

39 Prime Minister, Kevin Rudd MP, Apology to Australia's Indigenous Peoples, 13 February 2008.

- That nationally agreed frameworks exist to secure the appropriate engagement of Aboriginal people in the design and delivery of secondary care services.⁴⁰
45. The Steering Committee believes that Australian governments are aspiring to engage with Indigenous peoples more effectively as partners. The challenge is to identify *how* this is to be achieved.
46. Particularly in relation to a national primary health cares strategy, Aboriginal representative bodies must be active participants in development and implementation. Aboriginal community controlled health services must be involved in health planning at the local and regional level with the National Aboriginal Community Controlled Health Organisation, and State/Territory NACCHO Affiliates at national and jurisdictional levels respectively. Where relevant, additional partners would include the Indigenous health professional bodies and a national Indigenous representative body when it is established.

7.2 The criminal justice system and deaths in custody

47. There continued to be high levels of incarceration of Indigenous people, particularly women and children, and the over-representation of Indigenous people in prisons and juvenile justice facilities. For example:
- Indigenous prisoners represented 24% of the total prisoner population at 30 June 2006, the highest proportion since 1996
 - only 5% of Australians aged 10-17 years are Indigenous, but 40% of those aged 10-17 years under juvenile justice supervision were Indigenous.⁴¹
 - 85% of prisoners in the Northern Territory are Indigenous people.
48. The National Indigenous Drug and Alcohol Committee's recent report confirms the over-representation of Indigenous peoples in Australia's corrective systems and highlights that the proportion of adult Indigenous

40 Aboriginal and Torres Strait Islander Social Justice Commissioner and the Close the Gap Steering Committee for Indigenous Health Equality for Indigenous Health Equality for Indigenous Health Equality National Indigenous Health Equality Targets, Human Rights and Equal Opportunity Commission, Sydney, 2008., p22. Available online at: http://humanrights.gov.au/soial_justice/health/targets/index.html.

⁴¹ Australian Bureau of Statistics, *Prisoners in Australia 2006*. At: <http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/BA368B46230A4118CA2573AF0014B905?OpenDocument> (viewed 23 September 2008). Australian Institute for Health and Welfare, *Juvenile Justice National Minimum Data Set 2005-06: Facts and figures*. At: http://www.aihw.gov.au/childyouth/juvenilejustice/jj_facts_and_figures.cfm (viewed 23 September 2008).

women in prison has increased 3 fold since the 1991 Royal Commission into Aboriginal deaths in custody.⁴²

49. These issues have been dealt with extensively by the Social Justice Commissioner in the annual *Social Justice Report*.⁴³
50. The Commission has also highlighted concerns with the over-representation in correctional facilities and the treatment of Indigenous young people with cognitive disabilities and mental health issues, including foetal alcohol syndrome. The report highlights the need for further research in this area, the need for more education and awareness within correctional facilities of these issues, and the development of culturally appropriate responses.⁴⁴
51. In light of the continued over-representation of Indigenous people, particularly women, in the criminal justice system, there is a pressing need for the continued implementation of the 339 recommendations contained in the Report of the Royal Commission into Aboriginal Deaths in Custody, including any outstanding recommendations.
52. The Committee against Torture recommended that the Australian Government reduce the overcrowding in prisons, implement alternatives to detention, abolish mandatory sentencing and prevent and investigate deaths in custody.
53. A comprehensive response to the issues raised by this report requires government commitment in two key areas:
 - ongoing community justice mechanisms which recognise Indigenous governance models and return control and decision-making processes to Aboriginal and Torres Strait Islander communities
 - measures to address the impact of Indigenous marginalisation and socio-economic disadvantage on Indigenous peoples' contact with the criminal justice system.⁴⁵

⁴² National Indigenous Drug and Alcohol Committee, *Bridges and barriers: addressing Indigenous incarceration and health* (2009). At

http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf (viewed 20 July 2009).

⁴³ See, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Sydney, 2001; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, Sydney, 2002; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Sydney, 2003; and Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 2004*, Sydney, 2005.

⁴⁴ Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental health Issues* (2008). At http://humanrights.gov.au/social_justice/publications/preventing_crime/index.html (viewed 20 July 2009).

⁴⁵ See the findings of the Cooperative Research Centre for Aboriginal Health regarding the links between preventing recidivism and improving the social, emotional and cultural wellbeing of Aboriginal people: Cooperative Centre for Aboriginal Health Research, *Research Priorities in Aboriginal Prisoner*

7.3 Justice Reinvestment

54. Indigenous imprisonment remains one of the most entrenched issues facing Indigenous communities. Indigenous adults are 13 times more likely than non Indigenous adults to be imprisoned⁴⁶ and Indigenous juveniles are 28 times more likely than non Indigenous juveniles to be in juvenile detention.⁴⁷
55. Indigenous over representation in prison is not a new issue. At least since the Royal Commission into Aboriginal Deaths in Custody in 1991 it has been the subject of countless reports, research projects and roundtables. Some worthy initiatives have come out of these efforts but the bottom line remains: what we are doing is simply not working. If it was working, we would be seeing a reduction in Indigenous imprisonment, rather than the 48% increase since 1996.
56. Justice reinvestment is a criminal justice policy approach from the United States that diverts the funds spent on imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in these specific communities.
57. Justice reinvestment still retains prison as a measure for dangerous and serious offenders but actively shifts the culture away from imprisonment and starts providing community services that prevent offending.
58. Results to date are very promising with reductions in the prison population and prison expenditure, as well as significant investments in preventative and rehabilitative community based programs.
59. Justice reinvestment has not been tried in Australia yet, although we have good reason to believe that we can pin point the communities where high concentrations of Indigenous offenders live. This would allow community development and preventative programs to be put in place with reinvested funds.
60. Indigenous imprisonment is a cause of great social exclusion and impacts on the enjoyment of human rights. Justice reinvestment is a new idea in Australia that offers a proven rigorous methodology and good results from overseas experience. Given that little seems to be working at the moment, this is an opportunity to consider new ideas for the Australian context.

Health: Recommendations and Outcomes from the CRCAH Aboriginal Prisoner Health Industry Roundtable, November 2007, Discussion Paper Series No. 6, August 2008.

⁴⁶ SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission.

⁴⁷ SCRGSP (Steering Committee for the Review of Government Service Provision) 2009, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, Productivity Commission.

7.4 **Mandatory sentencing**

61. Mandatory sentencing laws are still in place in Western Australia.⁴⁸ These laws have resulted in situations of injustice, with individuals receiving sentences that are disproportionate to the circumstances of their offending.⁴⁹
62. The Commission notes that although the Northern Territory Parliament made changes to the 'mandatory sentencing' laws for property offences effective from 2001, the *Sentencing Act 1995* (NT) still contains forms of mandatory sentencing in cases involving offences of violence.⁵⁰
63. The *Social Justice Report 2001* concluded that the policy of mandatory detention is not only ineffective in deterring crime and rehabilitating offenders, but costly and manifestly unjust. The Social Justice Commissioner has called on the Western Australian Government to repeal its mandatory detention provisions and for the federal Parliament to exercise its responsibilities to ensure compliance by the WA Government with Australia's international human rights obligations by overriding the laws if necessary.⁵¹
64. In 2005 the Committee on the Elimination of Racial Discrimination reiterated its concerns about the provisions for mandatory sentencing in the Criminal Code of Western Australia and the disproportionate impact of this law on Indigenous groups.

7.5 **Funding Aboriginal Legal Services**

65. In 2008 the Federal Government allocated \$11.3 million for Aboriginal Legal Services (ALS) to assist meet the high demand for legal assistance among Indigenous communities. The total funding for the operation of Aboriginal Legal Services for 2007-2008 was over \$64 million.⁵²
66. However, Aboriginal Legal Services continue to struggle to deliver services with the level of resources they are provided. In 2008 the Aboriginal Legal Rights Movement submitted a complaint to the UN Committee on the Elimination of Racial Discrimination on the under-funding of Aboriginal Legal Services, in comparison with general legal aid services. ALRM

⁴⁸ See *Criminal Code* (WA), s 282.

⁴⁹ See further Australian Human Rights Commission, Submission to the Human Rights Committee. At: http://www.hreoc.gov.au/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf (viewed 23 September 2008).

⁵⁰ See *Sentencing Act 1995* (NT), ss 78BA, 78BB.

⁵¹ See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, available at: http://www.hreoc.gov.au/social_justice/sjreport_01/index.html (viewed 23 September 2008).

⁵² ALP, 'Additional funding for Aboriginal Legal Services', (Media Statement, 19 June 2008). At <http://www.alp.org.au/media/0608/msha190.php> (viewed 20 July 2009).

estimates it is disadvantaged in its funding by about 40% in real terms. The Committee expressed concern over the Aboriginal legal aid budget and recommended the government boost funding to provide proper access to justice for Indigenous people.

67. More recently, the Western Australia Aboriginal Legal Service noted they were on the verge of collapse because their lawyers continued to be overwhelmed by the demand, with lawyers in some outreach services having to see up to 90 clients a day.⁵³
68. The impact of these funding issues is Indigenous people are often unable to access adequate legal services.

7.6 Violence against women and children

69. The ABS 2002 National Aboriginal and Torres Strait Islander Social Survey found that:
 - 21.2% of Indigenous people reported family violence as a problem in their community; and
 - 18.3% of Indigenous women experienced physical or threatened abuse in the past 12 months, compared with 7% of non-Indigenous women.⁵⁴
70. Indigenous, women, children and men are entitled to live their lives in safety and full human dignity. This means without fear of family violence or abuse. This is their cultural and their human right.
71. Given the increasing levels of incarceration of Indigenous peoples generally, their over-representation in the criminal justice system and high level of recidivism, there remains a pressing need for culturally appropriate programs working with Indigenous offenders and offender rehabilitation programs in any sustained response to family violence.
72. There is also a clear connection between incarceration of Indigenous women and being a victim of violence – there are extremely high rates of substance abuse and reporting of having been a victim of violence among Indigenous female prisoners – this highlights the need for support programs for Indigenous women in prison and also post-release (such as healing and re-integration, housing etc).
73. In May 2008, the Australian Government formed a *National Council to Reduce Violence Against Women and Children* (the National Council). The

⁵³ ABC, 'WA Aboriginal legal service on verge of collapse' (Media Interview, 16 July 2009). At <http://www.abc.net.au/worldtoday/content/2009/s2627719.htm> (viewed 20 July 2009).

⁵⁴ SCRGSP (Steering Committee for the Review of Government Service Provision) 2005, *Overcoming Indigenous Disadvantage: Key Indicators 2005*, Productivity Commission, Canberra, p152.

Council was directed to develop a 12 year *National Plan to Reduce Violence Against Women and Children* (the National Plan). The submissions and consultations to inform the development of the National Plan highlighted a number of issues including the need for:

- improving support and services for those effected by domestic violence and sexual assault
- improving the legal system so that perpetrators are held to account
- increasing primary prevention efforts so that more children and young people are educated about respectful relationships
- increasing research and setting targets so that Australia can track its progress.⁵⁵

74. The Plan identifies a number of specific measures for Indigenous communities, some of which include:

- Support local communities that take a stand against the excessive use of alcohol and other substances that exacerbate violence against women and their children, by anticipating flow on effects and the need for additional services, and by creating a rapid response capability
- Fund culturally-appropriate mediation and conflict resolution training for non-violent men and women in Aboriginal and Torres Strait Islander communities to strengthen their role and influence in assisting to solve community and family disputes which occur as part of their everyday life.
- Collate disaggregated data for Aboriginal and Torres Strait Islander peoples.
- Provide adequate funding to support a diverse range of programs that meet the different needs of Aboriginal and Torres Strait Islander communities.
- Expand training and support to rural practice nurses and Aboriginal health workers in sexual assault and domestic and family violence assessment and referral.⁵⁶

75. The government has responded positively to the National Plan and in relation to Aboriginal and Torres Strait Islander communities has agreed to:

- Reduce overcrowding in Aboriginal and Torres Strait Islander Communities; and
- Fund healing centres for Indigenous communities.

55 Australian Domestic & Family Violence Clearinghouse, E-News December 2008 (2008) Available at <http://www.adfvc.unsw.edu.au/e-news/e-news%20December%202008.rtf> (viewed 17 March 2009).

⁵⁶ National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009). At http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/national_plan/Documents/The_Plan.pdf (viewed 20 July 2009).

