



Australian
Human Rights
Commission

Social Justice and Native Title Report 2014

ABORIGINAL AND TORRES STRAIT ISLANDER
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander
Social Justice Commissioner

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A full list of acknowledgements is contained at Appendix 1.

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Photo: The Fighting Gunditjmara Warrior. Photograph by Tim Kanoa (2014). The Fighting Gunditjmara Aboriginal dancer (whose skin name is Karntuluung, which means Lyrebird) is a warrior known for representing his people and keeping his culture alive in the 21st century. He is still fighting and resisting the influences of the wider world to remain a bearer of his ancestor's culture.

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



20 October 2014

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

Dear Attorney

Social Justice and Native Title Report 2014

I am pleased to present to you the *Social Justice and Native Title Report 2014*, in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth) and section 209 of the *Native Title Act 1993* (Cth).

The Report examines the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples from 1 July 2013 to 30 June 2014.

The Report provides an overview of the year with respect to Social Justice and Native Title issues.

It reports on discussions arising in the context of s18C of the *Racial Discrimination Act 1975* (Cth), which protects against racial vilification, or 'racial hatred', as it is more commonly referred to, and the need to balance the rights of people to be free from racial discrimination with their rights to freedom of speech.

The Report outlines developments in justice reinvestment in Australia, including ground breaking community initiatives in Bourke and Cowra. It also looks at the challenges for implementing justice reinvestment based on the Australian context and international experience.

I include a chapter on 'Nation building'. In my view, Nation building that is guided by the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) will lead to the realisation of Aboriginal and Torres Strait Islander rights, stronger communities and more meaningful engagement. I also reflect on a series of Declaration dialogues that have been held by the Australian Human Rights Commission and the National Congress of Australia's First Peoples in Aboriginal and Torres Strait Islander communities across the country over the past year.

I look forward to discussing the Report with you.

Yours sincerely

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

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

About the

Aboriginal and Torres Strait Islander Social Justice Commissioner

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

The Social Justice Commissioner:

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

Office holders

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

About the Social Justice Commissioner's logo



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

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

© Leigh Harris

Mick Gooda

Aboriginal and Torres Strait Islander Social Justice Commissioner

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

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

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



For information on the work of the Social Justice Commissioner, please visit:
http://humanrights.gov.au/social_justice/index.html about/publications/

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Executive summary

It is with great pleasure that I present my fifth *Social Justice and Native Title Report 2014* (the Report) as the Aboriginal and Torres Strait Islander Social Justice Commissioner.

One of my primary responsibilities is to report annually on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples.¹ I also report annually on the operation of the *Native Title Act 1993* (Cth) (the Native Title Act) and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples.² In 2014, I have again combined the reporting requirements into the *Social Justice and Native Title Report*, which covers the period from 1 July 2013 to 30 June 2014.

Chapter 1: Social justice - Year in review

In this chapter, I provide a snapshot of the key issues and developments relating to Aboriginal and Torres Strait Islander peoples and their enjoyment and exercise of human rights.

Discussion includes:

- machinery of Government changes
- the 2014 Budget
- leadership, representation and engagement
- recognition of Australia's First Peoples in the Constitution
- Indigenous Jobs and Training Review
- Closing the Gap.

I am concerned about the lack of clarity in relation to some of these key issues and the impact of this uncertainty on our peoples.

I also report on other developments during the year, including:

- the Collard Stolen Generations test case in Western Australia
- international developments
- complaints received by the Australian Human Rights Commission from Aboriginal and Torres Strait

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

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

Islander peoples during this reporting period.

Chapter 2: Racial Discrimination Act - Proposed changes to racial hatred provisions

In this chapter, I explore the proposed changes to the racial vilification provisions in sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth) (the RDA). I discuss the operation of the RDA in its current form and the reasons for retaining its effective protections for Aboriginal and Torres Strait Islander peoples. I outline principles to guide any future amendments.

Beyond legal protections, I also highlight the role that education and awareness can play in addressing racism.

Chapter 3: Native title - Year in review

In this chapter, I provide an overview of the significant issues that have arisen in native title. I consider the impact of these events on the exercise and enjoyment of our human rights as Aboriginal and Torres Strait Islander peoples.

There are a number of reviews currently underway into the operation of the native title system. These include:

- the Australian Law Reform Commission's Inquiry into Commonwealth Native Title laws and legal frameworks³
- the review of the roles and functions of Native Title Organisations by Deloitte Access Economics⁴
- the review by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group of existing arrangements for holding, managing and distributing land-related payments, and to identify options to strengthen governance and promote sustainability⁵
- the review of Indigenous Land Corporation and Indigenous Business Australia by Ernst & Young.⁶

These reviews provide the opportunity to look at the functioning of the system, and to consider necessary changes which will deliver better outcomes for Aboriginal and Torres Strait Islander peoples. It is my hope that once these changes are identified, ways to implement them will be forthcoming.

I also note some concerning native title developments in Queensland and a positive legal outcome in South Australia.

Chapter 4: Creating safe communities

The overrepresentation of Aboriginal and Torres Strait Islander peoples as both victims and offenders in the criminal justice system is one of the most urgent human rights issues facing Australia.

3 Australian Law Reform Commission, *Review of the Native Title Act 1993* (IP 45). At <http://www.alrc.gov.au/publications/native-title-ip-45> (viewed 8 October 2014).

4 Deloitte Access Economics, *Review of roles and functions of Native Title Organisations*. At <http://www.deloitteaccessconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review> (viewed 8 October 2014).

5 Commonwealth of Australia, *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group*. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 8 October 2014).

6 Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia* (2014). At http://www.dpmpc.gov.au/publications/docs/EY_final_report_review_of_ILC_IBA.PDF (viewed 8 October 2014).

Chapter 4 reflects on the statistics of rates of imprisonment, and highlights the need to create safer communities to address this overrepresentation as both victims and offenders.

I showcase a number of developments towards justice reinvestment in Australia, including ground-breaking community initiatives in Bourke and Cowra, and highlight some of the challenges for implementing justice reinvestment based on the Australian context and international experience.

This chapter reports on the development of the National Justice Coalition and its priorities. Just as the Close the Gap Campaign for health equality has gained broad-based support and government action, I am optimistic that the National Justice Coalition can be a similar circuit breaker in advocating for safer communities.

Chapter 5: Nations - Self-determination and a new era of Indigenous governance

Since the beginning of my term as Aboriginal and Torres Strait Islander Social Justice Commissioner, I have raised the need for stronger and deeper relationships. The *United Nations Declaration on the Rights of Indigenous Peoples*⁷ (the Declaration) can be used to improve relationships between Aboriginal and Torres Strait Islander peoples, the broader community and governments.⁸ I highlight the need for leadership in building and supporting effective Indigenous governance, and set out a framework for approaching this issue.⁹

In this chapter, I discuss Nations and 'Nation building' – that is, enhancing the capacities of Indigenous nations for self-governance and self-determined economic development. I present research which shows that where local Aboriginal and Torres Strait Islander nations, communities, authorities and organisations have power and control over decision making and resources, real change is achieved in a more sustainable way.

My view is that Nation building guided by the Declaration will lead to the realisation of Aboriginal and Torres Strait Islander rights, stronger communities and more meaningful engagement.

Chapter 6: Giving effect to the Declaration

This chapter sets out a path for advancing the implementation of the Declaration within Australia, and the benefits that will result from this.

It reflects on the Declaration Dialogues that have been held by the Australian Human Rights Commission and the National Congress of Australia's First Peoples in Aboriginal and Torres Strait Islander communities across the country over the past year.¹⁰

This chapter also highlights the need for improved engagement and concrete action to embed the Declaration in activities by all sectors of society: by governments, civil society, the private sector, and by Aboriginal and Torres Strait Islander communities.

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

8 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 106. At <https://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 8 October 2014).

9 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At <https://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 8 October 2014).

10 For an overview of this see: Australian Human Rights Commission 2013, *Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series: Discussion Paper 1 - Giving Full Effect to the Declaration – A National Strategy* (July 2013) p 8. At: <http://www.humanrights.gov.au/publications/declaration-dialogue-series> (viewed 22 August 2014).

Recommendations

Recommendation 1: The Australian Government revises its current position on targets as part of Closing the Gap, to include holistic justice targets aimed at promoting safer communities.

Recommendation 2: The Australian Government actively consults and works with the National Justice Coalition on justice related issues.

Recommendation 3: The Australian Government takes a leadership role on justice reinvestment and works with states, territories and Aboriginal and Torres Strait Islander communities to identify further trial sites.

Recommendation 4: The Australian Government:

- acknowledges that effective local community governance is central to achieving sustainable development in Aboriginal and Torres Strait Islander communities
- acknowledges the Nation building efforts to date and engages with those Nations as a means of linking with local Aboriginal and Torres Strait Islander peoples
- continues to resource and support research into the concept of nationhood, such as the Indigenous Nation Building Collaboration.

Recommendation 5: The Australian Government agrees to engage with the National Implementation Strategy to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 6: The Australian Government amends the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the *United Nations Declaration on the Rights of Indigenous Peoples* in the definition of human rights.

Chapter 1:

Social justice - Year in review

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1.1 Introduction

At the beginning of this reporting period, we were in the midst of the 2013 federal election. During the campaign, then Opposition Leader Tony Abbott pledged to be the nation's 'Prime Minister for Aboriginal Affairs'.¹ He intended to translate his long-standing concern for Australia's First Peoples into action, placing Indigenous Affairs at the heart of the Coalition government's agenda.

As this report was being prepared, the Coalition government took office, which provides an opportunity to reflect on its progress to date and on the challenges that lie ahead.

On 18 September 2013, as the new Cabinet was sworn in, responsibility for the majority of Aboriginal and Torres Strait Islander policies, programs and services was transferred to the Department of the Prime Minister and Cabinet (PM&C). The status of Indigenous Affairs was elevated with a dedicated Minister for Indigenous Affairs, Coalition Senator Nigel Scullion, and a Parliamentary Secretary to the Prime Minister on Indigenous Affairs, Coalition MP Alan Tudge. These appointments are concrete evidence of the Prime Minister's commitment to achieve positive and practical change in the lives of Aboriginal and Torres Strait Islander peoples.

Prior to being elected, then Opposition Leader Tony Abbott stated:

I am reluctant to decree further upheaval in an area that's been subject to one and a half generations of largely ineffectual 'reform'.²

As with any change of government, our first year under the Coalition government has been marked by a flurry of activity.

For Indigenous Affairs, it has been a year characterised by deep funding cuts, the radical re-shaping of existing programs and services, and the development of new programs and services.

This has coincided with the government commissioned reviews of Indigenous Training and Employment Programs³ and of Australia's welfare system.⁴ These reviews, in addition to the government's budgetary measures, have the potential to impact greatly on Aboriginal and Torres Strait Islander peoples.

It is not clear how these complement each other or what bearing these changes have on other areas of government. Contrary to the Prime Minister's statement when leader of The Opposition, we are now witnessing one of the largest scale 'upheavals' of Aboriginal and Torres Strait Islander affairs.

These measures, combined with the hesitation of government to set a date for a referendum on constitutional recognition, and the impact of various government reviews, has created an atmosphere of uncertainty for our peoples.

This is compounded by the way Aboriginal and Torres Strait Islander peoples are represented at the national level, which is in a state of flux. New advisory arrangements have been created and existing representative

1 The Hon T Abbott MP, 'Establishment of a Prime Minister's Indigenous Advisory Council' (Media Release, 10 August 2013). At <http://www.liberal.org.au/latest-news/2013/08/10/tony-abbott-establishment-prime-ministers-indigenous-advisory-council> (viewed 1 October 2014).

2 The Hon T Abbott MP, *Indigenous Affairs – A Coalition Approach* (Speech delivered at the Sydney Institute, Sydney, 15 March 2013). At <http://www.liberal.org.au/latest-news/2013/03/15/tony-abbott-address-sydney-institute-sydney> (viewed 1 October 2014).

3 The Hon T Abbott MP, 'Review of Indigenous training and employment' (Media Release, 8 October 2013). At <https://www.pm.gov.au/media/2013-10-08/review-indigenous-training-and-employment> (viewed 1 October 2014).

4 Australian Government, Department of Social Services, *Review of Australia's Welfare System*, <https://www.dss.gov.au/our-responsibilities/review-of-australia-s-welfare-system> (viewed 1 October 2014).

structures have been defunded.

This lack of clarity and muddled narrative is deeply worrying.

This chapter also reports on a number of developments at the national and international level concerning Stolen Generations and Australia's participation in United Nations mechanisms.

As I have done in previous reports, I will provide data on complaints received from Aboriginal and Torres Strait Islander peoples by the Australian Human Rights Commission (the Commission) and report on the progress of the Close the Gap campaign over the past year.

1.2 Machinery of Government changes

The past year has seen a significant restructuring of Aboriginal and Torres Strait Islander policies, programs and service delivery at the federal level.

Prior to the election, eight federal government departments were primarily responsible for Indigenous Affairs:

- Department of Attorney-General
- Department of Broadband, Communications and the Digital Economy
- Department of Education, Employment and Workplace Relations
- Department Families, Housing, Community Services and Indigenous Affairs
- Department of Health and Ageing
- Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education
- Department of Regional Australia, Local Government, Arts and Sport
- Department of Sustainability, Environment, Water, Population and Communities.

These departments administered 26 programs, which drove more than 150 Indigenous-specific initiatives and services. Many of these departments have since been restructured and renamed.

The consolidation of these policies, programs and service delivery into PM&C seeks to streamline arrangements, reduce red tape and prioritise expenditure to achieve practical outcomes on the ground.⁵

This move is intended to address some of the structural and logistical problems faced when Aboriginal and Torres Strait Islander programs and services are delivered through multiple agencies.

The transfer of the program delivery role to a 'central agency' such as PM&C, means a significant change in the way the department operates. I am informed that the bulk of Australian Government staff involved in delivering Indigenous programs and services, in regional and remote locations throughout Australia, will remain in their locations but will be part of PM&C. We now have a 'central agency' operating a regional network and all of its attendant issues.

The transfer of approximately 150 programs and activities, along with 2000 staff means that PM&C is now dealing with about 1440 organisations and nearly 3040 current funding contracts.⁶

It will take time to build the administrative systems, acclimatise staff in the new structure within PM&C, and for Aboriginal and Torres Strait Islander peoples, already cynical and fatigued by change, to have confidence in the competence of those implementing these new arrangements.

Information on the transfer arrangements has been scant with minimal involvement of Aboriginal and Torres Strait Islander peoples. There was little or no consultation with those working at the coalface about which programs and activities were best kept together or which Departments were best placed to administer them.

5 Australian Government, *Australian Government response to the Joint Committee of Public Accounts and Audit Report No 437* (2014), p 3. At http://www.dpmc.gov.au/publications/docs/gov_response_JCPAA_report.docx (viewed 1 October 2014).