76. The Commission's report on *Ending Family violence and Abuse in Aboriginal and Torres Strait Islander Communities* highlights the need for support for Indigenous community initiatives and networks, human rights education, government action, and robust accountability and monitoring.⁵⁷ The Social Justice Commissioner has also reported in his annual *Social Justice Reports*⁵⁸ on the prevalence of family violence in Indigenous communities and strategies for addressing this.
77. Policies and programs aimed at preventing violence against Indigenous women and children must be designed and developed with the input of Indigenous women and children. Indigenous men also have a role in this process and should be engaged in addressing the causes of violence as well as the solutions. Prevention activity in the form of community development and education is critical to break the cycle of intergenerational violence that afflicts so many Indigenous communities.
78. During 2007 and 2008 the Commission designed and delivered a training program to prepare Community Legal Education workers for employment in Family Violence Prevention Legal Services. The Community Legal Education Program provides a training model focused on community development approaches to family violence prevention. Programs of this nature are an important means of strengthening the capacity of Indigenous workers to expand the education and understanding among Indigenous communities of the legal contexts of family violence.

7.7 Stolen Generations

79. The *Bringing them home Report* of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997) documents the experiences of the Stolen Generations, who were forcibly removed from their families under the guise of welfare.⁵⁹
80. This report recommended that reparation be made in recognition of the history of gross violations of human rights and that the *van Boven principles* guide the reparation measures, which should consist of:
 - acknowledgment and apology
 - guarantees against repetition
 - measures of restitution

57 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Ending family violence and abuse in Aboriginal and Torres Strait Islander communities: Key issues* (2006), pp5-6. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, pp 194-95.

⁵⁸ See *Social Justice Reports 1996, 2001-2004 and 2007*. At: http://humanrights.gov.au/social_justice/sj_report/index.html (viewed 20 July 2009).

⁵⁹ Australian Human Rights Commission, *Bringing them home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, Sydney. At: http://www.hreoc.gov.au/social_justice/bth_report/report/index.html (viewed 23 September 2008).

- measures of rehabilitation
- monetary compensation.

81. The first of these steps for reparation was undertaken by the new Australian Government in 2008. The Prime Minister of Australia apologised to the Stolen Generations in February 2008 for 'laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians... especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country'.⁶⁰

82. The Aboriginal and Torres Strait Islander Social Justice Commissioner, recommended in his *Social Justice Report 2008* the federal Government establish an independent, Indigenous controlled national Indigenous healing body following extensive consultation, which is responsible for developing and then implementing a coordinated National Indigenous Healing Framework. The Framework should be developed in conjunction with the Commonwealth and state/ territory governments and Indigenous organisations and communities. The national Indigenous healing body should:

- be based on the key principles of self-determination, respect for human rights, reconciliation, and adopt a community development approach that is grounded in Indigenous culture and identity;
- have adequate resourcing for long term community generated, and culturally appropriate Indigenous healing services and programs, commensurate with need;
- have a broad range of possible roles and functions including: research, public education, capacity building, training, accreditation, policy review, public reporting and monitoring and evaluation;
- engage with state and territory governments to develop a nationally consistent approach in the provision of financial redress (compensation) for the Stolen Generations.

The national Indigenous healing body should also be funded to conduct educational activities about Indigenous healing to Indigenous communities, service providers and relevant government departments to ensure that the purpose of a national Indigenous healing body is clearly understood.⁶¹

83. The government has since committed to setting up a Healing Foundation for Aboriginal and Torres Strait Islander people which will support communities and individuals to address trauma and healing needs,

⁶⁰ House of Representatives, Official Hansard No.1 , Forty second Parliament, First Session, First Period (13 February 2008), p167. At: <http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf> (viewed 10 June 2008).

⁶¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (2009), ch 4. At http://humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 20 July 2009).

particularly those of the Stolen Generations and their families. The Healing Foundation's establishment will be guided by a Development Team, which has been established to work with Indigenous Australians to ensure broad ownership and support for the Foundation. The team is expected to report to the Government on its consultations by December 2009, with a Healing Foundation to be established in 2010.

84. The other recommendations for reparation remain largely outstanding, including the provision of monetary compensation to the Stolen Generations and their families. The only compensation scheme established for the Stolen Generations to date has been in Tasmania.

8 Culture, religion and language

Culture, religion and language rights are contained in articles 11-13 of the Declaration: right to practice and revitalise their cultural traditions and customs, right to practice and develop their spiritual and religious traditions, customs and ceremonies; right to revitalise, use, develop, and transmit their histories, languages, oral traditions, philosophies, writing systems and literatures; and right to interpretation for political, legal and administrative proceedings where necessary.

85. The *National Indigenous Languages Survey Report 2005* provides a summary and analysis of Australia's Aboriginal and Torres Strait Islander languages, and assesses their status and supporting resources. A major finding of the report is that Australia's Aboriginal and Torres Strait Islander languages are critically endangered and urgent action is required to preserve them for the future. Of over 250 known Australian Aboriginal and Torres Strait Islander languages, only about 145 Indigenous languages are still spoken or partially spoken and the vast majority of these, about 110, are in the severely and critically endangered categories. Less than 20 languages are strong and not currently on the endangered list.⁶²
86. Indigenous languages and cultures are closely intertwined. Safeguarding languages preserves Indigenous culture and identity.
87. Currently, the promotion and protection of Indigenous languages and cultures is not sufficiently prioritised by the Australian Government. If languages are to survive, genuine commitment and policies are required for language maintenance and language revitalisation programs at all levels of Australia's educational institutions. This means making schools culturally familiar and appropriate for Indigenous children and embedding Indigenous perspectives across the curriculum.

⁶²Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Languages Survey Report 2005*, Australian Government Publication, p. 4 At: http://www.arts.gov.au/__data/assets/pdf_file/0006/35637/NILS_Report_2005.pdf viewed 16 April 2009.

88. Additionally, the IPON is concerned that the protection of Indigenous cultural and intellectual property by the mainstream legal system is inadequate. Instruments such as the *Copyright Act 1986* (Cth) that provide legal protections for the life of the artist plus fifty years are not equipped to protect knowledge systems and artistic designs that are thousands of years old. Nor are they capable of recognising and protecting collective ownership of artistic content and products, which is common in Indigenous cultures.⁶³
89. In May 2009 the UN Committee on Economic, Social and Cultural Rights recommended:
- a) the State party strengthen its efforts to guarantee the indigenous peoples' rights under articles 1 and 15 to enjoy their identity and culture, including through the preservation of their traditional languages;
 - b) consider improving the Maintenance of Indigenous Languages and Records Program;
 - c) reform the Copyright Act 1986 to extend its legal protection to indigenous people; and
 - d) develop a special intellectual property regime that protects the collective rights of indigenous peoples, including protection of their scientific products, traditional knowledge and medicine. The Committee also recommends that a registry of intellectual property rights of indigenous peoples be opened and that the State party ensure that the profits derived thereof benefit them directly.⁶⁴

9 Education, knowledge, media, and employment

Education, knowledge, media and employment rights are contained in articles 14 – 17 of the Declaration: right to establish and control their educational systems; right to education, including in their own culture and language; right to indigenous cultures, traditions and histories, reflected in education and public information; right to establish their own media, in their own languages, and access non-Indigenous media without discrimination; and right to employment without discrimination and protect Indigenous children from economic exploitation.

63 For further information, President of Australian Human Rights Commission, Presentation on the legal protection of Indigenous Cultural and artistic works. At: http://www.hreoc.gov.au/about_the_commission/speeches_president/20060901_Malaysia.html (viewed 23 September 2008).

⁶⁴ Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Forty-second session Geneva, 4 to 22 May 2009, para 33. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (Viewed 12 June 2009)

9.1 Provision of Indigenous education in remote Australia

90. The vast majority of the Australian continent is defined as remote or very remote. In 2006 there were 1,187 discrete Indigenous communities in Australia with 1,008 of these communities in very remote areas. Of the very remote communities, 767 had population sizes of less than 50 persons. In 2006 there were 69,253 Indigenous peoples living in very remote Australia.⁶⁵
91. 31% of Indigenous Australians live in major cities and 24% live in remote and very remote Australia.⁶⁶ The remainder of the Indigenous population lives in regional centres. The Accessibility/Remoteness Index of Australia describes remote and very remote locations as having very little accessibility of goods, services and opportunities for social interaction.⁶⁷
92. Remoteness has obvious implications for school education, including limiting access to early childhood services, primary and secondary schools as well as other resources such as libraries and information technology. In remote areas, road access may be limited during times of the year and during wet season there may be no access for months on end. If internet access is available in remote Australia, it is usually via satellite, offering a dial-up service with limited and slow internet speeds.
93. In some remote areas there is a very poor or part time primary school service and in others there is no service at all. Of great concern is the fact that the Australian Government has no instrument to assess the extent to which remote students have reasonable access to schools services. The poor educational outcomes for this cohort suggest that action must be taken to assess and remedy this situation. Assessing school accessibility for remote students by region is one essential future action to which the Australian Government must commit. Such action is a starting point to address the poor outcomes as described *Review of Government Service Provision* to Indigenous Australians.
94. Indigenous children in remote areas have, on average, much lower rates of school attendance, achievement and retention than Indigenous children in urban areas and other Australian children. In remote areas of the NT, only

65 A Fordham, R Schwab, Summarising: Fordham, Preliminary analyses of access to education and discrete Indigenous communities in Australia, Reference No. 48, Centre for Aboriginal Economic Policy Research (2006). At <http://www.anu.edu.au/caepr/educationfutures/ref048.pdf> (viewed 18 September 2008). Data Source: ABS 2006 Community Housing and Infrastructure Needs Survey (CHINS) of Aboriginal and Torres Strait Islander communities

66 Australian Bureau of Statistics, 4705.0 - Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006. At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4705.0Main+Features12006?OpenDocument> (viewed 19 January 2009).

67 Measuring Remoteness: Accessibility/Remoteness Index of Australia (ARIA), Revised Edition, Occasional Papers: New Series Number 14, (2001), p. 19 At [http://www.health.gov.au/internet/main/publishing.nsf/Content/7B1A5FA525DD0D39CA25748200048131/\\$File/ocpanew14.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/7B1A5FA525DD0D39CA25748200048131/$File/ocpanew14.pdf) (viewed 21 September 2008).

3 to 4% of Indigenous students achieved the national reading benchmark in 1999.⁶⁸

95. At this time Australia has no accurate national data to assess the number of Indigenous school-aged children who have access or **no** access to a school within travelling distance. In the Northern Territory, where the total Indigenous population is approximately 68,000, there are conservatively estimated to be 2,000 Indigenous school-aged children with no access to a school. It is believed that these young people are not attending school.
96. In Australia, secondary education is not generally available in locations with small populations. The majority of small, remote communities in Australia are known as Indigenous Homelands. Homelands are made up of Aboriginal clan families who live on ancestral lands, usually in very remote parts of Australia.
97. In 2006 the number of discrete Indigenous communities spread across Australia was 1,187. Of this number 767 Indigenous communities were in very remote locations with a usual population of less than 50 persons. These communities are not likely to have schools, or if they do, the school is most likely to provide primary level education with a visiting teacher who attends for a number of days each fortnight. In many cases the communities have limited infrastructure, no power or running water.
98. In his *Social Justice Report 2008*, the Social Justice Commissioner recommends the Australian Government audit populations and projected populations of remote preschool and school-aged children and assess whether the existing education infrastructure and services meets the needs of remote Indigenous populations. Where the school provision does not meet population needs, the government should develop a national, funded plan to upgrade or build quality preschool, primary and secondary school infrastructure where populations warrant them.⁶⁹

9.2 Bilingual education

99. Apart from some notable exceptions, most government and non-government schools in Australia provide a Western model of education. They follow a Western calendar, celebrate Christian holidays and provide education that reinforces Western culture and ways of learning.⁷⁰ Assimilation and the forces of mainstream culture mean that any Indigenous-focussed study is directed to teaching a past history and (in

68 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2007 Report* (2007), Section 6. At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2007/keyindicators2007.pdf> (viewed 20 March 2009).

⁶⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), ch 3.

⁷⁰ Human Rights and Equal Opportunity Commission, *Education Access, National Inquiry into Rural and Remote Education*, 2000, p. 70

some rare instances) revitalising Indigenous languages that are no longer spoken. Indigenous culture is usually taught through a history syllabus. The revitalisation of Indigenous language and culture occurs at the margins of mainstream education, if at all.