6 Department of Prime Minister and Cabinet, Briefing on the transition to the Indigenous Advancement Strategy and restructuring of Indigenous programs and services to Aboriginal and Torres Strait Islander Social Justice Commissioner & National Congress of Australia's First Peoples, 20 June 2014.

There were significant negotiations between departments before these arrangements were finalised. As it stands, it is difficult to understand the logic behind the basis for the transfer of some programs and activities. For example, the Office of Aboriginal and Torres Strait Islander Health will remain with the Department of Health, however, petrol sniffing initiatives previously funded in that department have been transferred to PM&C.

The process of transferring those 150 programs and activities into PM&C has caused immense anxiety amongst Aboriginal and Torres Strait Islander communities. This, in part, can be attributed to the uncertainty of which programs would be transferred and who would be administering them.

In the *Social Justice and Native Title Report 2013*, I reflected on the 20 years of work by Aboriginal and Torres Strait Islander Social Justice Commissioners and I was reminded how circular and repetitive approaches to Indigenous Affairs can be.

In 2004, upon the abolition of Aboriginal and Torres Strait Islander Commission, the Coalition Government implemented a complex set of reforms, which became known as the 'new arrangements for the administration of Indigenous Affairs' and included:

- transferring responsibility for the delivery of all Aboriginal and Torres Strait Islander specific programs to mainstream government departments
- the adoption of whole-of-government approaches, with a greater emphasis on regional service delivery
- the establishment of new structures, such as the Office of Indigenous Policy Coordination (OIPC) to coordinate policy nationally and Indigenous Coordination Centres (ICCs) at the regional level
- a process of negotiating agreements at the local and regional level through Shared Responsibility Agreements (SRAs) and Regional Partnership Agreements (RPAs).⁷

At the launch of the *Social Justice Report 2005* my predecessor, Dr Tom Calma remarked:

One of the most basic problems of the new arrangements – a lack of information delivered down to the local level for both bureaucrats who are supposed to be implementing the new approach and most crucially for communities.⁸

Sadly, the words spoken above by Dr Calma are as relevant to the 2014 machinery of government changes as they were nearly ten years ago.

7 W Jonas, *Social Justice Report 2004*, Human Rights and Equal Opportunity Commission (2005), ch 3. At <http://www.humanrights.gov.au/publications/social-justice-report-2004> (viewed 1 October 2014).

8 T Calma, *Launch of the Social Justice Report 2005 and Native Title Report 2005* (Speech delivered at Launch of the Social Justice and Native Title Reports 2005, Museum of Sydney, 31 March 2006). At <http://www.humanrights.gov.au/news/speeches/site-navigation-30> (viewed 1 October 2014).

1.3 The 2014 Budget

We must remember that despite times of fiscal austerity Australia is an enormously wealthy nation...⁹
- Mick Gooda and Kirstie Parker, 12 February 2014

On 13 May 2014, the Australian Government introduced the 2014-15 budget (the Budget) into Parliament. This Budget was notable for cuts across almost all areas of public spending in order to meet the incoming government's commitment to move rapidly towards eliminating federal budget deficits.

(a) Indigenous Advancement Strategy

The Budget confirmed the above mentioned consolidation of all Indigenous specific programs through the introduction of the Indigenous Advancement Strategy (IAS).

The IAS aims to 'improve the lives' of our peoples through streamlined arrangements of programs and service delivery across education, employment, culture and capability, safety and wellbeing, by bringing these areas under the coordination of PM&C.¹⁰

The IAS also involves a range of administrative changes, including:

- dealing with approximately 1440 organisations with around 3040 current funding contracts
- establishing a new regional network
- new funding administration arrangements, where there will be changes to incorporation requirements and application processes including:
 - open competitive grants rounds
 - targeted or restricted grant rounds
 - direct grant allocation processes
 - a demand-driven process
 - one-off or ad hoc grants that do not involve a planned selection process, but are designed to meet a specific need, often due to urgency or other circumstances.¹¹

The government committed \$4.8 billion over four years to the IAS, in addition to \$3.7 billion allocated through National Partnership Agreements, Special Accounts and Special Appropriations to Indigenous-specific funds now administered by PM&C.

Importantly and unfortunately, this meant \$534.4 million was cut from Indigenous programs from the PM&C and the Department of Health over five years,¹² including:

- \$15 million from the National Congress of Australia's First Peoples (its entire forward funding)¹³

9 Close the Gap Campaign, 'Living up to the Close the Gap challenge' (Media Release, 12 February 2014). At <https://www.humanrights.gov.au/news/stories/living-close-gap-challenge> (viewed 1 October 2014).

10 Australian Government, *Indigenous Advancement Strategy*, https://www.dpmc.gov.au/indigenous_affairs/ias/ (viewed 1 October 2014).

11 Australian Government, Department of Prime Minister and Cabinet, *Indigenous Advancement Strategy Guidelines* (2014), p 5. At http://www.dpmc.gov.au/indigenous_affairs/docs/ias_guidelines.pdf (viewed 1 October 2014).

12 Australian Government, *Budget 2014-15: Budget Measures, Budget Paper No 2* (2014), p 185. At http://budget.gov.au/2014-15/content/bp2/download/BP2_consolidated.pdf (viewed 16 October 2014).

13 Australian Government, *Budget Paper No 2*, above.

- \$3.5 million from the Torres Strait Regional Authority¹⁴
- \$9.5 million from the Indigenous Languages Support Program.¹⁵

Senator Scullion reportedly promised that there would not be ‘any impact on the ground to frontline services’.¹⁶ Rather, the savings will be wholly achieved through the rationalisation of Indigenous programs and the cutting of red tape within PM&C.

This involves rationalising the previous 150 Indigenous programs and activities into five streamlined programs or funding streams of the IAS, set out below in Text Box 1.1.¹⁷

Text Box 1.1:

The Indigenous Advancement Strategy Programmes¹⁷

Jobs, Land and Economy Programme

This programme aims to get adults into work, foster viable Indigenous business and assist Indigenous people to generate economic and social benefits from land and sea use and native title rights, particularly in remote areas.

Children and Schooling Programme

This programme focuses on getting children to school, improving education outcomes including Year 12 attainment, improving youth transition to vocational and higher education and work, as well as, supporting families to give children a good start in life through improved early childhood development, care, education and school readiness.

Safety and Wellbeing Programme

This programme is about ensuring the ordinary law of the land applies in Indigenous communities, and that Indigenous people enjoy similar levels of physical, emotional and social wellbeing enjoyed by other Australians.

Culture and Capability Programme

This programme will support Indigenous Australians to maintain their culture, participate equally in the economic and social life of the nation and ensure that Indigenous organisations are capable of delivering quality services to their clients.

Remote Australia Strategies Programme

This programme will address social and economic disadvantage in remote Australia and support flexible solutions based on community and government priorities.

14 Australian Government, *Budget Paper No 2*, above.

15 Australian Government, *Budget Paper No 2*, above, p 59.

16 Australian Broadcasting Corporation, *The World Today – Indigenous groups fear impact of budget cuts*, <http://www.abc.net.au/worldtoday/content/2014/s4005113.htm> (viewed 1 October 2014).

17 Australian Government, *Budget Paper No 2*, note 12, p 185.

18 Australian Government, *Indigenous Advancement Strategy Guidelines*, note 10, p 4.

These five broad programs of the IAS are to be implemented by the new PM&C Regional Network (the Network).

The Network aims to 'deliver demonstrable improvements in school attendance, employment and community safety' and ensure that decisions are made closer to the people and communities they affect.¹⁹

The Network will be headed by a National Director and supported by a Deputy Director for Northern Australia.

The IAS was established in the first quarter of the current financial year. The government mandated a 12 month transition period in an effort to achieve seamless service delivery and give service providers and communities time to adjust to the new arrangements.²⁰

I am informed that most existing funding agreements are being honoured.²¹

In the transition period, organisations with funding agreements which have expired since the Budget, or are due to expire by June 2015, are being given extensions of six to 12 months in order to facilitate a smooth transition.

(b) Mainstream budget measures

It is disappointing that savings from the rationalisation of Indigenous programs and services will not be reinvested into Indigenous Affairs and Closing the Gap initiatives. In addition to the Indigenous Advancement Strategy, health funding for Aboriginal and Torres Strait Islander specific programs, grants and activities will be refocused under the 'Indigenous Australians Health Programme'.²² This is part of drawing up a new methodology for funding Indigenous health, flagged by the Budget.²³ The methodology needs to align with the Health Plan, and the government must engage with the Aboriginal and Torres Strait Islander health sector during this process.

The Budget outlines that savings from health programs will be directed to the new Medical Research Future Fund, while other savings from the restructure will be 'redirected by the Government to repair the Budget and fund policy priorities'.²⁴

On the other hand, the following new measures relating to Indigenous Affairs were included in the Budget, set out in Text Box 1.2.

19 The Hon N Scullion MP, 'Delivering our commitments for Indigenous Australians' (Media Release, 13 May 2014). At <http://minister.indigenous.gov.au/media/2014-05-13/delivering-our-commitments-indigenous-australians> (viewed 1 October 2014).

20 Australian Government, *Indigenous Advancement Strategy Guidelines*, note 10, p 3.

21 Prime Minister's Indigenous Advisory Council, *Budget 2014-15 Communiqué*, https://www.dpmc.gov.au/indigenous_affairs/indigenous_advisory_council/communique/communique_14052014.cfm (viewed 1 October 2014).

22 Australian Government, *Budget Paper No 2*, note 12, p 185.

23 Australian Government, *2014-15 Health Portfolio Budget Statements* (2014), p 110. At [http://www.health.gov.au/internet/budget/publishing.nsf/Content/2014-2015_Health_PBS_sup1/\\$File/2014-15_Health_PBS_2.05_Outcome_5.pdf](http://www.health.gov.au/internet/budget/publishing.nsf/Content/2014-2015_Health_PBS_sup1/$File/2014-15_Health_PBS_2.05_Outcome_5.pdf) (viewed 1 October 2014).

24 Australian Government, *Budget Paper No 2*, note 12, p 185.

Text Box 1.2:

New spending in Indigenous Affairs²⁴

Budget expense measures	Program	Amount
Prime Minister & Cabinet	Clontarf Foundation Academy	\$13.4m
	Community Engagement Police Officers in the Northern Territory	\$2.5m
	Outback Power	\$10.6m
	Permanent Police Presence in Remote Indigenous Communities	\$54.1m
	Remote School Attendance Strategy – extension	\$18.1m
	Support for the Northern Territory Child Abuse Taskforce – Australian Federal Police	\$3.8m
Education	AIATSIS - Digitisation of Indigenous cultural resources	\$3.3m
	Remote Indigenous Students Attending Non-Government Boarding Schools	\$6.8m
Health	Indigenous teenage sexual and reproductive health and young parent support	\$25.9m
Social Services	Income Management – one year extension and expansion to Ceduna, South Australia	\$101.1m

It is concerning that the largest allocation of new Indigenous spending in the Budget was to extended income management in existing locations for one year.²⁶ Income management has been extended for one year in the Northern Territory, metropolitan Perth, Western Australia's Kimberley region, South Australia's Anangu Pitjantjatjara Yankunytjatjara Lands, as well as Laverton Shire and Ngaanyatjarra Lands.²⁷ Income management has also been expanded to Ceduna, South Australia, since 1 July 2014.²⁸

(c) Indigenous Advancement Strategy – some challenges

The move to rationalise 150 programs and activities to five is to be applauded.

I believe that streamlining 150 small programs into five large programs provides greater flexibility for communities. It could provide more scope to develop on the ground responses to the issues that confront our

25 Data compiled from Australian Government, *Budget Paper No 2*, above, pp 88, 90, 131, 184, 186, 188, 202.

26 Australian Government, *Budget Paper No 2*, note 12, p 202.

27 Australian Government, *Budget Paper No 2*, above.

28 Australian Government, *Budget Paper No 2*, above.

communities on a daily basis. In other words, it is the first step away from a 'one size fits all' mentality that has, for so long, confounded our people.

If done right, this move to a smaller number of programs has the potential to achieve the Australian Government's stated aims of reducing red tape and cutting wasteful spending on bureaucracy. This, in turn, could also translate to a greater share of funds being provided on the ground.

However, the challenges are wide and varied. Bringing about budget cuts in the order of \$400 million over the next four years will be an immense undertaking. This figure alone tells us it is likely many organisations will be defunded through this process, with corresponding loss of services to the community. These losses will be even more severe if any new services or activities are funded during this time.

There is widespread concern amongst Aboriginal and Torres Strait Islander communities and organisations about the lack of detail on how the proposed measures will be implemented and what their impact will be.

Restructuring programs and funding processes, which will affect around 1400 organisations with over 3000 funding contracts, is complex and stressful. It is also time consuming and calls for a highly skilled and culturally competent workforce that is cognisant of the magnitude of this task. It requires an effective communication strategy and a transition process that is open, transparent and easily understood. Most importantly, it will require respectful engagement with Aboriginal and Torres Strait Islander peoples.

The government should be open to extending the transitional period in the event that the tasks outlined above present challenges that were not anticipated when the 12 month timeframe was set.

(d) Other budget measures – some concerns

In addition to what I have outlined above, there have been some added budgetary measures which will impact language, legal and family violence services that are provided to Aboriginal and Torres Strait Islander peoples.

(i) Indigenous languages

The inclusion in the Budget of cuts to the Indigenous Languages Support Program is regrettable in light of the 2005 *National Indigenous Languages Survey Report*, which found that, of the 145 Indigenous languages still spoken in Australia, 110 are critically endangered and the rest 'face an uncertain future if immediate action and care are not taken'.²⁹

(ii) Aboriginal and Torres Strait Islander legal services

The Australian Government announced in December 2013 that the broader legal assistance sector (including Community Law Centres) was to lose \$43.1 million over four years, from 2014-15.

Notably, this includes a \$13.4 million cut to the Indigenous Legal Aid and Policy Reform Program.³⁰ These cuts will take effect from 1 July 2015. This program funds Aboriginal and Torres Strait Islander Legal Services (ASTILS), and community controlled not-for-profit organisations that provide legal assistance as well as community legal education, prison, law reform and advocacy activities for our peoples.

The government indicated that any cuts to ATILS would only affect policy reform and advocacy work, not

29 Attorney-General's Department, *National Indigenous Languages Policy*, <http://arts.gov.au/indigenous/languages> (viewed 1 October 2014).

30 B Boney, 'Indigenous legal aid to be cut by \$13.4 million', *SBS News*, 18 December 2014. At <http://www.sbs.com.au/news/article/2013/12/17/indigenous-legal-aid-be-cut-134-million> (viewed 1 October 2014).

frontline legal services. However, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) has highlighted that the value of Indigenous legal services is that they provide 'strategic and well-informed advice about effective law and justice policies' to governments, leading to a reduction in the incarceration of Aboriginal and Torres Strait Islander peoples.³¹ The NATSILS has also stated concerns that the withdrawal of funding for law reform and advocacy positions will result in solicitors and legal officers, currently providing frontline services, assuming this work.

The NATSILS Chair, Mr Shane Duffy, predicted that without an advocacy capacity 'more people are going to end up in prison, it's as simple as that'.³²

According to NATSILS, evaluations in recent years have suggested that ATSILS are 'meeting their primary objectives to improve the access of Aboriginal and Torres Strait Islander Australians to high-quality and culturally appropriate legal aid services'.³³

The importance of having culturally competent legal services is demonstrated by the work of the Central Australian Aboriginal Legal Aid Service.

Text Box 1.3:

Central Australian Aboriginal Legal Aid Service (CAALAS)³⁴

CAALAS was acting for a number of people from a remote community which had been the scene of a serious conflict between two families. The conflict had erupted over a death in Alice Springs, and had resulted in numerous riot and assault charges. With members of the two families bailed or summonsed to attend a remote court on the same day, tensions were high and further conflict ensued. A CAALAS field officer, a Walpiri woman with excellent knowledge of the community and family connections, liaised with the court. She arranged for the list to be split between two days, so that family members could attend court separately and peaceably.

The case demonstrates how CAALAS's knowledge of community and of cultural responses to specific situations can have a positive and direct impact on service delivery, adding real value to the effectiveness of the justice system.

The impact on frontline services is already evident. ATSILS are losing staff and branch offices are being forced to close. This has already occurred in Queensland, with offices in Warwick, Cunnamulla, Chinchilla, Dalby and

31 National Aboriginal and Torres Strait Islander Legal Services, *Funding cuts to Aboriginal and Torres Strait Islander Legal Services*. At: <http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%202%20April%202013.pdf> (viewed 1 October 2014).

32 National Aboriginal and Torres Strait Islander Legal Services, 'Government to defund Aboriginal Legal Services Peak Body and all Law Reform and Policy Positions' (Media Release, 17 December 2013). At <http://www.natsils.org.au/portals/natsils/Media%20Releases/17-12-13%20NATSILS%20MR%20Govt%20to%20defund%20NATSILS%20and%20all%20ATSILS%20Law%20Reform%20and%20Policy%20Positions.pdf> (viewed 1 October 2014).

33 Australian Government, Office of Evaluation and Audit (Indigenous Programs), *Evaluation of the Legal Aid for Indigenous Australians Program (July 2008) & Evaluation of the Law and Justice Advocacy Development Program (2009)*, para 37. At http://anao.gov.au/~media/Uploads/Documents/evaluation_of_the_legal_aid_for_indigenous_australians_program.pdf (viewed 1 October 2014).

34 E Cubillo, 'Cutting funds to Aboriginal and Torres Strait Islander services: Why am I concerned?', (unpublished), p 6. Copy provided to the Australian Human Rights Commission, 25 July 2014.

Cooktown closing down.³⁵ It is disappointing that these budgetary measures may also lead to the closure of many other ATSILS offices across Australia.

Also causing widespread concern is the uncertainty over the National Family Violence Prevention Legal Services (NFVPLS). This organisation has been providing much needed support to Aboriginal and Torres Strait Islander victims of family violence for 16 years.³⁶ With their funding already cut by \$3.6 million in December 2013, it is unclear the extent to which this funding may be further reduced when NFVPLS is amalgamated into one of the five new programs of the IAS.

Given the extent of overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice and child protection systems, it is difficult to understand the rationale behind these funding cuts. Unfortunately, it seems that the organisations that are best placed to provide these vital legal and advocacy services to our communities are the ones that are, or are likely to be, affected by these cuts.

(iii) Cuts to other crucial services and programs

In addition to concerns about the measures specific to Aboriginal and Torres Strait Islander services and programs, the broader Budget measures will also have a significant impact on our communities. The effect of some of these measures could be felt disproportionately by Aboriginal and Torres Strait Islander peoples, given our higher rates of chronic disease, lower employment levels and general disadvantage. Such changes can only exacerbate Indigenous disadvantage and set back efforts to close the gap.

For instance, I am concerned by plans to withdraw \$80 billion of federal investment from hospitals and schools over the next decade and the potential impact on Aboriginal and Torres Strait Islander peoples.³⁷

(iv) Health measures

Several aspects of the budgetary changes in the health sector are cause for concern, particularly the \$7 Medicare co-payment and the cuts to national programs addressing chronic disease.³⁸

The proposed \$7 co-payment for visiting a bulk-billing general practitioner (GP), pathology and diagnostic services, and medication covered by the Pharmaceutical Benefits Scheme is a significant measure in the Budget.

The major concern is that the compounded effect of co-payments will mean a rise in out-of-pocket expenses, which will further entrench barriers to equitable access to appropriate healthcare for Aboriginal and Torres Strait Islander people.

For example, a patient who visited a GP and required a blood test and X-ray would be \$21 out of pocket. That sum would increase exponentially for a parent with sick children.

35 National Aboriginal and Torres Strait Islander Legal Services, Correspondence to W Mundy, Presiding Commissioner, Productivity Commission, 22 August 2014. At http://www.pc.gov.au/__data/assets/pdf_file/0015/140307/subdr327-access-justice.pdf (viewed 1 October 2014).

36 National Family Violence Prevention Service, 'New threat for Family Violence Prevention Legal Services' (Media Release, 18 August 2014). At: <http://www.fvpls.org/images/files/MR%2018082014%20National%20Forum%20Response%20to%20Indigenous%20Advancement%20Strategy.pdf> (viewed 1 October 2014).

37 Australian Government, *Budget 2014-15: Federal Financial Relations, Budget Paper No 3* (2014), p 1. At http://www.budget.gov.au/2014-15/content/bp3/download/consolidated_BP3.pdf (viewed 1 October 2014).

38 Australian Medicine, *2014 AMA National Conference Bumper Issue*, Australian Medical Association (2014). At https://ama.com.au/system/files/2611_final.pdf (viewed 1 October 2014).

The Australian Medical Association (AMA) president, Associate Professor Brian Owler, has warned that the \$7 co-payment, together with cuts to Indigenous health programs, may impede progress towards Closing the Gap.³⁹

Aboriginal and Torres Strait Islander peoples already access Medicare services at a rate one-third lower than their needs require. Under the current system, 37.5% of Aboriginal and Torres Strait Islander peoples in non-remote areas and 16.5% in remote areas find it difficult to access services because of cost.⁴⁰

Barriers to accessing medical services need to be reduced for Aboriginal and Torres Strait Islander peoples. The \$7 co-payment presents another obstacle for our communities.

In addition, there has been a \$3 million reduction to the National Tobacco Campaign and other programs aimed at reducing the risk of chronic disease.⁴¹ This is greatly concerning, as chronic disease is the biggest cause of early death and disability in Aboriginal and Torres Strait Islander peoples. It is also a major contributor to the health equality gap.

Cutting such programs is a case of short term thinking, where, experience tells us, relatively small cost savings now will only lead to greater costs down the track. While these measures may be seen as helpful to reducing the budget deficit in the short term, they are likely to have a devastating health impact on Aboriginal and Torres Strait Islander peoples.

(v) Welfare and pension age

The Budget proposal to introduce changes to youth welfare rules has also been a source of considerable anxiety for Aboriginal and Torres Strait Islander peoples.

These changes would increase the age of eligibility for Newstart and the Sickness Allowance from 22 to 24 years, and oblige first time Newstart and Youth Allowance claimants under 30 years of age to wait six months before receiving income assistance.⁴²

While the stated rationale for these changes is to increase work participation incentives, they could have a devastating impact on our communities. To deny access to welfare payments for six months is not only harsh, but will fail to address the very complex issues of youth employment and disengagement from education and training, particularly for Aboriginal and Torres Strait Islander people under 30 years.

There is also a proposal to raise the pension age to 70 years.⁴³ It seems grimly ironic that the average life expectancy of Aboriginal and Torres Strait Islander men is lower than the planned new pension age of 70.⁴⁴

As I mentioned at the start of this chapter, people working in the welfare space are grappling not only with these budgetary changes, but also with the potential impact of any reforms coming out of the reviews of

39 D Harrison, 'Doctors chief sounds alarm on \$7 co-payment', *The Sydney Morning Herald*, 13 August 2014. At <http://www.smh.com.au/federal-politics/political-news/doctors-chief-sounds-alarm-on-7-copayment-20140812-3dl11.html> (viewed 1 October 2014).

40 Australian Medical Association, *Practice in Primary Health Care for Aboriginal People and Torres Strait Islanders, Aboriginal and Torres Strait Islander Health Report Card* (2011) p 4. At <https://ama.com.au/.../Indigenous%20Report%20Card%202010-11.pdf> (viewed 1 October 2014).

41 The Hon C King MP, Shadow Minister for Health, 'Dutton Continues to Fail on Preventive Health' (Media Release, 18 June 2014). At <http://www.catherineking.com.au/media/dutton-continues-to-fail-on-preventive-health/> (viewed 1 October 2014).

42 Australian Government, *Budget Paper No 2*, note 12, pp 203, 210.

43 J Massola, 'Retirement age rise to 70 by 2035, Joe Hockey announces', *Sydney Morning Herald*, 2 May 2014. At <http://www.smh.com.au/federal-politics/political-news/retirement-age-rise-to-70-by-2035-joe-hockey-announces-20140502-zr318.html> (viewed 1 October 2014).

44 J Massola, above.

Indigenous training and employment and the welfare system. There does not seem to be a coherent approach to the collective impact of all of these potential reforms, which contributes to a muddled narrative.

(e) Future engagement

In general terms, the absence of clarity about how the proposed budget measures will be implemented, and the consequent impact on Aboriginal and Torres Strait Islander peoples, services and organisations, is a matter of considerable concern.

While the targeting of inefficient programs is to be welcomed, the cuts and the radical overhaul of both Indigenous specific and mainstream programs and services were planned with little or no input from Aboriginal and Torres Strait Islander peoples, their leaders or their respective organisations.

As I said, following the Budget announcements:

The Aboriginal leadership is now mature enough to understand if cuts are needed, we're willing to put our shoulder in, but there needs to be proper engagement with our mob.⁴⁵

This means respectful engagement with the Aboriginal and Torres Strait Islander community, particularly with the sector leadership, including in the areas of criminal justice, employment, education, early childhood and economic development.

Such engagement has been conspicuous by its absence before and after the announcement of the Budget. This should be rectified as a matter of urgency.

45 'Cuts will hit indigenous people hard', *The Australian*, 14 May 2014. At <http://www.theaustralian.com.au/news/latest-news/cuts-will-hit-indigenous-people-hard/story-fn3dxiwe-1226917894155> (viewed 1 October 2014).

1.4 Leadership, representation and engagement

Without Aboriginal involvement, you will fail. It's their story; it can't just be imposed on them... If you don't have a respectful relationship, any talk of consultation is a fiction. If you don't have adequate time, any talk of consultation is a fiction. You are simply the latest missionary telling them what to do.⁴⁶

- Fred Chaney, Chair of Desert Knowledge Australia, 20 May 2014.

When I was appointed to this role, I made it clear that one of my priorities was for stronger and deeper relationships to be built between Aboriginal and Torres Strait Islander peoples and the broader Australian community, with all levels of government and also among ourselves. These are relationships that need to be founded on partnership, honesty, mutual trust and respect.

For there to be effective and meaningful relationships, there needs to be a willingness of governments to involve us as active participants in the decisions that so profoundly affect us.

We need relationships that operate at multiple levels. We need relationships that are advisory and feed into the formation of policies, programs and legislation. We need relationships that are strategic, across sectors, and focus on effective implementation, so that desired outcomes are realised.

Finally, we need community driven relationships. The community level is where the political process begins, and where the operation of policies, programs and legislation are most sharply felt and experienced.

I will now discuss three current structures of engagement with Aboriginal and Torres Strait Islander peoples.

(a) Prime Minister's Indigenous Advisory Council

On 10 August 2013, the Opposition Leader pledged that, if elected, he would appoint an Indigenous Advisory Council (IAC), to be chaired by Mr Warren Mundine, Chairman of the Australian Indigenous Education Foundation and Executive Chairman of the Australian Indigenous Chamber of Commerce. Prime Minister Abbott said:

I want a new engagement with Aboriginal people to be one of the hallmarks of an incoming Coalition government... If lasting change is to be achieved in this area, it has to be broadly bi-partisan and embraced by Aboriginal people rather than simply imposed by government... In this area, the problem is not so much under-investment as under-engagement.⁴⁷

On 25 September 2013, Prime Minister Abbott announced the establishment of the IAC and confirmed Mr Mundine's appointment as Chair.⁴⁸

On 4 December 2013, the terms of reference were released which require the IAC to advise the government, focusing 'on practical changes to improve the lives of Aboriginal and Torres Strait Islander people'.⁴⁹ The IAC held its first meeting on 5 December 2013.

The IAC reports directly to the Prime Minister. The Chair also has monthly meetings with the Prime Minister, the Minister for Indigenous Affairs and the Parliamentary Secretary to the Prime Minister on Indigenous Affairs.

46 L Mottram, 'Could Tony Abbott be on the right track to improve Indigenous lives?', *702 ABC Sydney*, 20 May 2014. At <http://www.abc.net.au/local/audio/2014/05/20/4008200.htm> (viewed 1 October 2014).

47 The Hon T Abbott MP, 'Tony Abbott - Establishment of a Prime Minister's Indigenous Advisory Council' (Media Release, 10 August 2014). At <http://www.liberal.org.au/latest-news/2013/08/10/tony-abbott-establishment-prime-ministers-indigenous-advisory-council> (viewed 1 October 2014).

48 The Hon Tony Abbott MP, above.

49 Department of Prime Minister and Cabinet, *Prime Minister's Indigenous Advisory Council*, https://www.dpmc.gov.au/indigenous_affairs/indigenous_advisory_council/index.cfm (viewed 22 September 2014).

Mr Mundine signaled an overhaul of Indigenous policy which, he said would be as bold as the economic reforms of the 1980s and 1990s and would transform the welfare system for all Australian.⁵⁰ Mr Mundine said he would judge the success of the Prime Minister's Indigenous agenda based on school attendance rates, the number of people gaining university degrees and trade qualifications, and the delivery of economic outcomes, including the building of small businesses on country.⁵¹

(b) National Congress of Australia's First Peoples

In 2008, then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma, convened a Steering Committee to research a preferred model for a new national representative body. A series of consultations and workshops held across Australia during 2009 culminated in the incorporation in April 2010 of the National Congress of Australia's First Peoples (Congress).

The current Co-Chairs are Ms Kirstie Parker and Mr Les Malezer. As of September 2014, Congress had approximately 8200 individual members and 180 member organisations.⁵²

In the reporting period, Congress coordinated a series of community dialogues with the Commission generating debate on the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration)⁵³ (discussed in Chapter 6) and the World Conference on Indigenous Peoples (discussed later in this chapter).