100. Previous government policies of assimilation and the prevailing 'mainstream' Western cultural approach to culture in schools has all but eliminated Indigenous culture and languages in the densely populated areas of Australia. Of the estimated 250 original Indigenous languages that existed in Australia prior to colonisation, less than 20 languages exist as full languages and are considered to be safe in terms of their continuation.
101. Bilingual education is considered to be one way to keep Indigenous language and culture alive. Of the 9,581 schools that exist in Australia today, nine schools are Bilingual schools, instructing students in their first Indigenous language.
102. In 2009 the Northern Territory Government implemented a policy which makes it mandatory for schools to begin each school day with four hours of English literacy. The impact of this policy will be felt most markedly by the Bilingual schools. In fact, the four hours of English is likely to destroy the Bilingual education model. Dismantling Bilingual education potentially endangers some of the remaining Indigenous languages.
103. Bilingual Education or Two-Way Learning is an example of Indigenous controlled education. Students are instructed in their first language, learning educational concepts in their own language and learning their first literacies in their mother-tongue. English language and literacies are gradually introduced in the primary years.
104. Evidence from an Australian study demonstrates marginally better English literacy outcomes for students from Bilingual schools at the end of primary school compared with students from non-Bilingual schools with similar languages, demography and contact histories.⁷¹
105. Bilingual schools operate in some of the most remote regions of Australia and therefore they lack the quality education resources such as information technology which is routinely available to urban schools. English is a foreign language in these regions so students do not hear it spoken in their day-to-day lives.
106. Bilingual schools have periodically been threatened with closure by governments because they do not achieve national English literacy and numeracy benchmark standards. Bilingual schools have been reducing in number over time because of the lack of fully trained teachers and the lack of capacity to sustain these resource-intensive programs.

71 Department of Employment, Education and Training, Northern Territory Government, Indigenous Languages and Culture in Northern Territory Schools Report 2004 – 2005, pp. 34-37

107. Bilingual schools are resource intensive, they require 30% more staff than other schools. Bilingual schools have to be able to sustain a program that produces curricula in two languages. This means they need fully trained local Indigenous teachers as well as English literacy teacher specialists. Books and teaching materials need to be developed in both languages. These programs are threatened.
108. In remote regions of Australia Indigenous language and culture is endangered. An increase in the numbers of non-Indigenous people moving into remote regions and the influence of television is eroding languages. There are concerns about the ability of schools to reinforce Indigenous languages and culture because the numbers of trained Indigenous teachers is declining. It is difficult for remote Indigenous peoples to obtain teaching qualifications because of the lack of training facilities in remote areas and the fact that potential trainee teachers must leave family and ancestral lands to access formal education.
109. Mentor programs have been successful in assisting remote Indigenous teachers to become fully qualified, but they have been phased out by government departments in recent years. Remote mentor programs provided time release from teaching duties for fully qualified teachers so that could spend time each week mentoring Indigenous assistant teachers in teaching practice as well as providing support with their academic study. The mentor program was successful in increasing the numbers of Indigenous teachers in the Northern Territory in the 1980s and 1990s. Bilingual education
110. In May 2009 the UN Committee on Economic, Social and Cultural Rights recommended the Australian Government preserve and promote bilingual education at schools.⁷²

9.3 Indigenous employment

111. Low levels of education and the lack of available, suitable employment opportunities, for Indigenous peoples, particularly in remote areas, have contributed to the high levels of unemployment and welfare recipients among Indigenous communities.
112. In 2007 COAG committed to halve the gap in employment outcomes between Indigenous and non Indigenous Australians within a decade.
113. In February 2009, COAG signed the National Partnership Agreement for Indigenous Economic Participation. The National Partnership involves complementary investment and effort by the Commonwealth, states and

⁷² Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Forty-second session Geneva, 4 to 22 May 2009, para 33. At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc> (Viewed 12 June 2009)

territory governments to significantly improve opportunities for Indigenous people to engage in private and public sector jobs through:

- creating jobs in areas of government service delivery that have previously relied on subsidies through the Community Development Employment Projects program
- increasing public sector employment to reflect Indigenous working age population share by 2015
- building Indigenous workforce strategies into implementation plans for all COAG reforms contributing to the closing the gap targets
- strengthening government procurement policies to maximise Indigenous employment.⁷³

114. The government has also supported the Australian Employment Covenant (AEC). This is a national industry-led initiative which brings all Australians together to help close the gap between Indigenous and non-Indigenous Australians in employment and employment opportunities. The aim is the placement and long-term retention of 50,000 Indigenous people in 'Covenant jobs' within a two-year period. 114 people have been placed in the first nine months.⁷⁴

9.4 Community Development Employment Projects

115. The Community Development Employment Projects (CDEP) Program was introduced in the 1970s in an attempt to address the perceived negative effects that could flow from providing remote communities with social service benefits. There was a concern even then, that this 'passive welfare' would have harmful personal and social consequences.

116. The CDEP scheme has enabled many Indigenous communities to develop valuable community services which address key community needs. Many of these services are now regarded as 'essential services' in Indigenous communities and it is questionable that commercial enterprises could either afford to provide them, or deliver them in a culturally appropriate manner. Examples include: night patrol services; childcare centres; cultural and natural heritage programs; and garbage services.

117. The CDEP scheme has also contributed to the development of Indigenous businesses, entrepreneurship and leadership in some communities. CDEPs have been able to increase the employment prospects of many participants through the delivery of accredited vocational training courses,

⁷³ Department of Education, Employment and Workplace Relations, *Indigenous Employment and Business*, <http://www.deewr.gov.au/Indigenous/Employment/Pages/default.aspx> (viewed 20 July 2009).

⁷⁴ Department of Education, Employment and Workplace Relations, *Indigenous Employment and Business*, <http://www.deewr.gov.au/Indigenous/Employment/Pages/default.aspx> (viewed 20 July 2009).

paid work experience, personal support and literacy/numeracy skills.⁷⁵
There was a strong emphasis on projects that positively contributed to community coherence and cultural integrity.⁷⁶

118. However, over its lifespan, the CDEP scheme has also been criticised by Indigenous peoples and governments for a range of reasons, including that it:

- Is an alternative form of employment for Indigenous peoples, even where there are other jobs available in the local labour market;
- Is a destination or dead-end, rather than a pathway to 'real' and sustainable employment;
- It lets governments at all levels get away with not providing essential services to Indigenous communities;
- It devalues the work done by CDEP participants because a 'real job' would earn a 'real wage;' and
- CDEP participants do not have access to superannuation, long-service leave and union membership.

119. The Review Board of the Northern Territory Emergency Response recommended in 2008:

- The Community Develop Employment Projects (CDEP) program be reformed in tandem with an overhaul of training provided in Aboriginal communities so that CDEP participants must undergo literacy, numeracy and on-the-job training designed to improve non-CDEP employment opportunities.
- Community Employment Brokers (CEBs) should :
 - focus on mentoring, case management and training support particularly with CDEP participants
 - undertake workplace assessment
 - coordinate activities between education and training providers and Job Network Providers.⁷⁷

120. Reforms in recent years have shifted the focus of CDEP towards long-term employment outside the CDEP scheme, a re-orientation towards mainstream employment outcomes.

⁷⁵ Unpublished Job Futures response to government discussion paper: *Indigenous Potential Meets Economic Opportunity*, November 2006, p2. Response provided by Job Futures to the Aboriginal and Torres Strait Islander Social Justice Commissioner.

⁷⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006* (2006), ch 2. At http://humanrights.gov.au/social_justice/sj_report/sjreport06/chap2.html#3 (viewed 20 July 2009).

⁷⁷ Northern Territory Emergency Response Review Board, *Report of the Northern Territory Emergency Response Review Board* (2008), summary of recommendations. At: http://www.terreview.gov.au/docs/report_nter_review/summrec.htm (viewed 20 July 2009).

121. Most recently, the Australian Government has put in place reforms for CDEP to cease operating in non-remote locations as of 1 July 2009. Indigenous job seekers will be provided by new employment services and the Indigenous Employment Program. A new Community Support Program will be introduced to assist Indigenous Australians in those locations to access a range of services. This will be separate from the reformed CDEP.
122. Current participants in remote areas will be able to access CDEP wages until 30 June 2011 to support their transition to the new arrangements. Current participants will be required to move to income support after 1 July 2009 if they take a break from CDEP for more than 2 weeks, excluding approved leave. From 1 July 2009 all new CDEP participants in remote locations will not be eligible to receive CDEP wages, instead they may be eligible to receive an Income Support Payment.
123. CDEP Participation in the Torres Strait Islands will continue to be managed by the Torres Strait Regional Authority and is not affected by the CDEP Reforms.⁷⁸
124. Some of the concerns with these reforms have included:
 - concerns that sufficient information about the changes might not have been provided to communities and transition arrangements may not have been adequately implemented;
 - a number of productive community roles and projects (e.g. grounds maintenance, ranger work, and to assist at schools and at health clinics) previously supported through CDEP, may cease to continue where these cannot be transformed into mainstream employment opportunities;
 - a risk that Indigenous peoples become permanently isolated from the labour market in urban and regional areas, without the support of CDEP or some similar arrangement that meets the particular needs of Indigenous unemployed people and allows them activity, training and purpose; and
 - concerns that unemployment rates among Indigenous peoples will increase.

9.5 Stolen Wages

125. The Stolen wages compensation schemes are a means by which Indigenous peoples access their right to a remedy for the human rights violations they experienced. The Human Rights Committee recommended,

⁷⁸ Centrelink, *Community Development Employment Projects*, <http://www.centrelink.gov.au/internet/internet.nsf/services/cdep.htm> (viewed 20 July 2009).

in their concluding observations on Australia in 2000,⁷⁹ such a remedy be made available where rights have been violated.

126. Stolen wages compensation schemes have been established in Queensland and New South Wales to compensate Indigenous peoples for the withholding, non-payment and underpayment of wages in the control of government. Investigations and consultations on the nature and extent of stolen wages are also underway in Western Australia.
127. The right to remedy remains unfulfilled in areas where compensation schemes have not been established. The IPON notes the need for stolen wages compensation schemes to be established in other States and Territories as appropriate.
128. The IPON also has significant concerns about the adequacy and fairness of the regimes established, particularly by the Queensland Government, to address injustices inflicted on Aboriginal and Torres Strait Islander people through the underpayment of wages.⁸⁰
129. In December 2006 the Senate Standing Committee on Legal and Constitutional Affairs published a report titled *Unfinished business: Indigenous stolen wages*, which recommended that governments provide unhindered access to archives for the purposes of researching the stolen wages issue as a matter of urgency. They also recommended that funding be made available for education and awareness in Indigenous communities as well as for preliminary legal research into stolen wages issues.⁸¹ These recommendations have not been adopted.

10 Political and economic rights

Political and economic rights are contained in articles 18-24 of the Declaration: right to participate in decision-making, including through representative institutions; States shall consult with indigenous peoples and obtain free prior and informed consent; right to maintain and develop political, economic and social systems to secure their development; right to improvement of their economic and social conditions in the areas of education, employment, vocational training, and retraining, housing, sanitation, health and social security; states shall take special measures for continuous improvement of economic and social conditions, particularly for indigenous elders, women, youth, children and people with disabilities; indigenous women and children's right to protection from violence and discrimination; right to

79 Human Rights Committee, *Concluding observations: Australia*, 24/07/2000 UN Doc A/55/40, paras.498-528. At <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/e1015b8a76fec400c125694900433654?Opendocument>.

80 See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional References and Legislation Committee Inquiry into Stolen Wages* (2006), pars 13-24.

81 The report is available at http://www.aph.gov.au/senate/committee/legcon_ctte/stolen_wages/report/index.htm (viewed 23 September 2008).

determine development priorities and develop and administer health, housing and other programs; and right to progressive realisation of their right to health.

10.1 National Indigenous Representative Body

130. The Commission's *Social Justice Reports* from 2004-2006 outline a reduction in Indigenous people's participation in decision-making bodies since the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) and within the 'new arrangements' for the administration of Indigenous Affairs subsequently put in place by the Australian Government. The Commission has particularly noted the absence of processes for systematic engagement with Indigenous people under the new arrangements.⁸²
131. The new Australian Government has made a commitment to set up a new national representative body to provide an Aboriginal and Torres Strait Islander voice within government.
132. In 2008, the Australian Government invited the Aboriginal and Torres Strait Islander Social Justice Commissioner to convene an independent Steering Committee to develop a preferred model for a national representative body for Aboriginal and Torres Strait Islander peoples.
133. In March, the Steering Committee convened a national workshop in Adelaide to identify the key elements of a new national representative body. Consensus was reached at this workshop on a range of issues but further consultation and discussion is needed to address four outstanding issues: how the body can best represent Aboriginal and Torres Strait Islander peoples in a way that includes local and regional issues; what should be the structure of the national representative body; what should its relationship be with Government and the Parliament; and how should it be funded.
134. The Steering Committee is required to report on a preferred model to the Australian Parliament by the end of July 2009 and to recommend an interim body for establishment from August 2009.⁸³

10.2 Northern Territory Emergency Response

135. The IPON notes with concern that the application of the Race Discrimination Act continues to be suspended in relation to the NTER, an intervention strategy introduced by the Australian Government in 2007 to

⁸² See Australian Human Rights Commission, *Building a National Indigenous Representative Body – Issues for Consideration*, available at: http://www.humanrights.gov.au/social_justice/repbody/index.html (viewed 23 September 2008).