Congress was given initial funding of \$29.2 million over four years, and was allocated another \$15 million in the 2013-14 Budget. However, on 19 December 2013, Senator Scullion announced that the new government was 'unlikely' to deliver on that commitment.⁵⁴ The allocation had not been an election commitment, and the Australian Government's position was that it did not align with the Coalition's prioritising frontline services.⁵⁵ He also noted that Congress' membership constituted little over 1% of the Aboriginal and Torres Strait Islander population, and that only 800 or so members had voted in its board elections in July 2013.⁵⁶

After the 2014 Budget confirmed the withdrawal of the \$15 million, Congress vowed to continue as 'a strong, fearless national representative body'.⁵⁷ As of December 2013, Congress had reserves of \$8.3 million, which it said would enable its continued operation for another two years.⁵⁸ Meanwhile, at its annual general meeting in February 2014, Congress announced plans to launch a public fund, expand its membership and build new partnerships, in an effort to create a sustainable financial base.⁵⁹ Ahead of the Budget, Congress reduced its staff by two-thirds. Ms Parker said that while the defunding 'can be seen as a blow to our self-determination, it

50 N Berkovic, 'I'll be Abbott's worst nightmare, vows top indigenous adviser Mundine', *The Australian*, 2 December 2013. At <http://origin.www.theaustralians.com.au/national-affairs/indigenous/ill-be-abbotts-worst-nightmare-vows-top-indigenous-adviser-mundine/story-fn9hm1pm-1226772540211> (viewed 1 October 2014).

51 N Berkovic, above.

52 Note that those Congress member organisations represent upwards of 50,000 Aboriginal and Torres Strait Islander peoples. Membership Support Officer, National Congress of Australia's First Peoples, email to Commissioner Gooda's office, 26 September 2014.

53 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007.

54 National Congress of Australia's First Peoples, 'First People's voice will not be silenced' (Media Release, 19 December 2013), para 7. At <http://nationalcongress.com.au/first-peoples-voice-will-not-be-silenced/> (viewed 1 October 2014).

55 P Karvelas, 'Aboriginal congress told funding will go', *The Australian*, 19 December 2013. At <http://www.theaustralian.com.au/national-affairs/indigenous/aboriginal-congress-told-funding-will-go/story-fn9hm1pm-1226786220338> (viewed 1 October 2014).

56 P Karvelas, above.

57 National Congress of Australia's First Peoples, note 54.

58 K Parker, *Action from Ethics*, (Speech delivered at the ACOSS National Conference, Brisbane, 11 June 2014), p 3. At <http://acoss.org.au/conference/wp-content/Presentations/Kirstie%20Parker%20Transcript.pdf> (viewed 1 October 2014).

59 National Congress of Australia's First Peoples, *Third Annual General Meeting Minutes* (2014). At <http://nationalcongress.com.au/wp-content/uploads/2014/03/2013CongressAGMMinutes.pdf> (viewed 1 October 2014).

is by no means a knockout punch'.⁶⁰

(c) Empowered Communities

In the *Social Justice and Native Title Report 2013*,⁶¹ I noted that I would be watching the Empowered Communities project, led by Mr Noel Pearson, with interest.

The project aims to design a new governance model for the regions to ensure more customised and coordinated government initiatives and to provide greater empowerment of local Indigenous leaders over the activities in their communities.⁶²

The group met for the first time in February 2014 and is currently formalising the proposal for their work.⁶³

Parliamentary Secretary to the Prime Minister on Indigenous Affairs, Alan Tudge, said that Empowered Communities would build on the rationalisation of programs within PM&C, and would address the problem of small communities served by multiple agencies and programs which often were not aligned with their needs.⁶⁴

I will continue to observe the progress of Empowered Communities.

(d) Commentary

The Coalition government came into office promising a new era of Aboriginal and Torres Strait Islander engagement. It really worries me to say that, even at this early stage, we are yet to see the outcomes expected of an effective, meaningful and considered engagement strategy.

That a radical reshaping of the Indigenous policy space could be planned and executed with little or no involvement by Aboriginal and Torres Strait Islander stakeholders, communities and organisations at almost any level is disappointing.

I understand that the Prime Minister is entitled to appoint his own advisers and a diversity of views and voices is always a good thing.

Despite claims that the IAC was never intended to replace Congress,⁶⁵ the Coalition government created the IAC and removed the forward allocation of \$15 million from Congress within a few months of coming to power.

60 K Parker, National Congress of Australian First Peoples, '2014 Budget response: Concern over impact of the Budget on Aboriginal and Torres Strait Islander Peoples' (Media Release, 15 May 2014). At <http://nationalcongress.com.au/congress-2014-budget-response/> (viewed 1 October 2014).

61 M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), p 91. At https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_native_title_report_2013.pdf (viewed 1 October 2014).

62 The Hon A Tudge MP, Department of Prime Minister and Cabinet, 'Parliamentary Secretary Tudge: Project launched to "Empower Communities"' (Media Release, 6 February 2014). At <http://www.indigenous.gov.au/parliamentary-secretary-tudge-project-launched-to-empower-communities> (viewed 1 October 2014).

63 The Hon A Tudge MP, above.

64 The Hon A Tudge MP, above.

65 D Harrison, 'Indigenous organisation to defy Tony Abbott funding cut', *Sydney Morning Herald*, 19 December 2013, para 11. At <http://www.smh.com.au/federal-politics/political-news/indigenous-organisation-to-defy-tony-abbott-funding-cut-20131219-2znr4.html#ixzz3GCMvRM6K> (viewed 1 October 2014).

Further, the Prime Minister has met monthly with the IAC Chair, as stipulated in the terms of reference, during this reporting period. In contrast, Congress has reported that the Prime Minister has not met with the Co-Chairs of Congress at all since the election.⁶⁶

There is little doubt that the IAC members bring an impressive array of talent and experience to Indigenous issues. However, the different roles played by the IAC, as a strategic advisor, and Congress, as a representative voice, should be clarified and understood. While it is true to say that Congress' membership has not grown as fast as was perhaps hoped, these are still very early days.

It is early days, too, for the IAC, and I trust that they will engage with Aboriginal and Torres Strait Islander communities and advocacy bodies, as set out in their terms of reference. However, I have seen little engagement to date.

I also see the Empowered Communities concept of building relationships between government and particular regions as an opportunity to guide the development of processes so that 'government investment is informed by local leaders and targeted to make a genuine and practical difference.'⁶⁷

The building of these regional relationships is a step toward operationalising the model of Indigenous governance mentioned in the *Social Justice Report 2012*.⁶⁸ Empowered Communities covers what I have referred to as the 'governance of government' element.

In Chapter 5 of this report, I highlight the efforts over the last several years of our people organising themselves around their nations as a form of governance. In that chapter I discuss the benefits of building structures based on the cultural authority of Aboriginal and Torres Strait Islander nations. The work underway already shows the immense potential and benefits of this localised leadership and representation.

66 Interview transcript, 'PM speaks a "big game" on Indigenous issues, but govt agenda is very narrow: Parker', *ABC AM*, 12 September 2014. At <http://www.abc.net.au/am/content/2014/s4086148.htm> (viewed 1 October 2014).

67 The Hon A Tudge MP, note 62.

68 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_report_2012.pdf (viewed 1 October 2014).

1.5 Constitutional recognition

Starting next year, I will work to recognise Indigenous people in the Constitution, something that should have been done a century ago, that would complete our Constitution rather than change it.⁶⁹

- Then Opposition Leader Tony Abbott, in the lead up to the 2013 election

There has been significant discussion during the reporting period about the recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. Prime Minister Abbott has identified this issue as a key priority for this term of Parliament.

Recognition has also been a focal point of my advocacy and has featured in each of my Social Justice Reports. Despite strong multi-party support, there is uncertainty surrounding the model and timeframe for such a referendum.

(a) Background

Recognising Aboriginal and Torres Strait peoples in the Australian Constitution has been on the agenda since 1999 when Prime Minister Howard included it in the 'republic' referendum.⁷⁰

Since then we have seen commitments from all major parties for constitutional recognition in the 2007,⁷¹ 2010⁷² and the 2013 federal election campaigns.⁷³

These commitments have generally revolved around reforming the Constitution to:

- recognise Aboriginal and Torres Strait Islander peoples
- remove the race elements
- honour Aboriginal and Torres Strait Islander languages
- prevent discrimination on the basis of race, nationality, colour or ethnic origin.

(b) Processes, bodies and recommendations

Despite the broad political support I have mentioned above, concerted efforts towards constitutional recognition gained momentum after the 2010 appointment of the Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel), of which I am a member. Since that time, there have been a number of processes and bodies enacted to progress the recognition of Aboriginal and Torres Strait Islander peoples

69 The Hon T Abbott MP, *Address to the 2013 Federal Coalition Campaign Launch*, (Speech delivered 25 August 2013). At <http://www.liberal.org.au/latest-news/2013/08/25/tony-abbott-address-2013-federal-coalition-campaign-launch> (viewed 1 October 2014).

70 See Australian Electoral Commission, *1999 Referendum Report and Statistics*, http://www.aec.gov.au/elections/referendums/1999_Referendum_Reports_Statistics/Leading_Up_to_The_1999_Referendum.htm (viewed 1 October 2014).

71 J Howard (Speech delivered at his election launch, Brisbane, 12 November 2007). At <http://electionspeeches.moadoph.gov.au/speeches/2007-john-howard> (viewed 1 October 2014); see also ALP National Platform 2007, Ch 13, p 213, para 49. At http://pandora.nla.gov.au/pan/22093/20081124-0000/www.alp.org.au/download/2007_national_platform.html (viewed 1 October 2014).

72 Coalition, *The Coalition's plan for real action for Indigenous Australians 2010* (2010). At <http://www.alc.org.au/media/49211/coalitions%20plan.pdf> (viewed 1 October 2014); see also Australian Labor Party, *ALP National Platform 2010*, ch 10, p 183, para 17. At http://d3n8a8pro7vhmx.cloudfront.net/australianlaborparty/pages/121/attachments/original/1365135867/Labor_National_Platform.pdf?1365135867 (viewed 1 October 2014).

73 The Hon T Abbott MP, note 69; see also The Greens, *Election Platform 2010* (2010), pp 45, 46. At http://greens.org.au/sites/greens.org.au/files/election_platform_screen.pdf (viewed 1 October 2014).

in the Constitution.

In particular, we have seen:

- The Expert Panel's report to government in early 2012.⁷⁴
- A Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples convened in June 2012.
- The *Aboriginal and Torres Strait Islander Peoples Recognition Act* (Cth) passed unanimously in February 2013.⁷⁵
- The Joint Select Committee lapsed with the calling of the federal election in September 2013 and was reconvened later that year.
- The appointment of a Review Panel in March 2014, as required by the *Aboriginal and Torres Strait Islander Peoples Recognition Act* (Review Panel).⁷⁶
- The Joint Select Committee providing an Interim Report in June 2014.⁷⁷
- The Review Panel reporting in September 2014.⁷⁸

It is clear that between the Expert Panel, the Joint Select Committee and the Review Panel, there have been numerous consultations.

In 2012, the previous government committed \$10 million to establish Recognise, a national campaign body, to raise awareness of and support for constitutional recognition. To date, more than 222 000 Australians have signed up to the campaign.⁷⁹

Since May 2013, Recognise has been taking the campaign around Australia, on a 'Journey of Recognition'. This journey has covered more than 25 000 kilometres by foot, bike, four wheel drive, kayak and paddleboard across the Northern Territory, Western Australia, South Australia, Victoria and now Queensland. The journey has involved over 162 communities and more than 14 000 Australians at 197 events.⁸⁰

Despite all of the commitments, consultations, expert opinions, polling and campaigning, we are no closer to a referendum than we were when I was appointed to the Expert Panel in December 2010. It is for this reason that the Review Panel reported that 'political leadership is needed to break through the ongoing cycle of deliberations.'⁸¹

74 Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, (2012). At http://australianpolitics.com/downloads/issues/indigenous/12-01-16_indigenous-recognition-expert-panel-report.pdf (viewed 1 October 2014).

75 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, s 4.

76 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013*, s 4.

77 Joint Select Committee on Constitutional Recognition of Indigenous Australians, Parliament of Australia, *Interim Report* (2014). At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Interim_Report/-/media/Committees/Senate/committee/jscatsi_ctte/interim_report/report.pdf (viewed 1 October 2014).

78 The Hon J Anderson AO, T Hosch & R Eccles, *Final Report of the Aboriginal and Torres Strait Islander Act of Recognition Review Panel* (2014). At http://www.dpmc.gov.au/indigenous_affairs/constitutional_recognition/docs/Final%20Report%20of%20the%20Aboriginal%20and%20Torres%20Strait%20Islander%20Act%20of%20Recognition%20Review%20Panel%2018Sept2014.docx (viewed 1 October 2014).

79 Recognise, <http://www.recognise.org.au/> (viewed 1 October 2014).

80 Recognise, *The Journey*, <http://www.recognise.org.au/about/what-is-recognise/> (viewed 1 October 2014).

81 The Hon J Anderson AO, T Hosch & R Eccles, note 78.

(c) Timing of referendum

Prime Minister Abbott pledged that within a year of taking government, the Coalition would put forward a draft amendment of the Constitution for public consultation.

In December 2013, the government said the wording would be finalised by the end of 2014.⁸² This timing was reiterated by Senator Scullion in March 2014.⁸³

There have been suggestions around potential timeframes for holding the referendum in the life of the 43rd and 44th Parliaments, or at the 2013 or 2016 election.

However, at the time the *Social Justice and Native Title Report 2014* was being completed, there was a flurry of debate about the right timing for a referendum. In its final report, tabled on 19 September 2014, the Review Panel recommended that the referendum be held no later than the first half of 2017, coinciding with the anniversary of the 1967 referendum, but earlier if the necessary conditions are in place.

Two days before the Review Panel tabled its report, the Joint Select Committee issued a statement saying that, based on the feedback it had received at community hearings, it was of the 'strong view' that the referendum should be held no later than the 2016 federal election. The Committee Chair, Mr Ken Wyatt, said:

The committee has gathered evidence of public willingness for constitutional change. Australians want to see the question they will be asked to vote on. Once properly informed, they will be ready to vote. In the view of the committee, what is needed is a committed public education campaign towards a specified referendum date no later than the federal election in 2016.⁸⁴

(d) Support for constitutional recognition

There has been strong public support for constitutional recognition since the multi-party political commitments were made in 2010.

There have been various polls conducted since this time, with statistics showing:

- 61% support for the proposition from voters across the political spectrum in 2014.⁸⁵
- 70% support for constitutional recognition according to a Vote Compass survey of 1.3 million respondents in 2013.⁸⁶
- 80% levels of support from Aboriginal and Torres Strait Islander peoples in 2013.⁸⁷

Whilst these figures are encouraging, as at September 2014, the Review Panel reported that both public

82 Recognise, *What is proposed?*, <http://www.recognise.org.au/why/what-is-proposed/> (viewed 1 October 2014).

83 The Hon N Scullion MP, Minister for Indigenous Affairs, 'Next Step Towards Indigenous Constitutional Recognition' (Media release, 28 March 2014). At <http://minister.indigenous.gov.au/media/2014-03-28/next-step-towards-indigenous-constitutional-recognition> (viewed 1 October 2014).

84 The Hon K Wyatt MP, 'Indigenous constitutional recognition: Committee urges referendum before 2016 election', *ABC News*, 17 September 2014. At <http://www.abc.net.au/news/2014-09-16/committee-calls-for-referendum-on-indigenous-recognition/5748504> (viewed 1 October 2014).

85 The Hon J Anderson AO, T Hosch & R Eccles, note 78, p 26.

86 'Vote Compass: Most Australians support recognition of Indigenous people as first inhabitants', *ABC News*, 2 September 2013. At <http://www.abc.net.au/news/2013-09-02/vote-compass-indigenous-recognition-referendum/4925332> (viewed 1 October 2014).

87 YouMeUnity, 'Indigenous Australians say recognition could help to safeguard culture' (Media release, 2013). At <http://www.recognise.org.au/wp-content/uploads/shared/uploads/custom/4f98ded9ded74a6c3494.pdf> (viewed 1 October 2014).

support for and awareness of the importance of constitutional recognition were not yet sufficiently high.⁸⁸ In particular, recent data indicates a slight drop in awareness from 42% in 2013, to 34% in 2014.⁸⁹

Given what I have outlined above regarding support for and public awareness of constitutional recognition, it is important that the government provides clarity around the timeframe and model as a matter of urgency.

We risk squandering all the goodwill, as well as the momentum, by delaying a vote for too long.

(e) Seizing the moment

The Review Panel called for a ‘circuit-breaker’ by releasing a finalised model of the referendum question. It also urged the government to deliver on its commitment to form a special committee of trusted national figures, Indigenous and non-Indigenous, to advise and guide the referendum process.⁹⁰

I am concerned that both support and awareness levels will have waned if the referendum to formalise the recognition does not happen until 2017.

We need to remember the spirit and enthusiasm that we had when we started the quest to recognise Aboriginal and Torres Strait Islander peoples as the First Peoples of this country.

We need to remember that this is not a radical rewriting of the Constitution, but the rectifying of a century-old omission and a change that will complete the jigsaw of our nationhood and our national identity.

This will be something in which the entire nation can celebrate and rejoice. We need to act as soon as all of the right conditions are in place, not in three years’ time.

I believe the Australian people are ready to walk with us on this next important stage of our national journey towards reconciliation. Prime Minister Abbott has demonstrated his commitment to achieving the recognition of our peoples in the Constitution. Now is the time to commit to a solid timetable for the referendum to make this happen.

88 The Hon J Anderson AO, T Hosch & R Eccles, note 78, p 22.

89 The Hon J Anderson AO, T Hosch & R Eccles, above, p 15.

90 The Hon J Anderson AO, T Hosch & R Eccles, above, p 21.

1.6 Indigenous Jobs and Training Review

A number of reviews and inquiries have taken place during the reporting period that have the potential to impact on Aboriginal and Torres Strait Islander peoples.

One that I have already mentioned is the review into employment and training for Aboriginal and Torres Strait Islander people by Mr Andrew Forrest. However, given the release of the 256-page report falls outside my reporting period, I will confine myself to some fairly brief observations and a summary of its recommendations.

(a) Overview

On 7 October 2013, Mr Forrest was commissioned by the Australian Government to review Aboriginal and Torres Strait Islander training and employment services.⁹¹ The findings were set out in the *Creating Parity – the Forrest Review* report (the Forrest Review)⁹² which was delivered in early August 2014.

The purpose of the Forrest Review was to:

[P]rovide recommendations to the Prime Minister to ensure Indigenous employment and training services are properly targeted to connect unemployed Indigenous people with real and sustainable jobs, especially those that have been pledged to Indigenous people by Australian business.

...consider ways that training and employment services can better link to the commitment of employers to provide further sustainable employment opportunities for Indigenous people and finally end the cycle of entrenched Indigenous disadvantage.⁹³

The Forrest Review calls for a comprehensive approach to closing the employment gap, which, it argues, disappears once Aboriginal and Torres Strait Islander people are educated to the same level as non-Indigenous Australians.⁹⁴ The Forrest Review makes 27 recommendations, ranging across early childhood, school attendance, health, housing, criminal justice, welfare and tax incentives.

The key recommendations include:

- Making the family tax benefit payment conditional on children attending school at least 80% of the time, rising to 90%; imposing financial penalties on parents whose children fall below those targets; and tying federal school funding to the states and territories to attendance rates.⁹⁵
- Introducing a Healthy Welfare Card, in conjunction with financial institutions and retailers, to quarantine all welfare payments other than the age and veterans pension, for Indigenous and non-Indigenous recipients. No cash could be raised on the card, which blocks the purchase of alcohol, tobacco, gambling and illicit services.⁹⁶

91 The Hon T Abbott MP, 'Review of Indigenous training and employment' (Media Release, 8 October 2013). At <http://www.pm.gov.au/media/2013-10-08/review-indigenous-training-and-employment> (viewed 1 October 2014).

92 A Forrest, *The Forrest Review: Creating Parity* (2014). At <https://indigenousjobsandtrainingreview.dpmc.gov.au/sites/default/files/files/3838%20Forrest%20Review%20Update%20-%20Full%20Report%20-%20Complete%20PDF%20PRO1.pdf> (viewed 1 October 2014).

93 A Forrest, above, p 223.

94 A Forrest, above, pp 3-4.

95 A Forrest, above, rec 2.2, pp 23-24.

96 A Forrest, above, rec 5, p 28.

- Reducing the number of working age welfare payments; requiring under-19s to be in work, school or training in order to receive the Youth Allowance; and supporting young people to stay on at school or move into work.⁹⁷
- Introducing comprehensive case management for vulnerable children up to the age of three, to allow for early detection of developmental delays.⁹⁸
- Co-locating health, nutrition and other support services for parents of small children in schools or nearby community hubs.⁹⁹
- Conferring tax free status on new Indigenous-run businesses that create real jobs for Aboriginal and Torres Strait Islander peoples.¹⁰⁰
- Requiring the federal government to spend 4% of its \$39 billion purchasing budget with Indigenous-run businesses, and obliging state and territory governments to follow suit.¹⁰¹
- Requiring the federal government to negotiate contracts with the top 200 companies to increase Indigenous employment rates to 4% over the next four years; and obliging governments to recruit more Aboriginal and Torres Strait Islander people for public sector jobs.¹⁰²
- Abolishing the Commonwealth's Job Services Australia and replacing it with a model based on Vocational Training and Employment Centres; requiring training to be linked to guaranteed jobs, and rewarding employment service providers who place a client in a job where they remain for 26 weeks.¹⁰³

The Forrest Review states 'seismic, not incremental, change' is required to 'break the cycle of disparity'.¹⁰⁴ It also urges that all recommendations need to be adopted in their entirety, describing them as 'a package of complementary measures that are linked and reliant on each other'.¹⁰⁵

(b) Response

There have been a variety of reactions to the Forrest Review across the community and political spectrum.

The Prime Minister described the Forrest Review as 'bold, ambitious and brave',¹⁰⁶ and backed the linking of family tax benefits to school attendance. However, he said that the Healthy Welfare Card was 'running ahead of current public opinion'.¹⁰⁷

The Opposition Leader Bill Shorten, welcomed parts of the report, but said the Healthy Welfare Card would 'stigmatise everyone who receives a government payment'.¹⁰⁸

97 A Forrest, note 92, rec 9, pp 34-5.

98 A Forrest, above, rec 1.5, p 23.

99 A Forrest, above, rec 1.1, p 22.

100 A Forrest, above, rec 12.1, p 164.

101 A Forrest, above, rec 12.3, p 165

102 A Forrest, above, rec 19, p 187.

103 A Forrest, above, rec 13, p 165

104 A Forrest, above, p 1.

105 A Forrest, above, p 115.

106 The Hon T Abbott MP, Prime Minister, *Joint Doorstop Interview*, Hobart, 31 July 2014. At <http://www.pm.gov.au/media/2014-07-31/joint-doorstop-interview-hobart> (viewed 1 October 2014).

107 'Tony Abbott rules out expansion of income management measures flagged in Andrew Forrest report', *ABC News*, 1 August 2014. At <http://www.abc.net.au/news/2014-08-01/abbott-rules-out-expansion-of-income-management-measures/5640280> (viewed 1 October 2014).

108 *Racial Discrimination Act 1975* (Cth).

The Healthy Welfare Card, easily the report's most contentious proposal, was condemned by welfare organisations, Congress and Senator Nova Peris.¹⁰⁹

I stress that the introduction of the Healthy Welfare Card would require much further assessment and discussion around the effectiveness of these measures. If adopted, this would be one of the most radical welfare reforms ever proposed in Australia.

I am also concerned about how the proposals from this review might be reconciled with the outcomes of the commissioned review of Australia's welfare system in December 2013.¹¹⁰ An independent Reference Group, chaired by Mr Patrick McClure AO, was established to conduct the review. The Interim Report of this group (the McClure Review) proposed four pillars of reform:

- simpler and sustainable income support system
- strengthening individual and family capability
- engaging with employers
- building community capacity.¹¹¹

However, I welcome the Forrest Review's focus on health, early childhood education and real jobs for Aboriginal and Torres Strait Islander peoples.

109 See 'Noel Pearson disputes Nova Peris's view on income management in Aboriginal communities', *ABC News*, 5 August 2014. At <http://www.abc.net.au/news/2014-08-05/nova-peris-noel-pearson-debate-aboriginal-income-on-qanda-nt/5649010> (viewed 1 October 2014).

110 Australian Government, Department of Social Services, *Review of Australia's Welfare System*, <https://www.dss.gov.au/our-responsibilities/review-of-australia-s-welfare-system> (viewed 1 October 2014).

111 Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services, *A New System for Better Employment and Social Outcomes* (2014), p 5. At https://www.dss.gov.au/sites/default/files/documents/06_2014/dss001_14_full_report_27_june_tagged.pdf (viewed 1 October 2014).

1.7 Closing the Gap

It is not credible to suggest that one of the wealthiest nations in the world cannot solve a health crisis affecting less than three per cent of its citizens.¹¹²

- Dr Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2005.

(a) Background

Health inequality is a stark reminder of the great divide between Indigenous and non-Indigenous Australians. As fellow co-Chair of the Close the Gap Campaign Ms Kirstie Parker and I agreed earlier this year, 'it is a scar of our unhealed past and a stain on the nation's reputation'.¹¹³

Since its launch in 2007 the Close the Gap Campaign (the Campaign) has had the goal of raising the health and life expectancy of Aboriginal and Torres Strait peoples to that of the non-Indigenous population within a generation, to close the gap by 2030.

The Campaign is an ever growing national movement. More than 150 000 people attended almost 1 300 events on this year's National Closing the Gap Day, while nearly 200 000 Australians have signed the Close the Gap pledge, as of late 2014. The public, it is clear, believes that we can and should be the generation to finally close the gap.

I use the phrase 'national effort to close the gap' to indicate both the popular movement (such as the Campaign) and successive Australian Governments' efforts to achieve Aboriginal and Torres Strait Islander health equality by 2030.

(b) Prime Minister's report

Since 2009, it has become part of the national effort for the Prime Minister to report annually to Parliament on progress in Closing the Gap. As further recognition of the national importance of this effort, the report is delivered during the first sitting week of Parliament each year. Reflecting the long term nature of the challenge, this is a non-partisan occasion which is supported by all sides of Parliament and generates considerable national attention.¹¹⁴

On 12 February 2014, Prime Minister Abbott presented his first *Closing the Gap Prime Minister's Report 2014* to the House of Representatives.

The report documented progress since the national effort to close the gap began in 2008. It found that while some targets were on course to be met, there had been little or no progress on others.

The key findings were:

- Progress towards closing the life expectancy gap has been minimal.
- Child mortality rates in Indigenous children under five have declined steeply.

112 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity (2005), p 12. At <https://www.humanrights.gov.au/publications/social-justice-report-2005-home> (viewed 1 October 2014).

113 M Gooda & K Parker, 'Closing the Gap that scars Australia: stop our mob from dying prematurely', *The Guardian*, 12 February 2014. At <http://www.theguardian.com/commentisfree/2014/feb/12/closing-the-gap-indigenous-australians> (viewed 1 October 2014).

114 Close the Gap Campaign Steering Committee, *Progress and Priorities Report* (2014), p 4. At <https://www.humanrights.gov.au/publications/close-gap-progress-and-priorities-report-2014> (viewed 15 October 2014).

- The proportion of Indigenous children enrolled in pre-school programs in remote areas appears to have fallen.
- Little headway has been made in improving reading, writing and numeracy.
- The target in relation to young people acquiring a Year 12 or equivalent qualification is on track to be met.
- The employment gap has widened.¹¹⁵

The Prime Minister used his report to announce a new target regarding school attendance. Prime Minister Abbott said:

[T]he new target would be ‘all but’ met when all schools, regardless of their proportion of Indigenous students, achieved 90 per cent or higher attendance.¹¹⁶

Of course, while getting children into school is fundamental, attendance in itself does not guarantee a good education. With Aboriginal and Torres Strait Islander children and young people in many parts of Australia now less literate than their parents and grandparents, it is vital that educational resources and quality teaching are properly funded. As highlighted in the Productivity Commission’s 2012 report on Schools Workforce, the recruitment and retention of suitably qualified teachers is a major problem for schools with predominantly Aboriginal and Torres Strait Islander students.¹¹⁷

Opposition Leader Bill Shorten supported the new school attendance target. He also emphasised the non-partisan nature of efforts to close the gap.¹¹⁸

Labor’s spokesman for Indigenous Affairs, Mr Shayne Neumann, called for new targets to reduce Aboriginal and Torres Strait Islander incarceration rates, increase Indigenous access to disability services and the National Disability Insurance Scheme, and improve Indigenous participation in higher education.¹¹⁹ I report more fully on the Justice Targets in Chapter 4.

(c) Progress and Priorities Report 2014

The Campaign Steering Committee publishes an annual complementary ‘shadow report’ released to coincide with the Prime Minister’s report.¹²⁰ The Campaign’s report found that Indigenous smoking rates declined from 51% in 2002, to 45% in 2008, to 41% in 2012-13.¹²¹ In addition, it argued that Aboriginal and Torres Strait Islander maternal and child health are slowly improving. These two outcomes can be expected, over time, to

115 Australian Government, *Closing the Gap - Prime Minister’s Report* (2014). At http://www.dpmc.gov.au/publications/docs/closing_the_gap_2014.pdf (viewed 1 October 2014).

116 The Hon T Abbott MP, ‘Statement to the House of Representatives – Closing the Gap’ (Media Release, 12 February 2014). At <https://www.pm.gov.au/media/2014-02-12/statement-house-representatives-closing-gap> (viewed 1 October 2014).