⁸³ Copies of the Commission's Issues Papers and Community Guides are available at http://humanrights.gov.au/social_justice/repbody/index.html.

protect Aboriginal children in the Northern Territory from sexual abuse and family violence.⁸⁴

136. The legislation enacted for the NTER declares itself, and any acts done pursuant to it, to be a special measure for the purposes of the Race Discrimination Act and exempt from the operation of Part II of the Race Discrimination Act. It also declares that, where relevant, it is exempt from Northern Territory and Queensland anti-discrimination legislation.⁸⁵
137. The *Social Justice Report 2007* assessed the NTER's compliance with Australia's human rights obligations and found that:
- the Government has an obligation to promote and protect the right of Indigenous peoples to be free from family violence and child abuse.
 - the NTER legislation is inappropriately classified as a 'special measure' under the Race Discrimination Act because of the negative impacts of some of the measures on Indigenous peoples and the absence of adequate consultation or consent by Indigenous peoples to the measures.
 - the NTER legislation contains a number of provisions that are racially discriminatory.
 - some provisions raised concerns for the compliance with human rights obligations (e.g. the lack of access to review of social security matters and the compulsory acquisition of land without just compensation).⁸⁶
138. While the *Social Justice Report 2007* highlighted the importance of government addressing family violence and child abuse in Indigenous communities, he noted the need for this to be done through measures that are not racially discriminatory.
139. The Commissioner recommended a ten point plan be implemented to address the lack of compliance of the NTER with Australia's human rights obligations. The ten point plan sets out how to:
- remove formal discrimination under the NTER legislation

84 Minister for Families, Community Services and Indigenous Affairs, 'National emergency response to protect children in the NT', (Media Release, 21 June 2007). At: http://www.fahcsia.gov.au/internet/minister3.nsf/content/emergency_21june07.htm (viewed 18 October 2007). The catalyst for the measures was the release of Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, titled Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred'.

85 Northern Territory National Emergency Response Act 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth); Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007 (Cth).

86 The Social Justice Report 2007 is available at: http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2008).

- ensure that schemes for income management and alcohol control are undertaken in a manner that is consistent with the Race Discrimination Act and that qualify as a 'special measure'
 - transition from a crisis or emergency approach to a community development approach through ensuring participatory processes, the creation of community development plans and rigorous participatory based monitoring and reviews.
140. The Northern Territory Emergency Response Review Board was supportive of such recommendations, and recommended that the Government respect Australia's human rights obligations and conform with the *Race Discrimination Act*.
141. The ease with which the obligations under the *Race Discrimination Act* have been set aside highlights the weak status of protections against race discrimination in the Australian legal system. Underlying this weakness is the absence of any constitutional protection against race discrimination and the absence of a federal charter of rights.
142. The UN Committee on the Elimination of Racial Discrimination, in response to an Early Warning and Urgent Action Procedure submitted in relation to the NTER, has asked the State party to submit further details and information on the following issues no later than 31 July 2009:
- Progress on the drafting of the redesigned measures, in direct consultation with the communities and individuals affected by the NTER, bearing in mind their proposed introduction to the Parliament in September 2009.
 - Progress on the lifting of the suspension of the Race Discrimination Act.
143. The UN Human Rights Committee and the UN Committee on Economic Social and Cultural Rights have similarly noted in its recent review its concerns at the negative impact of the NTER measures, the suspension of the operation of the *Racial Discrimination Act 1975* and the lack of adequate consultation with Indigenous peoples. The Human Rights Committee recommended the NTER measures be redesigned in consultation with the Indigenous peoples concerned, to ensure that they are consistent with the Race Discrimination Act and the International Covenant on Civil and Political Rights.⁸⁷
144. On 21 May 2009 the Government released its final response to the NTER Review Report in a joint announcement with the Northern Territory Government.⁸⁸ In its response the Government commits to introducing

⁸⁷ Human Rights Committee, Concluding Observations of the Human Rights Committee: Australia (2009) UN Doc CCPR/C/AUS/CO/5, par 14.

⁸⁸ Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Pages/default.aspx (viewed 20 July 2009).

legislation into the Parliament in October 2009 to remove the provisions that exclude the operation of the race discrimination Act. It also identifies measures it will take in relation to welfare reform and employment, law and order, education, supporting families, child and family health, housing and land reform and coordination.

145. The Government's response supports most of the Review Report's recommendations but did not support the following recommendations:
- 4. The current blanket application of compulsory income management in the Northern Territory cease.
 - 5. Income management be available on a voluntary basis to community members who choose to have some of their income quarantined for specific purposes, as determined by them.
 - 6. Compulsory income management should only apply on the basis of child protection, school enrolment and attendance and other relevant behavioural triggers. These provisions should apply across the Northern Territory.
 - 24. The Northern Territory Government to consider transferring responsibility for the Aboriginal Interpreter Service to the Department of the Chief Minister signalling the importance of this issue.
146. The Government issued a paper, *Future Directions for the Northern Territory Emergency Response*,⁸⁹ as a starting point for community discussions on how certain NTER measures could be more clearly deemed special measures under the *Race Discrimination Act*, to enable the NTER to be made subject to the *Racial Discrimination Act 1975*. The Government has commenced a consultation process with Indigenous communities and these are expected to be completed by late August 2009.

10.3 Income management schemes

147. The NTER legislation made provision for four kinds of income management regimes under the *Social Security Administration Act* (Part 3B Division 1, Item 17):
- the person lives in a declared relevant area (prescribed community) in the NT (s123UB). Income management involves quarantining 50% of all income support and family assistance payments.

http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Documents/Aust_response_1882953_1.pdf (viewed 20 July 2009).

⁸⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response* (2009). At http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/future_directions/Pages/default.aspx

- a state/ territory child protection officer recommends to Centrelink that a person should be subject to income management because their child is considered to be at risk of neglect or abuse (s123UC). In most cases, the principal carer will have 100% of their welfare payments income managed until such time as the risk to the child ceases (s123XI and s123 XJ).
 - a person, or the person's partner, has a child who does not meet school enrolment and attendance requirements (s123UD and s123UE). The trigger can be identified by either Centrelink or the State Education Authority. Income management will result in the principal carer having 50% of their income support and 100% of their family assistance payment quarantined for an initial period of 12 months. The principal carer will also have mandatory deductions from their welfare payments to cover the cost of their children's breakfast and lunch at school (Division 6).
 - a person who is subject to the jurisdiction of the Queensland Family Responsibilities Commission, is recommended by the Commission for income management (s123UF). It is expected that a person would be recommended for income management because the Commission found their child to be at risk of abuse or neglect, or because their child was not enrolled or not meeting school attendance requirements.
148. A person who is subject to the income management provisions has an income management account. Amounts are deducted from the person's welfare payments and credited to their income management account. A person subject to the income management regime can then be given a store value card capable of storing monetary value in a form other than cash, to purchase essential items at particular designated shops.
149. Amounts quarantined from a person's income can be spent on 'priority needs' including food, beverages, clothing, basic household items, housing, household utilities, health, childcare and development, education and training and other specified items by legislative instrument. The Minister has discretion to exempt people from income management in any circumstances the Minister sees fit.
150. Income management can also apply to people who enter a prescribed area in the Northern Territory for any period of time, or if their partner enters for any prescribed period of time. The category of people in the Northern Territory subject to income management can be expanded because the Minister may declare that a relevant Northern Territory area is a 'prescribed area' and will be subject to the Act. This declaration can last for up to one year. In couples where both parents receive income support, both parents' income support and family payments are subject to income management. In couples where one parent receives a family income payment, the entire family income support could be subject to.
151. Other adults with at least a 14% or larger share of responsibility for care of a child may be subject to income management. However, Centrelink has

the discretion to exclude parents on a case-by-case basis from income management where parents are only responsible for 14-34% care of their children. Parents or carers of children who are identified by child protection authorities as 'at risk' will have income management arrangements for as long as the State Child Protection Authorities deem it necessary.

152. Under the amended *Social Security and other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth) the three income management schemes currently in place include:
- NTER income management scheme - income management is applicable on all Indigenous peoples in 73 prescribed Northern Territory Communities for a period of 12 months, with the possible extension of this for up to five years. More than 15,100 people currently have their welfare payments income managed by Centrelink;
 - QLD Family Responsibilities Commission - which is empowered to make income management decisions and is authorized to direct Centrelink to take certain steps in relation to people's welfare payments. The people who could be subject to the Commission processes are welfare recipients and community members in Arukun, Coen, Hope Vale or Mossman Gorge. The Queensland model can be triggered by school absence, child safety notification or report, conviction of an offence to breach of a public tenancy agreement. Individuals who are welfare recipients within the four communities who breach one or more of the triggers are referred to the Family Responsibilities Commission. There is also provision for a voluntary referral system, an opt-in approach for community members.
 - The WA school attendance income management scheme – applied in selected areas of WA and the NT, taking reasonable steps to ensure school attendance is made a condition of income support in these areas. Parents who do not comply with the requirements of the pilot may have their income support suspended, with payments restored and back paid when parents take necessary corrective action.
153. The Government has indicated it intends to evaluate all three trial schemes in 2009-2010 before implementing more broadly the most effective scheme.
154. The Australian government has also developed a national framework for child protection that consolidates the different state and territory child protection systems, to ensure an integrated response across all government and non-Government organisations.⁹⁰ As part of this

⁹⁰ Council of Australian Governments, *Protecting Children is Everyone's Business - National Framework for Protecting Australia's Children 2009–2020* (2009). At: http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/child_protection_framework.pdf (viewed 20 July 2009).

framework, the government has looked to introduce income management schemes, where welfare incomes are quarantined or deducted subject to the enrolment and participation of children in schools.

155. Income Management for Child Protection trials have been implemented in selected trial communities in Western Australia (the Kimberley region and Cannington District) since November 2008. This scheme allows for schools to report non-attendance of students to Centrelink for income management. The trial has been extended to continue through to 30 June 2010.
156. Voluntary Income Management (VIM) is also being offered in conjunction with the Child Protection trials. This initiative allows income support recipients in particular districts in metropolitan Perth and the Kimberly region to volunteer for income management to assist them to meet their priority needs and learn tools to help manage their finances for themselves and/or their family in the long term. Individuals who are placed on voluntary income management will also receive a referral to financial counseling or financial education services funded by the Department of Families, Housing, Community Services and Indigenous Affairs.
157. The *Social Justice Report 2007* provides a detailed review of the income management measures under the NTER legislation. The income management measures raise the following concerns relating to compatibility with the right to social security:
 - The blanket application of the income management regime in the 73 prescribed communities in the NT means that the measures are applied to individuals that are not responsible for the care of children, do not gamble, and do not abuse alcohol or other substances. The criteria for being subject to the income management provisions is therefore solely on the basis of the race of the welfare recipient instead of being on the basis of need.
 - The scheme is also established so that it is difficult for individuals to be exempted from the income management provisions. A decision by the Minister is required for an exemption to be granted. It would be more appropriate for the decision-making about the applicability of the scheme to be inverted, so that for the scheme to operate in relation to a particular individual it would require a decision, based on clearly defined criteria, that the scheme should be applied.
 - This also means that the method for delivery of welfare provisions is extremely costly, with significantly increased bureaucratic involvement and costs. It is questionable that this is the most appropriate approach for delivering welfare. Better outcomes could be obtained at a more reasonable cost by focusing efforts on ensuring that there is appropriate education and awareness about social security issues in Indigenous communities.
 - As the income management measures are so broadly applied, there is a tenuous connection between the operation of the scheme and the object of addressing family violence and abuse. When coupled with the lack of participation and consultation with Indigenous communities, this

renders it very difficult to support the view that these measures are appropriately characterised as a special measure.

- If the measures were targeted solely to parents or families in need of assistance to prevent neglect or abuse of children, as they are in s123UC of the legislation, then some form of income management may be capable of being seen as an appropriate exercise of the governments 'margin of discretion' to ensure that families benefit from welfare and receive the minimum essentials for survival.
- It is difficult, however, to see how the quarantining of 100% of welfare entitlements can be characterised as an adapted and appropriate response, given the impact that benefits are being provided in a form that is onerous and potentially undignified.
- As discussed earlier, the limitations on reviewing decision-making in relation to the income management regime, and especially the denial of external merits review processes, significantly undermines the ability to characterise the income management regime as an adapted and appropriate response. This is a clear denial of justice, is discriminatory in its impact and does not meet the requirement for the provision of effective judicial or other appropriate remedies that is integral to the right to social security. The absence of access to complaints processes such as under the Race Discrimination Act also breaches the right to social security.

158. It is arguable that some forms of income management could be undertaken consistent with the right to social security. For example, it is likely that the model proposed by the Cape York Institute in its report *From a hand out to a hand up* contains the appropriate procedural guarantees and participatory requirements to enable those proposed measures to potentially be characterised as a special measure and as consistent with the right to social security.
159. Notably, however, some of those procedural guarantees – such as access to merits review and to access Queensland discrimination laws – are removed in the provisions that are contained in the social security amendments in the NTER legislation and so it is not clear that the Queensland Commission that has been authorised actually complies.
160. Consistent with the right to social security, the provisions on income management in the NTER legislation should be reviewed and amended to ensure that these provisions are compatible with obligations arising from the right to social security.
161. Such a review should ensure that the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to social security are made an integral part of the NTER process into the future.
162. The NTER legislation should also be amended to ensure that adequate protections are provided to protect the privacy of individuals in the handling of personal information.

163. A further objective of income management is to provide an incentive for Aboriginal families to ensure that their children attend school. However, the income management scheme as set forth in the NTER legislation presupposes that children in the Northern Territory could access ordinary educational opportunities if they so wished.
164. An emphasis on providing children with incentives to learn and developing methods of teaching that resonate with Indigenous students is preferable to measures that penalise parents. Along with extensive Federal and Northern Territory government financial commitments to improve the quality and availability of education, such measures should be extensively trialled before options as punitive as income management of 100% of welfare entitlement recipients are utilised.
165. The Commission has recommended against the introduction such schemes as part of the national child protection framework. The Commission has called for the government to adopt a human rights-based approach to the framework that would uphold the 'best interests of the child', 'non-discrimination', and the child's 'right to life' and 'right to participation'.
166. The Government's consultations currently underway in the Northern Territory on the Northern Territory Emergency Response measures include consulting on the NTER income management scheme.

10.4 Homelands Policy

167. Homelands are located on Aboriginal ancestral lands with cultural and spiritual significance to the Aboriginal people who live there. The connections to land are complex and include cultural, spiritual and environmental obligations, including obligations regarding the protection of sacred sites.
168. Homelands vary in size, composition, resources, access to potable water, access to services and time of establishment. Some may be very small and comprise a few families living together. Others may be expanding and developing small economies such as Mapuru Homeland in Arnhem Land. Homelands are difficult to categorise and in policy terms are distinguished as such because they are relatively small compared with townships and larger regional centres.
169. Homelands provide a healthy alternative living environment for Aboriginal people who want to avoid some of the problems that can be associated with living in larger regional centres. Evidence from a study conducted over a ten year interval at the Utopia Homelands in the Northern Territory found that there are positive health benefits for Aboriginal people living in Homelands. The study found: 'The factors associated with the particularly good [health] outcomes here are likely to include outstation living, with its

attendant benefits for physical activity and diet and limited access to alcohol, as well as social factors, including connectedness to culture, family and land, and opportunities for self-determination'.⁹¹

170. Homeland populations have been under-resourced and underfunded for many years. Due to the relatively small populations of Homelands and their dispersal over large unpopulated regions, many Homeland residents have to temporarily relocate to access services. For example, there are limited education services to Homelands communities. To date, governments have no firm estimates of the number of school-aged children across the Northern Territory who have **no** access to school education, and school staffing is allocated on the basis of school attendance rather than population estimates.
171. In September 2007 a Memorandum of Understanding was signed between the Australian Government and the Northern Territory Government, assigning responsibility for the delivery of municipal and essential services to Territory outstations⁹² to the NT Government, starting 1 July 2008.
172. In response, the NT Government has developed its policy for the delivery of services to homelands. In October 2008 they issued a Discussion Paper on which they received written submissions and feedback through community engagement sessions.⁹³
173. The Commission's submission noted the need for government to develop a homelands policy that will sustain and improve the viability of existing and new homelands. This included:
 - employing a flexible model for determining eligibility for Homeland support which allows for new Homelands which may be established in future.
 - a resource model which allocates municipal and essential service funds to regions on a per-capita basis with additional funds on a needs basis.
 - allocating municipal and essential service funds to regions to be managed by leaders of existing clan leadership groups in association with Outstation Resource Agencies.

⁹¹ Kevin G Rowley, Kerin O'Dea, Ian Anderson, Robyn McDermott, Karmananda Saraswati, Ricky Tilmouth, Iris Roberts, Joseph Fitz, Zaimin Wang, Alicia Jenkins, James D Best, Zhiqiang Wang and Alex Brown, *Lower than expected morbidity and mortality for an Australian Aboriginal population: 10-year follow-up in a decentralised community* (2007).

⁹² 'Outstations' is another term used to refer to 'homelands'. The official term used by Aboriginal families, groups or clans living on their own country is 'homeland'.

⁹³ The outcomes of the consultations are contained in the following report: Socom and DodsonLane, *Our Home, Our Homeland: community Engagement Report* (2009). At http://www.workingfuture.nt.gov.au/download/Community_Engagement_Report.pdf (viewed 20 July 2009).

- any definition of Homeland communities recognising the fundamental right of Aboriginal people to live on their country of affiliation and maintain language, custom and cultural practices.
- education services being provided to school-aged Homeland children on a per-capita basis and the Hub and Spoke model being abandoned for education purposes. As a matter of urgency, the Northern Territory government auditing school-aged populations with limited or no education services and develop accessible and appropriate education options.
- policies being congruent and consideration being given to the ways in which Commonwealth policies may undermine Northern Territory priorities and the viability of Homelands into the future.
- consideration being given to expanding the development of sustainable industries in Homelands.
- representative groups of Aboriginal residents from Homeland communities being part of any process to develop policies for Homeland communities.⁹⁴

174. In May 2009, the Government released its 'Outstations/homelands policy'.⁹⁵ The focus of the new policy is a hub and spokes model, with service delivery being prioritised for the establishment of 20 towns across the Territory. The policy outlines some of the limitations it intends to place on delivering services in homeland communities, which include:

- No financial support for the establishment of new outstations and homelands.
- No funding to construct housing on outstations in the NT (Memorandum of Understanding with the NTG, September 2007).
- Government services provided through a form of remote delivery, based from the closest or most accessible hub town.
- Education to smaller outstations/homelands limited to support for transport to hub town schools, boarding facilities in hub towns and distance learning.
- outstation/homeland residents expected to pay costs for the installation and maintenance of water, electricity and sanitation
- The future of outstations/homelands cannot rely on ongoing government support.

⁹⁴ Australian Human Rights Commission, *Submission to the Office of Indigenous Policy, NT Department of Chief Minister on the Outstations Policy Discussion Paper* (2008). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20081215_outstations.doc (viewed 20 July 2009).

⁹⁵ Northern Territory Government, *Working Future – fresh ideas / real results: Outstations/ Homelands Policy* (2009). At http://www.workingfuture.nt.gov.au/download/Headline_Policy_Statement.pdf (viewed 20 July 2009).

175. The concerns with the new policy are that it could result in Homeland communities being unable to access adequate housing, water, sanitation, power, education, and health services within their homelands and having to move into larger cluster communities to access these services. The Social Justice Commissioner has also noted his concerns with the NT Government's policy:

Homelands are places where we Aboriginal people can exercise our fundamental right to live on our country of affiliation and maintain language, custom and cultural practices. This has enabled us to be the oldest continuous surviving culture in the world...

The Homelands movement is a powerful expression of Aboriginal self-determination and self-governance. Government should be assisting these communities in their quest to control their lives and their future rather than undermining these efforts.

...(The) new combinations of government policies seemed to be designed to drive Aboriginal people from ancestral Homelands.⁹⁶

176. COAG's 'National Partnership Agreement on Remote Service Delivery'⁹⁷ has similarly also identified 15 priority locations⁹⁸ in the Northern Territory to receive for the delivery of services. This similarly raises concerns as to the extent non-prioritised communities will be resourced and supported.

10.5 Housing and homelessness

177. Indigenous peoples are likely to experience homelessness because of the high levels of social and economic disadvantage. According to the 2006 Census, there were 4116 Indigenous peoples who were homeless on Census night.⁹⁹ In every state and territory, Indigenous clients of SAAP services were substantially over-represented relative to the proportion of Indigenous peoples in those jurisdictions.¹⁰⁰
178. In 2006, the Special Rapporteur on Adequate Housing identified that there was an Indigenous housing crisis in Australia. He argued that the following factors have led to a 'severe housing crisis' which is likely to worsen in coming years as a result of the rapid rate of population growth in Indigenous communities:

⁹⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner – media release....

⁹⁷ Council of Australian Governments, *National Partnership Agreement on Remote Service Delivery* (2009). At

http://www.federalfinancialrelations.gov.au/content/national_partnership_agreements/OT003/remote_service_delivery_np.rtf (viewed 20 July 2009).

⁹⁸ The 15 priority locations include: Galiwinku, Gapuwiyak, Gunbalanya, Hermannsburg, Lajamanu, Maningrida, Milingimbi, Nguiu, Ngukurr, Numbulwar, Wadeye, Yirrkala, Yuendumu, Angurugu and Umbakumba.

⁹⁹ ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, p46.

¹⁰⁰ ABS, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, p47.

- lack of affordable and culturally appropriate housing
- lack of appropriate support services
- significant levels of poverty
- underlying discrimination.¹⁰¹

179. Further factors that contribute to Indigenous homelessness include:

- Many Indigenous peoples enter poverty and homelessness as a result of poor educational and employment opportunities
- Indigenous peoples are vulnerable to homelessness when they are forced to move in order to access employment and income support
- The removal or temporary suspension of welfare benefits can increase the chances of an Indigenous person becoming homeless
- A survey of housing in the Northern Territory by Professor Torzillo found that 65% of houses surveyed in remote communities did not have a working shower. Such inadequate housing can severely impact on the health of residents. While initiatives to improve health through better housing, like the 'Fixing Houses for Better Health' program, are to be applauded, there is still a long way to go to close the gap in Indigenous and non-Indigenous housing and health outcomes.
- The amendments to the *Aboriginal Land Rights Act 1976* (NT) were a point of concern noted by the Special Rapporteur, as contributing to inadequate housing, by undermining security of tenure. The *Social Justice Report 2007* also outlined concerns about the compulsory acquisition of property without the provision of just terms compensation as further undermining security of tenure on a community-wide level.
- Ensuring that housing is culturally appropriate is necessary to make a difference to Indigenous homelessness. This means that consultation must occur with local people to ensure that housing design meets local cultural and environmental needs.

180. COAG has agreed to a National Partnership Agreement on Remote Indigenous Housing to address: significant overcrowding, homelessness, poor housing conditions and the severe housing shortage in remote Indigenous communities. Total funding of \$5.5 billion over 10 years has been allocated to provide up to 4,200 new houses in remote Indigenous communities; and upgrades to around 4,800 existing houses through a program of major repairs and/or replacement. Funding is also provided for a minor repairs and maintenance program, housing functionality checks, tenancy management, improvements to town camps and for the provision of employment related accommodation.¹⁰²

¹⁰¹ Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Addendum - Mission to Australia (31 July to 15 August 2006), U.N. Doc. A/HRC/4/18/Add.2, 11 May 2007, para 80, available at:

<http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/72/PDF/G0712572.pdf?OpenElement>.

¹⁰² COAG has also agreed to a National affordable housing agreement, a National partnership agreement on social housing and a National partnership agreement on homelessness, which also

181. The Australian Government has made funding for housing under the National Partnership Agreement on Remote Indigenous Housing places conditional upon:
- secure land tenure being settled;
 - the relevant State/ Territory government ensuring provision of standardised tenancy management and support for all Indigenous housing in remote areas consistent with public housing standards of tenancy management including through, where appropriate existing service providers; and
 - the relevant State/ Territory government developing and implementing land tenure arrangements to facilitate effective asset management, essential services and economic development opportunities.
182. These conditions appear to reduce the capacity for Indigenous peoples and Indigenous organisations to be involved in the decision-making and management of Indigenous housing on Indigenous lands.
183. In contrast the centrepiece of reform under the National Agreement on Housing Affordability has been 'to facilitate the growth of a number of sophisticated not for profit housing organisations that will operate alongside existing state-run housing authorities'.¹⁰³

10.6 Child care and protection

184. As exemplified by reports such as the *Little Children are Sacred Report* (NT) and the *Breaking the Silence Report* (NSW), child abuse, child sexual abuse and family violence are critical issues for Indigenous communities. An Indigenous child is six times more likely to be involved with the statutory child protection system than a non-Indigenous child, but four times less likely to have access to child care or preschool service that can offer family support to reduce the risk of child abuse.¹⁰⁴
185. The new federal government is currently developing a national framework for child protection that consolidates the different state and territory child protection systems, to ensure an integrated response across all government and non-Government organisations.

address elements of Indigenous housing and homelessness. These are available on the COAG website at <http://www.coag.gov.au/>.