117 Productivity Commission, *Schools Workforce: Productivity Commission Research Report* (2012). At http://www.pc.gov.au/__data/assets/pdf_file/0020/116651/schools-workforce.pdf (viewed 1 October 2014).

118 D Harrison, ‘Tony Abbott sets new school attendance target for indigenous students’, *The Sydney Morning Herald*, 12 February 2014. At <http://www.smh.com.au/federal-politics/political-news/tony--abbott-sets-new-school-attendance-target-for-indigenous-students-20140212-32h9k.html> (viewed 1 October 2014).

119 P Karvelas, ‘Closer to closing the gap’, *The Australian*, 13 February 2014. At <http://www.theaustralian.com.au/news/features/closer-to-closing-the-gap/story-e6frg6z6-1226825062651> (viewed 1 October 2014).

120 Australian Human Rights Commission, *Close the Gap: Indigenous Health Campaign*, <https://www.humanrights.gov.au/close-gap-indigenous-health-campaign> (viewed 1 October 2014).

121 Close the Gap Campaign Steering Committee, *Progress and Priorities Report* (2014), p 19. At <https://www.humanrights.gov.au/publications/close-gap-progress-and-priorities-report-2014> (viewed 1 October 2014).

be important building blocks toward an increase in life expectancy.¹²²

These 'green shoots' are evidence that the national effort to close the gap is working, and that generational change is possible.¹²³

They also demonstrate the impact of 'closing the gap' related investment in Aboriginal Community Controlled Health Services (ACCHS).¹²⁴ That investment has built a substantial foundation which will help underpin the national effort to close the gap over the next 16 years.¹²⁵

The Campaign argues that while progress in closing the life expectancy gap has been slow, many Aboriginal and Torres Strait Islander deaths since 2008 are likely to have resulted from pre-existing chronic conditions. With continued commitment and as new services, health checks and preventive health campaigns begin to take effect, the gap is likely to narrow.¹²⁶

(d) Latest data on progress in Closing the Gap

On 30 April 2014, the Council of Australian Governments (COAG) Reform Council published its final report.¹²⁷ This report found that Aboriginal and Torres Strait Islander child mortality rates were continuing to fall and the literacy gap was narrowing, but unemployment was still on the rise.¹²⁸

The report found that reading scores had improved across all year levels, while the number of Aboriginal and Torres Strait Islander students achieving a Year 12 or equivalent qualification had risen, along with the number acquiring post-school qualifications.¹²⁹

However, these gains were unfortunately not translating into employment outcomes, which had failed to improve in any state or territory since 2008. In schooling, falls in attendance were larger and more widespread than improvements, and high school numeracy levels had worsened.¹³⁰

The report highlighted obesity as a matter for concern. More than 41% of Aboriginal and Torres Strait Islander peoples are obese, compared with 27% of the non-Indigenous population.¹³¹

Cardiovascular and respiratory diseases were responsible for 33.8% of Indigenous deaths between 2007 and 2011. Although the Indigenous smoking rate fell by 3.6% during that period, it is still more than double that of non-Indigenous Australians.¹³²

122 Australian Bureau of Statistics, *2012-13 Australian Aboriginal and Torres Strait Islander Health Survey* (2014). At <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4727.0.55.006main+features12012-13> (viewed 1 October 2014).

123 Close the Gap Campaign Steering Committee, note 121, p 1.

124 Close the Gap Campaign Steering Committee, above, p 1.

125 Close the Gap Campaign Steering Committee, above.

126 Close the Gap Campaign Steering Committee, above, p 18.

127 Council of Australian Governments Reform Council, *Indigenous Reform 2012-13: Five years of performance: Report to the Council of Australian Governments* (2014). At http://www.coagreformcouncil.gov.au/sites/default/files/files/Indigenous%20Reform%202012-13%20Five%20years%20of%20performance_30%20April%202014.pdf (viewed 1 October 2014).

128 Council of Australian Governments Reform Council, above.

129 J Brumby, Council of Australian Governments Reform Council, 'Indigenous education gap closing, but employment gap widens' (Media Release, 22 May 2014). At <http://www.coagreformcouncil.gov.au/media/releases/2014-05-22.html> (viewed 1 October 2014).

130 J Brumby, above.

131 Council of Australian Governments Reform Council, note 127.

132 Council of Australian Governments Reform Council, above.

The independent COAG Reform Council, which was abolished on 30 June 2014, played an important role in monitoring and reporting on efforts to close the gap. I encourage the federal government to ensure that regular, independent monitoring of national, state and territory progress towards Closing the Gap is maintained.

(e) Next steps

The Campaign's Steering Committee report argued that three things are critical to achieving these targets:

- Completing the implementation of the National Aboriginal and Torres Strait Islander Health Plan 2012-13 (Health Plan), in partnership with Aboriginal and Torres Strait Islander peoples. Launched in July 2013, the Health Plan marked the fulfilment of a major commitment by all signatories to the 'Statement of Intent'. As a framework document, it emphasises a whole-of-life approach while focusing on a number of priority areas.¹³³

On 24 June 2014, Coalition MP Fiona Nash, Assistant Minister for Health, announced that the government was beginning work on an implementation plan.¹³⁴ I understand that this process, being undertaken in partnership with Aboriginal and Torres Strait Islander leadership in the sector, is progressing well.

- Continuing to build partnerships with Indigenous communities for the planning and delivery of health services, ideally through ACCHS. Such partnerships enable individuals, families and communities to exercise responsibility for their health, as well as helping to ensure that resources are directed to those areas of health where they are most needed, and to services and programs with the maximum impact.¹³⁵
- Long term funding to guarantee effective implementation of the Health Plan.¹³⁶ As the 2010 *Strategic Review of Indigenous Expenditure* noted:

The deep-seated and complex nature of Indigenous disadvantage calls for policies and programs which are patient and supportive of enduring change... A long-term investment approach is needed, accompanied by a sustained process of continuous engagement.¹³⁷

As Co-Chair of the Campaign, I hope that the Australian Government acts on these recommendations.

As these reports point out, we are dealing with entrenched problems with long histories. Fixing Aboriginal and Torres Strait Islander disadvantage is a national effort requiring long term commitment and policy continuity.

We need to build on encouraging data such as the decrease in Aboriginal and Torres Strait Islander smoking rates, redoubling efforts and ensuring that Closing the Gap remains a national priority.

133 Close the Gap Campaign Steering Committee, note 121, p 1.

134 The Hon F Nash MP, 'Another Step Towards Indigenous Health Equality' (Media Release, 24 June 2014), para 2. At <http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarelat-yr2014-nash030.htm> (viewed 1 October 2014).

135 Close the Gap Campaign Steering Committee, note 121, p 1.

136 Close the Gap Campaign Steering Committee, above.

137 Australian Government, *Strategic Review of Indigenous Expenditure* (2010). At http://www.finance.gov.au/sites/default/files/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 1 October 2014).

1.8 Stolen Generations

In last year's report, I considered progress made towards achieving justice for families affected by Stolen Generations policies.

I noted how the national apology was a significant act of acknowledgement of the Stolen Generations policies and a step closer to reconciliation. I also mentioned the establishment of the Indigenous Child Placement Principles, community education campaigns, measures of restitution such as Link Up services, the establishment of the Healing Foundation and the Tasmanian compensation scheme to members of the Stolen Generations and their families.¹³⁸

I commented that *Trevorrow v South Australia*¹³⁹ remains the only successful Stolen Generation litigation and that a system of *ex gratia* payments would provide a faster, more appropriate, less traumatising alternative to litigation for remedying these past injustices.¹⁴⁰

Sadly, these sentiments are only reinforced by the 2013 decision of the Supreme Court of Western Australia, *Collard v Western Australia*.¹⁴¹ This was the Collard family's claim for reparations after nine of their children were removed from them by the government in the late 1950s and early 1960s. One of their children was fostered out when she was only six months old and had been hospitalised, without the consent or knowledge of her parents. A few years later, eight of the Collard children were taken from the care of their parents and placed in the Sister Kate's Children's Home.

In a complex and legally technical case, the Collards alleged breaches of equitable fiduciary duties against the Western Australian government for removing the children and for failing to act in their best interests with respect to their custody, maintenance and education.¹⁴² They argued that the government had a continuing fiduciary obligation to advise and provide the plaintiffs with independent legal advice.¹⁴³ The Collards also argued that a broader fiduciary relationship, and associated duties, existed between the Indigenous peoples of Western Australia and the government as a consequence of colonisation.¹⁴⁴

The court found against the Collards on all substantive arguments.¹⁴⁵ Further, the court found that there was a limitations issue because the Collards had not complied with the requirements of the *Crown Suits Act 1947* (WA).¹⁴⁶

Without going into the specifics of the decision, I am disappointed with this outcome for the Collards. The court's finding denies that a policy of assimilation was in effect at the time the children were taken, and instead depicts the government's actions as seeking only to protect the children from neglectful parents.¹⁴⁷

138 M Gooda, 2013, note 61, pp 28 – 32.

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

140 M Gooda, 2013, note 61, p 32.

141 *Collard v State of Western Australia [No 4]* [2013] WASC 455.

142 *Collard v State of Western Australia*, note 141, paras 6 – 8, 1107.

143 *Collard v State of Western Australia*, above, para 1491.

144 *Collard v State of Western Australia*, above, para 1121.

145 *Collard v State of Western Australia*, above, paras 12, 1025, 1047, 1171, 1130, 1184, 1187, 1355.

146 *Collard v State of Western Australia*, above, para 12.

147 *Collard v State of Western Australia*, above, paras 873-874.

The judgment also contains findings that relate to the sexual abuse of two Collard sisters. The court found that because the girls did not tell anyone about the abuse, Sister Kate's Children's Home had no actual or constructive knowledge of the harm done to them, and therefore did not breach any fiduciary obligations if they existed.¹⁴⁸ This raises concerns about whether courts are appropriate mechanisms for holding institutions and governments accountable for the abuse of Stolen children in their care.

It has long been recognised that there are significant barriers facing Stolen Generation claimants in litigation.¹⁴⁹ The Collard case is another example of how difficult it is to achieve justice through the courts for Stolen Generation families. Cases like this impact on reconciliation and question the extent to which court decisions are capable of recognising the true experience of families affected by Stolen Generations policies.

The Royal Commission on Institutional Responses to Child Sexual Abuse has the potential to address these issues.¹⁵⁰ However, caution is necessary to avoid further trauma to those who have already provided evidence at other inquiries, such as the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families.¹⁵¹

I reiterate my call for the Australian Government to address the issue of reparations for Stolen Generations and their families: including acknowledgement and apology, guarantees against repetition, measures of restitution and measures of rehabilitation, in addition to monetary compensation.¹⁵² If healing is to occur, it is necessary for government to address the physical and psychological experiences of the Stolen Generations in a way that recognises and validates trauma.¹⁵³

I urge the Australian Government to prioritise effective reparations for the Stolen Generations and their families before the opportunity to effect personal reparation is lost to history.

148 *Collard v State of Western Australia*, above, paras 1436 – 1442, 1464-1477.

149 See Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008* (9 April 2008), para 14. At <https://www.humanrights.gov.au/inquiry-stolen-generation-compensation-bill-2008> (viewed 1 October 2014); see also C Cunneen & J Grix, Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Limitations of Litigation in Stolen Generations Cases, Research Discussion Paper No 15* (2004). At http://www.aiatsis.gov.au/_files/research/dp/DP15.pdf (viewed 1 October 2014).

150 See Royal Commission on Institutional Responses to Child Sexual Abuse, <http://www.childabuseroyalcommission.gov.au/about-us> (viewed 1 October 2014).

151 See Human Rights and Equal Opportunity, *Bringing them Home Report: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families April 1997* (1997). At https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (viewed 1 October 2014).

152 M Gooda, 2013, note 61, pp 29-32.

153 Human Rights and Equal Opportunity Commission, note 151, para 29.

1.9 International developments

There have been a number of developments at the international level during the reporting period from 1 July 2013 to 30 June 2014. Some of these developments have included specific engagement by Aboriginal and Torres Strait Islander peoples, while others have addressed issues that affect the lives of our peoples. These include:

- ongoing preparations for the World Conference on Indigenous Peoples 2014 (WCIP) (held on 22-23 September 2014)¹⁵⁴
- the sixth session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (8-12 July 2013)
- the 13th session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) (12-23 May 2014).

The following is an update on the engagement by Aboriginal and Torres Strait Islander peoples at some of these international fora, and on the attendance and contribution to these made by my office, as Aboriginal and Torres Strait Islander Social Justice Commissioner.

(a) World Conference on Indigenous Peoples

On 21 December 2010, the United Nations General Assembly agreed to organise a High-Level Plenary Meeting of the General Assembly, to be known as the WCIP, in order to:

- share perspectives and best practices on the realisation of the rights of Indigenous peoples
- pursue the objectives of the Declaration

The President of the United Nations General Assembly was invited to conduct open-ended consultations with Member States and with representatives of Indigenous peoples in the framework of the UNPFII, the EMRIP and the Special Rapporteur on the rights of indigenous peoples. These consultations aimed to determine the modalities for the WCIP, including Indigenous peoples' participation.¹⁵⁵

The outcome sought from the WCIP was to be a concise, action oriented document that would:

- be based on a draft text developed in consultations with Member States and Indigenous peoples (taking into account views from the preparatory processes and interactive hearings)
- contribute to the realisation of the rights of Indigenous peoples
- pursue the objectives of the Declaration
- promote the achievement of all internationally agreed development goals
- set the future direction for Indigenous peoples' involvement in the United Nations.

Last year I reported that Congress and the New South Wales Aboriginal Land Council (NSWALC) co-hosted the Preparatory Meeting for Pacific Indigenous Peoples in Redfern from 19-21 March 2013.¹⁵⁶

¹⁵⁴ The United Nations World Conference on Indigenous Peoples was held outside of the reporting period.

¹⁵⁵ *Indigenous issues*, GA Resolution 65/198, UN Doc A/RES/65/198 (2011).

¹⁵⁶ Preparatory Meeting for Pacific Indigenous Peoples on the World Conference on Indigenous Peoples 2014 - Redfern, *The Pacific Declaration* (2013), p 1. At <http://wcip2014.org/regions-caucuses/pacific> (viewed 1 October 2014).

In June 2013, the Sami Parliament of Norway hosted the Global Indigenous Preparatory Conference on the WCIP in Alta, Norway. That meeting produced the Alta Outcome Document, the foundation from which Indigenous representatives would negotiate the WCIP Outcome Document.¹⁵⁷

In April 2012, Mr Luis Alfonso de Alba, the Permanent Representative of Mexico, and Mr John Henriksen, International Representative of the Sami Parliament of Norway, conducted inclusive consultations with Member States and representatives of Indigenous peoples on issues concerning the organisation and modalities of the WCIP. They did so as official representatives of the President of the United Nations General Assembly (PGA).

It was generally acknowledged that two representatives would eventually become the Co-Chairs of the WCIP, and with this in mind, the June 2013 Alta meeting endorsed Mr John Henriksen to represent Indigenous peoples.

However, at the beginning of 2014 several Member States disagreed with this proposed structure as it was seen to be giving preference to the participation of Indigenous peoples to a level equal to Member States of the United Nations.

In any event, it was negotiated that the PGA would appoint two Indigenous Advisors. These were Dr Myrna Cunningham, an Indigenous rights activist from Nicaragua and former President of the UNPFII, and Mr Les Malezer, Co-Chair of Congress.

Interactive meetings facilitated by the PGA were held in the lead up and as preparation for the WCIP.

A 'Zero Draft Outcome Document' (Zero Draft) was released in July 2014.¹⁵⁸ Domestic consultations between Aboriginal and Torres Strait Islander representatives and the Australian Government were conducted on the Zero Draft in August. Versions 2 and 3 Draft Outcome Documents were released in late August and early September respectively, with the Final Draft Outcome Document released on 15 September, a week before the WCIP.

An update on the outcomes of WCIP will be in next year's Social Justice and Native Title Report.

I am pleased to report that the domestic consultations, facilitated by the PM&C, the Department of Foreign Affairs and Trade and Congress, were conducted respectfully, cooperatively and in good faith where all opinions were valued.

This resulted in the Australian Government and Aboriginal and Torres Strait Islander representatives working together to develop an agreed position for the WCIP that was not only acceptable to both, but also capable of being advocated to United Nations Member States and Indigenous peoples alike.

This spirit was replicated at the international interactive meetings, where I am pleased to say that Australia took a leading role and was considered to be a 'friendly' nation, that is, one that generally supported the position of Indigenous peoples.

157 Global Indigenous Preparatory Conference on the World Conference on Indigenous Peoples, *Alta Outcome Document* (2013). At <http://wcip2014.org/wp-content/uploads/2013/06/Adopted-Alta-outcome-document-with-logo-ENG.pdf> (viewed 1 October 2014).

158 This will be considered further in the next reporting period of this report, as these events occurred outside the reporting period.

(b) Expert Mechanism on the Rights of Indigenous Peoples

The sixth session of EMRIP was held in Geneva in July 2013. As one of the two Indigenous specific forums of the United Nations, the EMRIP has a standing agenda item on the Declaration.

The Indigenous Peoples Organisation (IPO) Network submitted statements on the following agenda items:

- WCIP
- access to justice
- the Declaration.

I attended EMRIP and endorsed the statements by the IPO Network on the WCIP and the Study on Access to Justice. These statements by the IPO Network stressed the importance of Indigenous participation at the WCIP, including all preparatory meetings and urged the United Nations Human Rights Council to endorse the Zero Draft from the WCIP preparatory meeting in Alta. They also requested an extension of the Study on Access to Justice in the promotion and protection of the rights of Indigenous peoples.¹⁵⁹

(c) United Nations Permanent Forum on Indigenous Issues

The 13th session of the UNPFII was held in New York in May 2014. Like the EMRIP, it also has a standing agenda item on the Declaration.

The 13th session addressed recommendations on the following themes:

- principles of good governance
- implementation of the Declaration
- dialogue with the Special Rapporteur WCIP Study on an Optional Protocol to the Declaration
- Indigenous children and youth
- second International Decade of the World's Indigenous People
- post-2015 development agenda
- dialogue with UN agencies and funds
- future work and emerging issues of the UNPFII.

As Aboriginal and Torres Strait Islander Social Justice Commissioner, my office provided statements to the UNPFII, addressing:

159 S Duffy, *Statement by the National Aboriginal and Torres Strait Islander Legal Services and the National Congress of Australia's First Peoples on Agenda Item 5*, (Speech delivered at the sixth session of the Expert Mechanism on the Rights of Indigenous Peoples, 8-12 July 2013). See also Office of the High Commissioner of Human Rights, *Study on Access to Justice*, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/AccessToJustice.aspx> (viewed 1 October 2014).

- the centrality of effective Indigenous governance to self-determination and sustainable development¹⁶⁰
- the need for States to conduct an audit of their laws and policies, conduct human rights training, and engage in meaningful dialogue with Indigenous people in order to implement the Declaration¹⁶¹
- the importance of the role of the Special Rapporteur¹⁶²
- the importance of improving both resourcing of services and data collection regarding Indigenous youth self-harm and suicide¹⁶³

My office joined with the IPO Network in acknowledging and specifically thanking Professor James Anaya for his work as Special Rapporteur on the rights of indigenous peoples, and formally congratulated Ms Victoria Tauli-Corpuz on her appointment to the role, commencing in June 2014.

The IPO Network also submitted several interventions across those agenda items including governance¹⁶⁴ and Indigenous children and youth.¹⁶⁵

The Economic and Social Council (ECOSOC) authorised the UNPFII to conduct a study on the development of an optional protocol to the Declaration.

Ms Dalee Sambo Dorrough and Ms Megan Davis, Members of the UNPFII, were appointed to undertake a study focusing on a potential voluntary mechanism to serve as a complaints body at the international level. In particular, this mechanism would deal with claims and breaches of Indigenous peoples' rights to lands, territories and resources at the domestic level. The outcome of the study was submitted to the UNPFII's 13th session.¹⁶⁶

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- 160 K Kiss, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 3: Governance* (Speech delivered at the thirteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014). At <http://www.docip.org/greenstone/cgi-bin/library.cgi?e=d-00100-00---off-0cendocdo--00-2-----0-10-0--0--0direct-10----4-----0-11--10-en-50---20-about---00-3-1-00-00--4--0--0-0-01-10-OutfZz-8-00&a=d&c=cendocdo&cl=CL2.4.17> (viewed 1 October 2014).
- 161 K Kiss, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4a: Implementation of the Declaration* (Speech delivered at the 13th session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014).
- 162 K Kiss, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 4b: Dialogue with Special Rapporteur* (Speech delivered at the 13th session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014).
- 163 K Kiss, *Statement on behalf of the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 7: Indigenous Children and Youth* (Speech delivered at the 13th session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014).
- 164 J Mohamed, *Joint Statement by the National Aboriginal Community Controlled Health Organisation (NACCHO) and the Indigenous Peoples Organisations Network of Australia on Agenda Item 3: Principles of good governance consistent with the United Nations Declaration on the Rights of Indigenous Peoples: articles 3 to 6 and 46* (Speech delivered at the 13th session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014).
- 165 S Miller, *Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 7: Ongoing priorities and themes and follow up: Indigenous children and youth* (Speech delivered at the 13th session of the United Nations Permanent Forum on Indigenous Issues, New York, 12-23 May 2014).
- 166 M Davis, *Outcomes on a study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples*, Permanent Forum on Indigenous Issues, 13th session, New York, 12-23 May 2014, UN Doc E/C.19/2014/7 (2014). At <http://daccess-ods.un.org/TMP/9465957.28397369.html> (viewed 1 October 2014).

1.10 Australian Human Rights Commission complaints

The Commission has two roles; a policy and advocacy role, and a role to investigate and conciliate complaints made under federal human rights and discrimination law. The types of complaints received help to inform the policy and advocacy work of the Commission.

The Commission receives a wide range of complaints from Aboriginal and Torres Strait Islander peoples, including complaints about individual acts of discrimination and complaints about systemic discrimination.

The majority of complaints made by Aboriginal and Torres Strait Islander peoples were about racial discrimination, as can be seen from Table 1.1.

The information regarding the number and types of complaints received this year has been provided by the Commission's Investigation and Conciliation Service, who I thank for their assistance and important work.

(a) Complaints received in 2013-14 by Aboriginal and Torres Strait Islander peoples

Table 1.1 below provides the number and percentage of complaints by Aboriginal and Torres Strait Islander peoples received in the last financial year under all relevant legislation. Table 1.2 provides the outcomes of finalised complaints during my reporting period.

Table 1.1: Number and percentage of Aboriginal and Torres Strait Islander complaints received in 2013-14

	RDA ¹⁶⁵		SDA ¹⁶⁶		DDA ¹⁶⁷		ADA ¹⁶⁸		AHRCA ¹⁶⁹		Total	
Aboriginal	159	36%	5	1%	17	2%	1	0.5%	5	2%	187	9%
Torres Strait Islander	1	-	0	-	0	-	0		0	-	1	-
Both of the above	3	1%	1	-	0	-	1	0.5%	-	-	5	-
None of the above/ Unknown	278	63%	438	99%	738	98%	170	99%	259	98%	1883	91%

¹⁶⁷ *Racial Discrimination Act 1975* (Cth).

¹⁶⁸ *Sex Discrimination Act 1984* (Cth).

¹⁶⁹ *Disability Discrimination Act 1992* (Cth).

¹⁷⁰ *Age Discrimination Act 2004* (Cth).

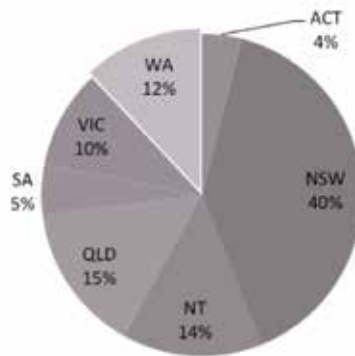
¹⁷¹ *Australian Human Rights Commission Act 1986* (Cth).

Table 1.2: Outcome of complaints from ATSI peoples finalised in 2013-14

Outcome	Number of complaints from ATSI peoples	Percentage of complaints from ATSI peoples	Comparison with percentage of all finalised complaints
Conciliated	110	62%	49%
Terminated/declined	31	17%	23%
Withdrawn	19	11%	16%
Discontinued	16	9%	9%
Reported (AHRCA only)	1	1%	3%
Total	177	100%	100%

Figure 1.1 provides the geographic origin of Aboriginal and Torres Strait Islander complainants for the year 2013-14.

Figure 1.1:
Complaints received from ATSI peoples in 2013-14 by State/Territory of complainant



1.11 Conclusion

The past year has been characterised by uncertainty and upheaval for Aboriginal and Torres Strait Islander peoples.

While there have been some positive developments, and a promising renewed political commitment to the affairs of our peoples, this is not enough in itself.

I am heartened by the Prime Minister's leadership on the issue of constitutional recognition of Aboriginal and Torres Strait Islander people as the First Peoples of our nation. However, we need to act on the public support for this historic change and hold a referendum as soon as all of the right conditions are in place.

The release of the Budget saw a dramatic overhaul of both Indigenous-specific and general programs and services, with accompanying funding cuts. This included the significant restructure of the delivery of Aboriginal and Torres Strait Islander programs and policy, consolidated through the government's new Indigenous Advancement Strategy. Disappointingly, these changes were planned without meaningful engagement with Aboriginal and Torres Strait Islander peoples, their leaders or their respective organisations.

We are yet to see the outcomes expected of an effective, meaningful and considered engagement strategy between the Australian Government and our peoples. Aboriginal and Torres Strait Islander voices need to be heard clearly, especially in times of upheaval and change.

It is also important that the Australian Government considers the collective impact of the reviews commissioned in the last year of both Indigenous jobs and training and the Australian welfare system, along with the government's budgetary measures. Each of these developments has the potential to significantly affect Aboriginal and Torres Strait Islander peoples. It is vital that these efforts are harmonised in order to achieve sustainable outcomes.

Overall, this upheaval and lack of clarity is deeply worrying and is causing widespread uncertainty and stress, particularly amongst our communities.

The intentions are well placed but we have been left with a muddled narrative. We need clarity and a tangible plan of action. I am hopeful that government will work with us to carve a clear path for the future of Aboriginal and Torres Strait Islander peoples.

Chapter 2: Racial Discrimination Act - Proposed changes to racial hatred provisions

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2.1 Introduction

There has been significant discussion during the reporting period about the need to balance the right of people to be free from racial abuse with the right to freedom of speech. This has occurred in the context of s 18C of the *Racial Discrimination Act 1975* (Cth) (RDA), which protects against racial vilification, or 'racial hatred', as it is more commonly referred to.

Research shows that racism and racial discrimination significantly impacts on the lives of Aboriginal and Torres Strait Islander peoples.

It is the experience of racism that prevents many of our people from entering public places and the workforce, that follows us around at stores, stops us from securing housing and has serious consequences for our everyday lives. The evidence shows that racism also has devastating impacts on our health.

It is this experience of racism that targets, questions and attacks our identity as Aboriginal and Torres Strait Islander peoples.

However, legislation such as the RDA plays an important role in protecting our people against racial harm and providing us with equality before the law.

In this chapter I will explore the proposed changes to the racial vilification provisions in ss 18C and 18D of the RDA. I will discuss the operation of the RDA in its current form and the reasons for retaining its effective protections for Aboriginal and Torres Strait Islander peoples. I will then outline principles to guide any future amendments.

Beyond legal protections, I will also highlight the role that education and awareness can play in addressing racism.

2.2 Background to the Racial Discrimination Act

The RDA was the first of Australia's anti-discrimination laws and marked a historic moment for our nation.

Australia signed the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)¹ in 1966 and ratified the convention in 1975.² The RDA was legislated in 1975 as a means of giving effect to Australia's obligations under the ICERD.³ Under this convention, Australia has a responsibility to enact laws to prevent and combat racial hatred.

Australia also has an obligation to protect the right to freedom of expression, as set out in the *International Covenant on Civil and Political Rights* (ICCPR).⁴ Australia became a signatory to the ICCPR in 1972, and ratified the convention in 1980.⁵

Sometimes human rights conflict with one another, and when they do, a balance needs to be struck. It is a question about how far one right should be limited in order that another right be protected. This year we have seen a public debate about how far the freedom of expression should be limited to ensure protection against racial hatred.

Upon introduction, it was hoped that the RDA would work to 'entrench new attitudes of tolerance and understanding in the hearts and minds of the people'.⁶ When former Prime Minister Gough Whitlam proclaimed the RDA, he noted the impact of racism on Aboriginal and Torres Strait Islander peoples:

The main sufferers in Australian society - the main victims of social deprivation and restricted opportunity - have been the oldest Australians on the one hand and the newest Australians on the other... By this Act we shall be doing our best to redress past injustice and build a more just and tolerant future.⁷

There is a tension between freedom of expression and the need to protect against racial hatred. However, the devastating impact of racial intolerance requires that public limits are set as to what kind of expression is acceptable and what is not.

(a) International human rights and responsibilities

We can understand this tension further by exploring the international context of the responsibility of governments to protect against racial hatred and the obligation to protect freedom of expression.

(i) Freedom of expression

The obligation to protect the freedom of expression is enshrined in art 19(2) of the ICCPR. This freedom has been recognised internationally as one of the 'essential foundations of a democratic society'.⁸

1 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965.

2 Australian Government, *Convention on the Elimination of All Forms of Racial Discrimination*, <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/2F70352A0B65EB67CA256B6E0075FE13> (viewed 13 October 2014).

3 *Racial Discrimination Act 1975* (Cth), preamble.