¹⁰³ T Plibersek, Room for more: boosting providers of social housing (Speech delivered at Sydney Institute, Sydney, 19 March 2009). At http://www.tanyaplibersek.fahcsia.gov.au/internet/tanyaplibersek.nsf/content/social_housing_19mar09.htm (viewed 31 July 2009).

¹⁰⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, p116.

186. As part of this framework, the government has looked to introduce income management schemes, where welfare incomes are quarantined or deducted subject to the enrolment and participation of children in schools.
187. The Commission has recommended against the introduction such schemes as part of the national child protection framework. The Commission has called for the government to adopt a human rights-based approach to the framework that would uphold the 'best interests of the child', 'non-discrimination', and the child's 'right to life' and 'right to participation'.

11 Lands, territories and resources

Lands, territories and resources rights are contained in articles 25 – 32 of the Declaration: right to maintain and strengthen spiritual relationship with their lands; right to own, use, develop and control lands, territories and resources traditionally owned, occupied, used or acquired; States shall establish in conjunction with indigenous peoples a process for recognising and adjudicating the rights of indigenous peoples to their lands and resources; right to redress for lands and resources taken without free, prior and informed consent; right to conservation and protection of environment; limits on storage or disposal of hazardous materials and military activities on indigenous peoples' lands; right to maintain and develop cultural heritage and protect their intellectual property; right to determine development priorities for their lands.

11.1 Native Title

188. Native Title reforms which were announced in 2005 have resulted in the *Native Title Amendment Act 2007* and the *Native title Amendment (Technical Amendments) Act 2007*.
189. The *Native Title Reports 2007* and *2008* provided detailed discussion and a number of recommendations regarding the Native Title Reforms. The Aboriginal and Torres Strait Islander Social Justice Commissioner has expressed concerns that the reforms announced by the Australian Government in 2005 do not ensure any significant improvement in outcomes for Aboriginal and Torres Strait Islander peoples.¹⁰⁵ Of particular concern is:
 - the extent to which the reforms will impact on the realisation of the human rights of Aboriginal and Torres Strait Islander Peoples
 - the failure to place the recognition and protection of native title at the centre of the government's reform agenda. Instead, the changes were directed at achieving a more efficient and effective native title system

¹⁰⁵ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 24-27.

- the failure to provide a mechanism to review the implementation of the changes.¹⁰⁶
190. To date, the Attorney-General has not formally responded to the *Native Title Reports 2007 and 2008* or advised the Commission of the Australian Government's position in relation to its recommendations.
191. The CERD Committee in its concluding observations in 2005 expressed its concerns on many of the issues raised in the Native Title Reports referred to above:

The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention.

The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.¹⁰⁷

192. While the Commission notes that the previous Government has provided a response to some of the Committee's concerns, many of the concerns raised by the Committee have not been addressed. These are:
- That the 1998 amendments to the Native Title Act rolled back some protections previously offered to Indigenous peoples and provide legal certainty for Government and third parties at the expense of Indigenous title.
 - That the burden of proof for Indigenous peoples in Australia continues to be a significant barrier to Indigenous peoples' success in achieving a determination that native title exists.

106 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 11 September 2008.
107 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia* (2005), UN Doc CERD/C/AUS/CO/14, par 16. At: <http://www.hreoc.gov.au/legal/submissions/cerd/report.html> (viewed 24 March 2009).

11.2 Land rights under the Northern Territory Emergency Response

193. The NTER legislation has allowed the federal government to acquire a wide range of interests in land. For example, while generally, any rights, titles or interests that existed in relation to lands to be covered by a five-year lease immediately before the lease is to take effect are preserved, the federal minister may, at any time, terminate the right, title or interest by giving notice in writing to the person who holds it.¹⁰⁸
194. The rights, titles and interests the federal government has acquired include:
- compulsory acquisition of five-year leases over certain lands
 - control of leases for town camps in Darwin, Katherine, Tennant Creek and Alice Springs including the power to forfeit the lease and resume the land
 - power to acquire all rights, titles and interests in the land subject to a town camp lease
 - rights in construction areas, and buildings and infrastructure constructed on Aboriginal land.
195. The High court in its decision on *Wurridjal v the Commonwealth*¹⁰⁹ (February 2009) held that the Constitution required any acquisition under the Northern Territory Emergency Response legislation to be on 'just terms'. The court further held that there had been an acquisition of property under the legislation and that the laws provided for just terms for any acquisition. The court also found that the statutory formula provided for in the NTER legislation provided for 'just terms'.
196. Additionally, Schedule IV of the Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007 (Cth), modifies the existing permit system for Aboriginal land in the Northern Territory set out by the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ALRA by giving the Northern Territory Legislative Assembly the power to make laws authorising entry onto Aboriginal land. Schedule IV also gives the administrator of the Northern Territory the power to declare an area of Aboriginal land to be an area not requiring a permit for entry.
197. The removal of the permit system affected specified townships - prescribed areas and roads but it did not affect all areas. Sacred sites and land outside the identified areas still required permits. The removal of the permit system, consequently removed the capacity for Aboriginal Northern

108 NTNER Act, s37(1)(a).

109 *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 (2 February 2009)

Territorians to exercise self-determination and self governance on their lands and territories.

198. The Commission supports the view that the blanket removal of the permit system on roads, community common areas and other places is not an appropriate measure and does not have a sufficient relationship to the purpose of the legislation to qualify as a special measure. In the absence of contrary evidence, these provisions should be repealed.
199. With regard to the implications for the operation of the native title system, the preservation of pre-existing rights, titles or other interests does not apply to native title rights and interests. Any native title rights and interests, to the extent that they may occur over the area covered by a five year lease, are not expressly preserved by the legislation.
200. While the legislation states that the non-extinguishment principle¹¹⁰ applies to the granting of a five year lease and other specified acts as determined by the NTER legislation, the legislation does ensure the suspension of the future acts regime.¹¹¹
201. The future act regime provided for in Part 2, Division 3 of the Native Title Act, provides for procedures to be followed to ensure that a future act is valid and prescribes the affect of future acts on any native title rights and interests. The preamble to the Native Title Act states:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and, if whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.
202. In some cases compliance with procedural requirements is a precondition for a future act to be valid. Notification to those who hold, or may hold, native title in the land in question may be required and the parties may be required to negotiate in good faith for the doing of the act. Where procedural requirements must be followed, failure to do so will mean that the future act is invalid.¹¹²

110 NTNER Act s51(2). The non-extinguishment principle is set out in s 238 Native Title Act 1993 (Cth). In essence, where the non-extinguishment principle is said to apply then if the act affects any native title in relation to the land or waters concerned the native title is nevertheless not extinguished, either wholly or partly by the act.

111 NTNER s51(1). Provides that Part 2, Division 4 of the Native Title Act 1993 (Cth) which deals with future acts, does not apply. A 'future act' is an act ('act' is defined in s226 of the Native Title Act) which affects native title (or would affect native title if it were valid) and: consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993; or is any other act taking place on or after 1 January 1994.

112 Native Title Act 1993 (Cth), s28. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 2007, Australian Human Rights Commission (2008), p 201. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

203. The NTER legislative amendments to the ALRA displace the protection given in Section 71 of the ALRA, to the traditional rights of use and occupation of Aboriginal land. In effect, an Aboriginal or group of Aboriginals is no longer entitled to enter upon Aboriginal land and use or occupy that land in accordance with Section 71(1) of the ALRA if to do so would interfere with the use or enjoyment of the statutory rights of a government (or authority or a third party with a permit to exercise those rights) acquired under Part IIB of the ALRA.
204. The NTER legislation significantly reduces the protection of Aboriginal people's rights and interests in their traditional lands as provided by both the ALRA and the Native Title Act. However, this legislation also impacts on the ability for those Aboriginal people affected to leverage economic, social and cultural development through the future acts regime.
205. Most recently the Government has under the NTER legislation given notice to Tangentyere Council to compulsorily acquire the town camps of Alice Springs by 4 August 2009, before proceeding with the provision of housing infrastructure in the town camps. The notice was provided after the negotiations for lease terms broke down over disagreements on the allocation of management of the town camp leases and their housing to the NT Government.

7.3 Indigenous participation in environmental management and climate change

206. Indigenous participation in the management of environment, cultural heritage and climate change Indigenous Australians have had very limited influence in decision-making affecting their natural environment and their means of subsistence. For example, while the Australian Government has been developing a policy for climate change, and while they developed laws and policies for water use and access, there has been minimal consultation or discussion with Indigenous peoples.
207. A detailed overview of issues relating to climate change facing Indigenous peoples in Australia is provided in the *Native Title Report 2008* of the Social Justice Commissioner. It includes case studies on different regions of Australia – including the Torres Strait Islands and the Murray-Darling Basin.

12 Self-government

Self-government rights are contained in articles 33 – 37 of the Declaration: right to determine their own identity, membership and structures; right to promote and develop institutional structures, customs, traditions, and customary laws in accordance with international human rights standards; right to determine the responsibilities of individuals to their communities; right to maintain contacts and relations with their own members across international borders; right to recognition and enforcement of treaties and agreements concluded with States.

12.1 Customary law

208. The Commission has expressed concern about developments under federal law which undermine the role of Aboriginal customary law. These developments prevent a court from taking into account 'any form of customary law or cultural practice' as a mitigating factor in sentencing, or in the context of granting bail.¹¹³
209. The Commission opposes this law for a number of reasons, including the importance of recognising the right of minorities to enjoy their own culture, which applies to Indigenous peoples and imposes a positive obligation on States to protect their cultures.¹¹⁴ People who are convicted of criminal offences should be appropriately punished. This is best achieved by ensuring that courts can consider the full range of factors relevant to the commission of the offence, including a person's culture. The right to enjoy culture cannot be enjoyed at the expense of the rights of others and must be consistent with other human rights in the ICCPR and the rights of women and children as protected by the CEDAW and the CRC.

13 Implementation of the Declaration domestically

The requirements for implementation are contained in articles 38-42 of the Declaration: States shall in consultation with indigenous peoples take appropriate legislative and other measures to achieve the Declaration; right to access financial and technical assistance for enjoyment of rights in the Declaration; right to prompt decision and just and fair procedures for resolution of conflicts and disputes with States and other parties; UN, PFII and other intergovernmental organisations contribute to full realisation of the Declaration.

210. The Social Justice Commissioner identified a number of measures in his *Social Justice Report 2008* that could effectively contribute to the implementation of the Declaration in Australia, including:
- State, territory and federal departments to publicly commit to the *Declaration* to guide their own operations, and encourage non-government organisations with which they have partnerships to follow suit;
 - Funding and resources for the *Declaration* to be summarised in plain English and in Aboriginal languages for distribution in metropolitan, regional and remote communities would also remedy the Australian

¹¹³ *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth).

¹¹⁴ ICCPR, article 27; Human Rights Committee, General Comment 23, par 7. For further details, see Australian Human Rights Commission, Submission to the Legal and Constitutional Affairs Committee (2006). At: http://www.humanrights.gov.au/legal/submissions/crimes_amendment.html (viewed 22 September 2008).

community's generally low level of understanding about the existence and effects of the *Declaration*.

- Incorporating the Declaration's terms into basic training curricula for high school students, lawyers, public servants, parliamentarians, and others with significant input into policy-making processes;
- Government funding for widespread human rights education in Australia
- Committing training and resources to develop the capacity of non-governmental organisations to advance and promote Indigenous rights protection;
- Establishing monitoring mechanisms on the uptake of the *Declaration* in Australia in order to allow government and community progress in advancing its standards to be tracked effectively. Over time, this would also facilitate adjustments in strategies to enhance awareness and implementation of the *Declaration*. In this regard, the *Declaration* elaborates a clear role for national human rights institutions,¹¹⁵ as do the Objectives of the Second International Decade of the World's Indigenous Peoples.¹¹⁶
- Amending the powers of the Australian Human Rights Commission so that it could take the *Declaration* into account in exercising its functions would therefore be an important step in strengthening the operation of the *Declaration* in Australia. In order for this to take place, the Federal Attorney General could declare that the *Declaration* is an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act*.¹¹⁷ This would allow the Commission to:
 - Examine laws and proposed laws to assess whether they are consistent with the *Declaration*;
 - Inquire into acts and practices that may be inconsistent with or contrary to the *Declaration*;
 - Promote public understanding, acceptance, and discussion of the *Declaration* in Australia;
 - Undertake research and educational programs to promote the *Declaration*;
 - Report to the Attorney General about laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to the *Declaration*;

¹¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples GA Resolution 61/295*, UN Doc A/61/L.67 (2007) articles 38-40.

¹¹⁶ *Program of Action for the Second Decade of the World's Indigenous Peoples*, UN Doc A/60/270 (2005).

¹¹⁷ The power to make such a *Declaration* is conferred upon the Attorney General under s 47 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

- Report to the Attorney General about the action Australia needs to take to comply with the provisions of the *Declaration*;
- Publish guidelines for the avoidance of acts or practices done by or on behalf of the Commonwealth that would breach the *Declaration*; and
- Intervene, with the leave of the Court, in proceedings involving the *Declaration*.¹¹⁸

211. The Australian government should also be guided by the recommendations of the United Nations Permanent Forum on Indigenous Issues and the United Nations Expert Mechanism on the Rights of Indigenous Peoples¹¹⁹. Some of these include:

Permanent Forum on Indigenous Issues

128. The Forum thus invites the international community as a whole, States, indigenous peoples, non-governmental organizations, the private sector, academia and the media to promote the *Declaration* and apply it in their policies and programmes for the improvement of indigenous peoples' well-being around the world.

139. The Permanent Forum ...encourages all States to submit substantive information on measures taken to implement the *United Nations Declaration on the Rights of Indigenous Peoples*.

145. The Permanent Forum recommends that national human rights institutions and other relevant national and regional bodies, including the African Commission on Human and Peoples' Rights, promote the rights of indigenous peoples and monitor the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*, and ensure that the international standards on indigenous peoples' rights are translated into national laws.

148. The Permanent Forum recommends that the United Nations system continue to build the capacities of indigenous peoples' organizations and to develop their knowledge and skills to have their rights respected, protected and fulfilled.

151. The Permanent Forum recommends that States include representatives of indigenous peoples in the national consultation process for the preparation of national reports to be submitted to the Human Rights Council for universal periodic review.

¹¹⁸ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 11.

¹¹⁹ Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April-2 May 2008)*, UN Doc E/2008/43, E/C.19/2008/13 (2008). At <http://daccessdds.un.org/doc/UNDOC/GEN/N08/338/82/PDF/N0833882.pdf?OpenElement> (viewed 31 January 2009); Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its First Session (1-3 October 2008)*, UN Doc A/HRC/10/56 (2009). At <http://www2.ohchr.org/english/issues/indigenous/ExpertMechanism/1st/docs/A-HRC-10-56.pdf> (viewed 31 January 2009).

UN Expert Mechanism on the Rights of Indigenous Peoples

24. The Expert Mechanism engage with other international human rights mechanisms, including the treaty bodies, as well as with regional and national human rights bodies, in particular national human rights institutions and the Working Group on Indigenous Populations/ Communities of the African Commission on Human and Peoples' Rights.

28. The indigenous caucus, on behalf of all indigenous observers, proposed that the agenda of the Expert Mechanism include a permanent item on the *United Nations Declaration on the Rights of Indigenous Peoples*. Three thematic issues were identified as possible sub-agenda items for the second session: (a) the right to self-determination and the right to development; (b) free, prior and informed consent; and (c) adjudication, remedies, repatriation and redress.

212. The Commission notes compliance with the Objectives of the Second Decade of the World's Indigenous Peoples¹²⁰, would further advance the status of Indigenous rights recognised in the Declaration (see Appendix B).

213. Effective means by which Indigenous peoples in Australia can seek to use the Declaration include:

- Referring to it as an applicable standard; 'adopt' the *Declaration*, and use it as a framework for engagement and partnership with governments and third parties in a similar way. For example, a number of land councils in Western Australia have already committed to using the *Declaration* as the basis for negotiation with mining companies.¹²¹
- The *Human Rights Act (2004)* in the ACT and the *Charter of Human Rights and Responsibilities Act (2006)* in Victoria, create an obligation on decision makers to interpret their human rights obligations consistent with the body of international law, which now includes the *UN Declaration on the Rights of Indigenous Peoples*;
- It may also be possible for Indigenous peoples to bring actions under the (*Racial Discrimination Act 1975 (Cth)* ('RDA')) for any abrogation of their rights as set out by the *Declaration*.¹²²

¹²⁰ *Program of Action for the Second Decade of the World's Indigenous Peoples GA Resolution 59/174 (2005)*

¹²¹ See, for example, the Mining Policy statement of the Goldfields Land and Sea Council: Goldfields Land and Sea Council, *Our Land is Our Future* (2008). At http://www.glc.com.au/pu_xx/Mining%20Policy%20@%20April08.pdf (viewed 20 January 2009).

¹²² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), pp 35-36.

Appendices

Appendix A: Role of the Australian Human Rights Commission

The Human Rights and Equal Opportunity Commission was established in 1986 by an Act of the federal Parliament. In September 2008, the Commission changed its operating name to the Australian Human Rights Commission.¹²³

The *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) is a law of the federal Parliament that establishes the Commission. It confers the following functions on the Commission:

- inquiring into and attempting to resolve complaints of discrimination or breaches of human rights
- holding public inquiries into acts or practices that may breach human rights, such as the forcible removal of Indigenous children from their families and the rights of children in immigration detention centres
- developing human rights education programs and resources for schools, workplaces and the community
- with the leave of the court, intervening in cases that involve human rights issues
- providing advice and assistance to parliament in relation to laws, programs and policies that relate to human rights
- undertaking and coordinating research into human rights and discrimination issues.

In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the *HREOC Act* and the *Native Title Act 1993* (Cth) to monitor the human rights of Indigenous peoples. This provides a dedicated focus on Indigenous issues at all times. These functions include:

- to submit a report (*Social Justice Report*) to the federal Parliament annually regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the enjoyment and exercise of human rights by those persons;
- to submit a report (*Native Title Report*) to the federal Attorney-General on an annual basis on the effect of native title laws on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders;
- to promote discussion and awareness of human rights in relation to Aboriginal persons and Torres Strait Islanders;
- to undertake research and educational programs, and other programs, for the purpose of promoting respect for the human rights of Aboriginal persons and Torres Strait Islanders and promoting the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders;

¹²³ The legislation changing the legal name of the Commission comes into effect on 5 August 2009.

- to examine enactments, and proposed enactments, for the purpose of ascertaining whether they recognise and protect the human rights of Aboriginal persons and Torres Strait Islanders, and to report to the Minister the results of any such examination.¹²⁴

¹²⁴ More information about the Aboriginal and Torres Strait Islander Social Justice Commissioner's role and work is available at http://humanrights.gov.au/social_justice/about_social_justice.html.

Appendix B: Objectives of the Second Decade of the World's Indigenous Peoples¹²⁵

- Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, programmes and projects;
- Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent;
- Redefining development policies that depart from a vision of equity and that are culturally inappropriate, including respect for the cultural and linguistic diversity of indigenous peoples;
- Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth;
- Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

¹²⁵ *Program of Action for the Second Decade of the World's Indigenous Peoples GA Resolution 59/174 (2005).*

Appendix C: Briefing paper by the National Indigenous Youth Movement of Australia

Briefing paper for the visit to Australia of Professor S. James Anaya,
UN Special Rapporteur on the human rights and fundamental freedoms of
Indigenous Peoples



Subject: Aboriginal and Torres Strait Islander Youth

Prepared by: National Indigenous Youth Movement of Australia (NIYMA)

Contact: info@niyma.org (Tim Goodwin – Chair, Eugenia Flynn – Deputy Chair)

Introduction

Aboriginal and Torres Strait Islander¹²⁶ youth in Australia care deeply about the future of their communities. Many are working tirelessly to create better opportunities for their peers, their elders, their families and their communities generally. NIYMA has witnessed this first hand through the involvement of our members and by conducting Indigenous youth engagement workshops throughout the country in 2007.

Background

NIYMA is a not-for-profit organisation founded and run by Indigenous young people that envisages healthy, strong and free Indigenous communities. NIYMA believes that to achieve this vision the practical reality is that Aboriginal and Torres Strait Islander young people must be at the forefront of this movement. NIYMA is a membership based organisation for 18-30 year old Indigenous young people. NIYMA's motto is “*respecting* those before us, *inspiring* those here today, *believing* in those to come”.

The organisation was established in 2001 on the basis of funding from the Levi Strauss Foundation in San Francisco, USA, and Lumbu Indigenous Community Foundation in Brisbane, Australia.

The organisation is currently undergoing a review of its internal operations. There are approximately 100 members of the organisation from around Australia. The organisation is currently led by a 3 member Executive who are responsible for the day-to-day management of the organisation.

¹²⁶ The terms “Aboriginal and Torres Strait Islander” and “Indigenous” are used interchangeably in this paper. This paper acknowledges current debate in the Indigenous community-at-large concerning the use of the term Indigenous when speaking of Australia’s first peoples. In NIYMA’s experience, young Indigenous people have not expressed the same deep concern over these terms as some of our Elders and do not highlight it as a pressing issue in our communities.

Structure of Briefing Paper

This briefing paper will first state the particular demographics of Indigenous young people in Australia. The paper will then discuss the Indigenous Youth Engagement workshops run by NIYMA in 2007. Finally, this paper will outline the major learnings from those workshops about the issues facing young Indigenous people.

Demographics

Approximately 63% of Indigenous people are under the age of 30.¹²⁷ Amongst non-Indigenous people, the corresponding statistic is approximately 40%.¹²⁸ Unlike other population groups, the majority of Indigenous Australians are young people. Consequently, Indigenous young people are central to the development of policy and programs and community capacity-building. A failure to engage young Aboriginal and Torres Strait Islanders will mean that a majority of the community are effectively shut out of decision-making processes. This is a situation similar to the one Indigenous people have fought against for many years regarding non-Indigenous decision-making in our own affairs.

Indigenous Youth Engagement Workshops in 2007

NIYMA, in conjunction with Reconciliation Australia, held seven one-day workshops with Indigenous people aged 18-30 in Canberra, Cairns, Adelaide, Darwin, Perth, Sydney and Melbourne throughout 2007. The workshops were designed to give young Indigenous people space to support and network with each other, share in their own voices what they believed the issues to be in their communities and begin to build the solutions needed. The workshops gave NIYMA the opportunity to partner with local and state Indigenous youth organisations that are contributing positively to their communities. Many of these organisations go unnoticed and uncelebrated and yet are making a major impact in the lives of young Indigenous people.

From the workshops and from NIYMA's other work in the youth and Indigenous sectors, three major issues arose generally in addition to 'traditional' socio-economic issues raised such as health, education, employment, drug and alcohol abuse. These three issues are:

- The need and desire for greater Indigenous youth involvement in community solution-building
- The shift in view about Indigenous identity
- Breaking down the sense of isolation many young Indigenous people feel

Greater Indigenous Youth Involvement in Solution-Building

The young Indigenous people that attended NIYMA workshops, as well as many others NIYMA know of and have witnessed, are making major contributions to their communities. However many feel disengaged from community solution-building.

¹²⁷ Australian Bureau of Statistics, 2008, *Year Book Australia*.

¹²⁸ Australian Bureau of Statistics, 2007, *Population by Age and Sex, Australian States and Territories*.

NIYMA refers to this dynamic as the 'stand up, sit down' effect, where Indigenous community leaders tell young people that they need to stand up for their community and work harder because they are the future, and then when Indigenous young people make efforts in their community they are told they are too young, need more experience and respect and must 'earn their stripes'. Many young Indigenous people are frustrated with this confusing situation. Most want to respect the wishes of their elders, and yet want to contribute in a positive way without the risk of appearing arrogant or disrespectful.

While young Indigenous people continue to be disengaged or confused about their role, Indigenous communities miss out on their talents being utilised.

Indigenous identity

An existing issue in Indigenous communities, how Indigenous identity is conceptualised and defined, is a source of stress for many young Indigenous people. Often there is a sense of tension amongst Indigenous people about a superficial hierarchy of identity. As more Indigenous people live in urban centres, and live 'non-traditional' (i.e. non-historical) lifestyles, there is a question about 'who is more Indigenous than who'. This debate can often be used by those who consider themselves more Indigenous than others to silence critics or attack other Indigenous people. This focuses attention on identity rather than the worthiness of particular opinions or arguments. This debate is further complicated by the unnecessary tension between the Aboriginal and the Torres Strait Islander communities.

Amongst NIYMA members and those that attended the 2007 workshops, and generally from our experience, young Indigenous people overwhelmingly reject this negative form of 'identity politics'. This does not mean that some Indigenous young people do not participate in such politics. However, a vast majority of young Indigenous young people want to treat each other and be treated with respect. Young Indigenous people are often more mobile than the generations before them. Many move out of their home communities for education or employment. As this situation continues, it will be impossible for us as a community to define Indigenous identity solely by historical place and practice.

Identity politics place barriers to meaningful Indigenous youth engagement in communities. This is the reason why NIYMA has as one of its principles the notion of *safe space* – where young Indigenous people are safe from being told they are too young, too light, too dark, too educated, too urbanised or too non-traditional to be considered Indigenous, or Indigenous-enough.

Sense of Isolation

Many young Indigenous people suffer from a sense of isolation in their communities. Sharing the burden of exclusion and disadvantage from a young age, many young Indigenous people are forced to deal with compounding trauma, but are then required to assist in healing and strengthening families and communities. Unfortunately, many young Indigenous people are left with a feeling of isolation from their own communities, from culture and identity and from the wider Australian community. Suicide rates are unacceptably high in Indigenous communities, particularly amongst our young men. According to the Bureau in 2008, the suicide rate was almost three times that for non-

Indigenous males, with the major differences occurring in younger age groups. For Indigenous males aged 0-24 years and 25-34 years, the age-specific rates were three and four times the corresponding age-specific rates for non-Indigenous males respectively. The suicide rate for Indigenous females aged 0-24 years was five times the corresponding age-specific rates for non-Indigenous females. For age groups 45-54 years and over, age-specific rates for Indigenous females were similar to, or lower than the corresponding rates for non-Indigenous females.¹²⁹

There is a desire amongst young Indigenous people to have space to be able to support each other to continue the work they already are doing in their communities. There is a need to build a more sustainable and tangible sense of connection amongst young Indigenous people so they can support each other, share stories and solutions, and build networks for change. As the political and community landscape around Indigenous communities changes, young Indigenous people are seeking appropriate support to continue in the struggle for healthy, strong and free Indigenous communities. Solidarity from their peers and Elders is strongly craved by young Indigenous people and in NIYMA's experience essential to the ongoing involvement of Indigenous young people in solutions and decision-making.

Conclusion

Much has been spoken of and written about concerning the issues facing Indigenous communities in Australia – a large number of these issues centering on children and young people as, out of the 400,000 Indigenous Australians there are in the country, 250,000 of them are under the age of 30. Whilst these issues are known and documented, what we have not known in the past are the issues young Indigenous people feel are most important and their thoughts on being involved in change. What NIYMA has always known is that due to the unique demographics of Aboriginal and Torres Strait Islander society, young Indigenous people must be at the forefront of any movement for change.

More recently, NIYMA has also been fortunate enough to discover that young Indigenous people want to deal with larger community-based issues surrounding engagement, voice, culture, identity, solidarity and support in order to deal with the more specific issues resulting from disadvantage and exclusion. That is, the most critical area to examine in determining the challenges faced by Indigenous people, and what policies and programs will help us overcome those challenges, should and must involve an examination of the opportunities for young people to contribute to and even lead those initiatives. Only when young Indigenous people are involved as decision-makers and solution-brokers will we see our Indigenous communities healthy, strong and free.

¹²⁹ See Australian Bureau of Statistics, 2008, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People's*, 2008 (cat. no. 4704.0).

Appendix D: List of key documents

Australian Human Rights Commission Reports

- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Reports* (1993-2008). At http://humanrights.gov.au/social_justice/sj_report/index.html
- Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Reports* (1994-2008). At http://humanrights.gov.au/social_justice/nt_report/index.html
- *National Indigenous Representative Body Workshop Report* (March 2009). At http://humanrights.gov.au/pdf/social_justice/nirb/adl_workshop09.pdf
Summary report: http://humanrights.gov.au/social_justice/rebody/summary_report.pdf
- *Building a sustainable National Indigenous Representative Body – Issues for consideration* (2008). At http://humanrights.gov.au/social_justice/rebody/paper.html
(Summary report at: http://humanrights.gov.au/social_justice/rebody/summary.html)
- *Indigenous Health Equality Summit Statement of Intent* (20 March 2008). At http://humanrights.gov.au/social_justice/health/statement_intent.html
- *Close the Gap: National Indigenous Health Equality Targets* (2008). At http://humanrights.gov.au/social_justice/health/targets/index.html
- *Achieving Aboriginal and Torres Strait Islander health equality within a generation – A human rights approach* (2007). At: http://humanrights.gov.au/social_justice/health/health_summary.html
- *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008). At http://humanrights.gov.au/social_justice/publications/preventing_crime/index.html
- *Ending Family Violence in Aboriginal and Torres Strait Islander Communities* (2006). At http://humanrights.gov.au/social_justice/familyviolence/index.html
- *Training for Community Legal Education workers in preparation for employment in Family Violence Prevention Legal Services: Trainers Guide and Resource Guide (NSW)* (2008) (hard copy provided).
- *Issues in International and Australian Law*, Martin Place Papers No. 6 (2007). At

http://humanrights.gov.au/social_justice/publications/International2007/index.html

- *Bringing them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997). At http://humanrights.gov.au/social_justice/bth_report/report/index.html
- *Face the Facts: Some Questions and Answers about Indigenous Peoples, Migrants and Refugees and Asylum Seekers* (2008). At http://humanrights.gov.au/racial_discrimination/face_facts/index.html
- Australian Human Rights Commission Submission to the National Human Rights Consultation (June 2009). At http://humanrights.gov.au/legal/submissions/2009/200906_NHRC.html
- Commission submissions to the following international human rights bodies:
 - Office of the High Commissioner of Human Rights in preparation for the Durban Review Conference (2009). At http://humanrights.gov.au/racial_discrimination/conferences/Durban2009/Report_Preparation_Durban2009.html
 - Review of Australia's Fourth Periodic Report on the Implementation of the International Covenant on Economic Social and Cultural Rights (2009). At http://humanrights.gov.au/legal/submissions/2009/20090417_icescr_review.html
 - Australia's compliance with the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2008). At http://humanrights.gov.au/legal/submissions/2008/080415_torture.html
 - Committee on Racial Discrimination (2005). At <http://humanrights.gov.au/legal/submissions/cerd/index.html>
 - United Nations Committee on the Rights of the Child - Day of General Discussion on the Rights of Indigenous Children (September 2003). At http://humanrights.gov.au/legal/submissions/sj_submissions/submissions.html#un

Key Australian NGO reports to international human rights bodies

- Interventions by Australian Indigenous People's Organisations to the Permanent Forum on Indigenous Issues
 - Eighth Session (2009) – hard copies provided
 - Seventh Session (2008) At http://humanrights.gov.au/social_justice/internat_develop_PFI.html
 - Sixth Session (2007). At http://humanrights.gov.au/social_justice/PFI/internat_develop_PFI_6.html
- *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Human Rights Committee* (September 2008) and *Addendum* (March 2009). At <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICCPR>
- *Freedom, Respect, Equality, Dignity: Action – NGO Submission to the Committee on Economic, Social and Cultural Rights* (April 2008) and

Addendum (April 2009). At <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/#ICESCR>

International human rights bodies' Concluding Comments/ Observations on Australia

- Committee on Economic Social and Cultural Rights (May 2009). At <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>
- Human Rights Committee (April 2009). At <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>
- UN Special Rapporteur on Adequate Housing (2006). At <http://daccessdds.un.org/doc/UNDOC/GEN/G07/125/72/PDF/G0712572.pdf?OpenElement>
- Committee on the Elimination of Discrimination Against Women (2006). At <http://daccessdds.un.org/doc/UNDOC/GEN/N06/237/98/PDF/N0623798.pdf?OpenElement>
- Committee on the Elimination of Racial Discrimination's Observations on the additional report of Australia (2006). At http://www.humanrights.gov.au/social_justice/international_docs/pdf/cerd_observations_on_aust_additreport.pdf
- Committee on the Elimination of Racial Discrimination (2005). At http://humanrights.gov.au/social_justice/international_docs/word/conc_observ_aust_croc_october2005.DOC
- Committee on the Rights of the Child (2005). At [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.268.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.268.En?OpenDocument)

Key Australian Government reports

- J Macklin, *Closing the Gap Between Indigenous and non-Indigenous Australians*, Statement by the Minister for Families, Housing, Community Services and Indigenous Affairs for the 2009-2010 Budget, (2009). At http://www.aph.gov.au/Budget/2009-10/content/ministerial_statements/indigenous/html/ms_indigenous.htm
- Council of Australian Governments (COAG) National Agreements and National partnership Agreements: <http://www.coag.gov.au/>
- Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009). At <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009>
- Commonwealth of Australia, *Australia 2020 Summit Final Report: Options for the Future of indigenous Australia* (2008). At http://www.australia2020.gov.au/docs/final_report/2020_summit_report_7_indigenous.doc
- Commonwealth of Australia, *Responding to the 2020 Summit – Options for the Future of Indigenous Australia* (2009). At http://www.australia2020.gov.au/docs/government_response/2020_summit_response_7_indigenous.doc

- *Common Core Document forming part of the reports of States Parties Australia - incorporating the Fifth Report under the International Covenant on Civil and Political Rights and the Fourth Report under the International Covenant on Economic, Social and Cultural Rights* (2006). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_CommonCoreDocument

Key reports on governance and reconciliation issues

- Council for Aboriginal Reconciliation, *Australian Declaration for Reconciliation* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm>
- Council for Aboriginal Reconciliation, *Roadmap for Reconciliation* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/10/>
- Council for Aboriginal Reconciliation, *Final report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000). At <http://www.austlii.edu.au/au/other/IndigLRes/car/2000/16/>

Northern Territory Emergency Response reports

- Northern Territory Emergency Response Review Board, *Report*, (2008). At: http://www.terreview.gov.au/docs/report_nter_review/default.htm

Key reports on child protection issues

- R Wild and P Anderson, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007). At <http://www.inquirysaac.nt.gov.au/>
- Attorney General's Department NSW, *Breaking the Silence: Creating the Future. Addressing child sexual assault in Aboriginal communities in NSW* (2006). At [http://www.lawlink.nsw.gov.au/lawlink/acsat/acsat.nsf/vwFiles/80001%20CP%20Rep-all_sml.pdf/\\$file/80001%20CP%20Rep-all_sml.pdf](http://www.lawlink.nsw.gov.au/lawlink/acsat/acsat.nsf/vwFiles/80001%20CP%20Rep-all_sml.pdf/$file/80001%20CP%20Rep-all_sml.pdf)

Key reports on criminal justice issues

- *Royal Commission into Aboriginal Deaths in Custody* (1991). At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>
- National Indigenous Drug and Alcohol Committee, *Bridges and Barriers: Addressing Indigenous Incarceration and Health* (2009). At http://www.nidac.org.au/publications/pdf/nidac_bridges_and_barriers.pdf

Key reports on housing and homelessness issues

- Australian Institute of Health and Welfare, *Indigenous Housing Indicators 2007-08* (2009). At <http://www.aihw.gov.au/publications/index.cfm/title/10701>

Key reports on health and wellbeing issues

- National Health and Hospitals Reform Commission, *A healthier future for all Australians Final Report* (2009). At <http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/nhhrc-report>
- Australian Institute of Health and Welfare, *Measuring the social and emotional wellbeing of Aboriginal and Torres Strait Islander peoples* (2009). At <http://www.aihw.gov.au/publications/index.cfm/title/10685>
- Australian Institute of Health and Welfare, *The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples 2008* (2008). At <http://www.aihw.gov.au/publications/index.cfm/title/10583>

Key reports on education issues

- Department of Education, Employment and Workplace Relations, *National Aboriginal and Torres Strait Islander Education Policy*. At <http://www.dest.gov.au/archive/schools/indigenous/aep.htm>
- Department of Education, Employment and Workplace Relations, *Indigenous Education and Training 2005-2008*. At: http://www.dest.gov.au/sectors/indigenous_education/policy_issues_reviews/indigenous_education_and_training_2005_2008.htm
- J. Simpson, J. Caffery & P. McConvell, *Gaps in Australia's Indigenous Language Policy: Dismantling bilingual education in the Northern Territory*, AIATSIS Discussion Paper 24 (2009). At http://www.aiatsis.gov.au/data/assets/pdf_file/10703/Simpson_et_al_2009_DP_24.pdf

Key reports on income management issues

- J Altman and M Johns, *Indigenous welfare reform in the Northern Territory and Cape York: A comparative analysis*, CAEPR Working Paper 44 (2008). At <http://www.anu.edu.au/caepr/system/files/Publications/WP/CAEPRWP44.pdf>

Key reports on employment issues

- J Altman and K Jordan, *The untimely abolition of the Community Development Employment Program: Submission to Senate Community Affairs Committee Inquiry into the Family Assistance and Other Legislation Amendment (2008 Budget and Other Measures) Bill 2008*, CAEPR Topical Issue 5 (2009). At http://www.anu.edu.au/caepr/system/files/Publications/topical/Altman_Jordan_CDEP_0509.pdf