4 *International Covenant on Civil and Political Rights*, 1966.

5 Australian Government, *International Covenant on Civil and Political Rights*, <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E> (viewed 13 October 2014).

6 G Whitlam, 'Proclamation of Racial Discrimination Act: text of a speech by the Prime Minister, Mr Gough Whitlam at a ceremony for the proclamation of the Racial Discrimination Act 1975' (Media Release, 31 October 1975). At http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/Q0IF6/upload_binary/q0if67.pdf;fileType=application%2Fpdf#search=%22racial%20discrimination%22 (viewed 10 October 2014).

7 G Whitlam, above.

8 *Freedom of opinion and expression*, HRC Resolution 12/16, UN Doc: A/HRC/RES/12/16 (2009), preamble. At http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/12/16 (viewed 10 October 2014).

Without freedom of expression, it would be difficult for us to exercise our other rights, such as the right to freely associate or the right to exercise our religious beliefs.⁹ It is not only important for democracy, but also as a tool to protect other human rights.¹⁰

Freedom of expression is not without limits.¹¹ According to arts 19(3) and 20 of the ICCPR, these rights are subject to special duties and responsibilities. As such freedom of expression may be subject to the following limited restrictions, but only such as are provided by law and are necessary:

- for respect of the rights or reputations of others
- for the protection of national security or of public order, or of public health or morals
- regarding any propaganda for war
- regarding any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

However, these kinds of restrictions must be kept to a minimum and be proportionate to achieve the legitimate aim.¹² In other words, even if the reason is legitimate, the measure put in place cannot be unnecessarily restrictive.

Different measures may be required in relation to these legitimate restrictions on freedom of expression. This can involve separate measures for acts that:

- constitute an offence under international law and must be prohibited
- are not criminally punishable but may require civil remedies, or
- raise concerns in terms of tolerance, civility and respect for others.¹³

Different types of race hate speech will require responses in each of these categories. The challenge confronting us in Australia is identifying where we appropriately draw the line between these different levels of protection and response.¹⁴

(ii) Prohibition of hate speech

As mentioned above, governments can limit freedom of expression in order to protect the rights of others. This may be necessary if there are kinds of expression that might cause serious injury to the human rights of other people.¹⁵

Article 20(2) of the ICCPR creates an obligation to prohibit hate speech. The threshold of what qualifies as hate speech is set very high. 'Hate speech' involves a person promoting discrimination, hostility or violence based on race that amounts to incitement. In other words, the person promoting hate speech intends to provoke a response from their audience.¹⁶

9 F La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23 (2010), para 27. At http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (viewed 10 October 2014).

10 F La Rue, above, para 28.

11 *International Covenant on Civil and Political Rights*, 1966, art 19(3).

12 F La Rue, note 9, para 77.

13 F La Rue, note 9, para 79.

14 F La Rue, note 9.

15 F La Rue, note 9, para 28.

16 F La Rue, note 9, para 28.

Any restriction to prevent hate speech must also meet the criteria in art 19(3) that it is necessary, made by law and for a legitimate aim.¹⁷

Australia has a broad obligation under art 4(a) of the ICERD, namely to legislate that it is an offence to:

- spread ideas based upon racial superiority or hatred
- incite others to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent or national or ethnic origin
- make threats or incite others to violence against persons or groups
- express insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination, when it clearly amounts to incitement to hatred or discrimination.¹⁸

The Federal Court of Australia has emphasised that the ICERD is concerned with eliminating racial discrimination in *all* its forms, including but not limited to racial hatred.¹⁹

The ICERD was developed in the aftermath of World War 2. In the immediate post-war period, shocking instances of racial hatred in Europe convinced the nations of the world that they needed to ensure specific protections were in place. Article 4 arose from this concern.²⁰ Racial hatred was seen as ‘the perceived evil most likely to lead to brutality and violence’.²¹

The ICERD also provides other forms of protection. Article 2 requires governments to commit to taking measures to eliminate racial discrimination. Article 6 requires governments to have effective protection and remedies in place for victims. Article 7 encourages governments to support ‘teaching, education, culture and information’ to promote inter-ethnic understanding and tolerance. Article 5 of the ICERD acknowledges that all people have the right to equality before the law.

Importantly, the convention does not aim to prevent the public discussion of controversial ideas.²²

Australia has voluntarily committed to complying with both the ICCPR²³ and the ICERD.²⁴ Governments are expected to take certain actions to give effect to these obligations.

(b) Sections 9 and 10 of the Racial Discrimination Act

The final wording of the RDA, as introduced in 1975, included significant protections against race based discrimination.

17 Human Rights Committee, *General Comment 34 – Article 19: Freedom of opinion and expression*, UN Doc: CCPR/C/GC/34 (2011), para 50. At http://www.un.org/en/ga/search/view_doc.asp?symbol=CCPR/C/GC/34 (viewed 10 October 2014).

18 Committee on the Elimination of Racial Discrimination, *General Comment 35 – Combating racist hate speech*, UN Doc: CERD/C/GC/35 (2013), para 28. At http://www.un.org/en/ga/search/view_doc.asp?symbol=CERD/C/GC/35 (viewed 10 October 2014).

19 *Toben v Jones* (2003) 129 FCR 515, para 136.

20 Human Rights Committee, note 17, para 1; Committee on the Elimination of Racial Discrimination, note 18.

21 *Toben v Jones* (2003) 129 FCR 515, paras 98, 100.

22 Committee on the Elimination of Racial Discrimination, note 18, para 25.

23 United Nations Treaty Collection, *International Covenant on Civil and Political Rights – Declarations and Reservations*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (viewed 10 October 2014).

24 United Nations Treaty Collection, above. Australia has reservations to both the ICCPR and the ICERD. While these reservations mean that Australia does not have an obligation to introduce more legislation (in relation to the ICCPR) or create criminal offences relating to racial hatred (in relation to ICERD), the nature of Australia’s reservations recognise the importance of preventing the harm to which those articles in the ICCPR and the ICERD are directed.

Part II of the RDA sets out the prohibitions of racial discrimination as found in ss 9(1) and 1(A). This draws on the broad prohibition of racial discrimination as contained in art 1(1) of the ICERD and prohibits acts or conduct which involves:

a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of impairing the recognition, enjoyment or exercise on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

Section 10 provides a guarantee of equal treatment on the basis of race. This has been critical in preventing state and territory governments from discriminating against Aboriginal and Torres Strait Islander peoples in legislation.

In order to establish a successful claim under s 10, complainants must show that the law operates in a way that means that they do not enjoy a particular right to the same extent as others, who are not of that race.²⁵

(c) The 1995 amendments

In 1995, the RDA was amended by means of the *Racial Hatred Act 1995* (Cth). This added Part IIA, comprising ss 18B to 18F.²⁶ The amendments were made in response to the recommendations of three significant inquiries:

- the 1991 *National Inquiry into Racist Violence*,²⁷ carried out by the Human Rights and Equal Opportunity Commission, the predecessor of the Australian Human Rights Commission (the Commission)
- the 1991 *Royal Commission into Aboriginal Deaths in Custody*²⁸
- the Australian Law Reform Commission's 1992 report, *Multiculturalism and the Law*.²⁹

The inquiries found that racial vilification can cause emotional and psychological harm, and can reinforce other forms of discrimination and exclusion.³⁰ Collectively, the inquiries concluded that apparently 'low-level' behaviours can lead to more severe acts of harassment, intimidation or violence, by implicitly condoning such acts.³¹

25 Australian Human Rights Commission, *Federal Discrimination Law* (2011), ch 3. At <https://www.humanrights.gov.au/our-work/legal/federal-discrimination-law-2011> (viewed 10 October 2014).

26 Section 18B stipulated that if an action was carried out for two or more reasons, and one of the reasons was a person's race, the action was to be interpreted as being motivated by race. Section 18E made employers 'vicariously liable' for racial vilification by their employees in the course of their duties.

27 Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence* (1991). At <https://www.humanrights.gov.au/publications/racist-violence-1991> (viewed 15 October 2014).

28 E Johnson, *Royal Commission into Aboriginal Deaths in Custody: National Reports* [Vol 1-5] (1991). At <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/> (viewed 15 October 2014).

29 Australian Law Reform Commission, *Multiculturalism and the Law* (1992). At <http://www.alrc.gov.au/report-57> (viewed 10 October 2014).

30 Australian Human Rights Commission, *At a glance: Racial vilification under sections 18C and 18D of the Racial Discrimination Act 1975 (Cth)* (2013). At <https://www.humanrights.gov.au/glance-racial-vilification-under-sections-18c-and-18d-racial-discrimination-act-1975-cth> (viewed 10 October 2014).

31 Australian Human Rights Commission, above.

The *National Inquiry into Racist Violence* said that ‘political leaders and opinion makers must work to break the silence and build a culture which condemns racism and racist violence and encourages respect for cultural differences’.³² The Inquiry found that introducing legislation against incitement and vilification was ‘an important way of addressing this problem directly’.³³

The three inquiries advocated, variously, the introduction of criminal or civil penalties (or both) for racial violence, intimidation and harassment. It should be noted that none of the inquiries recommended language as broad as that adopted in s 18C.³⁴

Following a lengthy debate, federal politicians ultimately opted for exclusively civil sanctions for breach of the new racial hatred provisions. The *Racial Hatred Act 1995* (Cth) passed into law, amending the RDA to insert a new Part IIA, including the key 18C and 18D sections.³⁵

Section 18C outlawed public actions and words which were ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ on the basis of their ‘race, colour or national or ethnic origin’.³⁶

Section 18D created exemptions, stating that actions and words which might otherwise contravene s 18C, were permissible in the following contexts:

- the performance, exhibition or distribution of an artistic work
- statements, publications, discussion or debate made or held for a genuine academic, artistic or scientific purpose, or for any other genuine purpose in the public interest
- making or publishing a fair and accurate report of any event or matter of public interest, or a fair comment on any event or matter of public interest if the comment expresses a genuine belief.³⁷

In order for an exemption to apply, the words or actions had to be ‘said or done reasonably and in good faith’.³⁸

32 Human Rights and Equal Opportunity Commission, note 27, p 268.

33 Human Rights and Equal Opportunity Commission, note 27.

34 Australian Human Rights Commission, *Amendments to Part IIA, Racial Discrimination Act 1975 - Australian Human Rights Commission submission to the Attorney-General’s Department* (2014), para 42-61. At <https://www.humanrights.gov.au/submissions/amendments-part-ii-a-racial-discrimination-act-1975> (viewed 8 October 2014).

35 *Racial Hatred Act 1995* (Cth), s 3.

36 *Racial Discrimination Act 1975* (Cth), s 18C.

37 *Racial Discrimination Act 1975* (Cth), s 18D.

38 *Racial Discrimination Act 1975* (Cth), s 18D.

2.3 Operation of the Racial Discrimination Act in its current form

The RDA has proved to be a useful tool in combatting racial hatred, both through a complaints mechanism administered by the Commission and also through legal action. The RDA also provides a public statement of society's commitment to racial tolerance; it has a symbolic role in offering people a sense of assurance that there are protections against racial vilification.

(a) Complaints mechanism

The Commission has specialist knowledge in the administration of the RDA. This is because of its legislative mandate under the RDA and the *Australian Human Rights Commission Act 1986* (Cth), which sets out our role in investigating and conciliating complaints alleging racial discrimination, including complaints about racial hatred under s 18C.³⁹

The Commission has resolved hundreds of complaints and provided effective civil redress for victims since the RDA was amended to include the racial hate provisions nearly 20 years ago. Over the last five years, the Commission received an average of 130 complaints per year alleging a breach of s 18C.⁴⁰

Section 18C complaints, like all complaints alleging racial discrimination, must be made to the Commission in the first instance, at which point the Commission tries to resolve the complaint by conciliation. If that fails, the complainant can apply for their case to be heard and determined by the Federal Circuit Court or the Federal Court.⁴¹

In practice, only a minority of complaints proceed to court. In 2012-13, these equated to fewer than 3%, compared with 53% being resolved through conciliation, 19% that were withdrawn and 23% that the Commission terminated either on the basis of no reasonable prospect of settlement (17%) or because they were trivial, misconceived or lacked substance (4%).⁴² As can be seen from those figures, the vast majority of s 18C complaints are resolved out of court, and at minimal public cost.

Most complaints resolved by the Commission under s 18C result in a combination of the following outcomes:

- an apology
- an agreement to remove material
- systemic outcomes, such as changes to policies and procedures, training for staff and training for individual respondents
- payment of compensation.⁴³

39 Australian Human Rights Commission, note 34, para 66.

40 Australian Human Rights Commission, above.

41 *Australian Human Rights Commission Act 1986* (Cth), s 46PO.

42 Australian Human Rights Commission, note 34, para 68.

43 Australian Human Rights Commission, note 34, para 64.

(b) Interpreting s 18C matters before the court

If the matter cannot be resolved by conciliation, complainants may take the matter to the Federal Circuit Court or the Federal Court.⁴⁴ In a successful case, the Court may order a range of outcomes including an apology, the removal of material or payment of compensation.⁴⁵

Since 1995, ss 18C and 18D have been interpreted as maintaining a balance between freedom of speech and freedom from racial discrimination, harassment and vilification.

Cases that have successfully argued the s 18D exemption to dismiss s 18C claims have included:

- A book by One Nation's Mrs Pauline Hanson and Mr David Etteridge, which claimed that Aboriginal and Torres Strait Islander people are unfairly favoured by governments and the courts, was found by the Commission to have been published reasonably, in good faith and for a genuine purpose in the public interest: namely, political debate about the fairness of the distribution of social welfare payments.⁴⁶
- The *Kelly-Country v Beers*⁴⁷ case, which involved a complaint about a comedian's performances, where the comedian purports to be an Aboriginal person. The performances were on video and audio tape, and available for public purchase and portrayed Aboriginal people as rude, stupid, unable to speak English properly, dirty, always drunk or drinking and swearing, among other things.

In the *Kelly-Country* case, the Court noted the acts and tapes were 'impolite and offensive' to many groups within Australia, but because they were offensive or insulting did not mean they were unlawful under the RDA.⁴⁸ The Court noted the performances and tapes were comedic in intention, were not to be taken literally or seriously and had no overt political context. The Court found the performances fell within the term 'artistic work', as found in the exemption in section 18D.

By way of contrast, successful racial discrimination cases under s 18C include:

- *Eatock v Bolt*,⁴⁹ where the Court ruled that the s 18D exemption did not apply because Mr Bolt's articles had not been published reasonably and in good faith.
- *Toben v Jones*,⁵⁰ in 2003, in which Dr Frederick Toben was found to have breached s 18C by publishing anti-Semitic material online denying the Holocaust.

The courts have found that s 18C is an appropriate measure to implement Australia's obligations under the ICCPR and the ICERD.⁵¹ They have also held that, in order for conduct to be covered by s 18C, it must involve 'profound and serious effects', and not 'mere slights'.⁵²

44 Australian Human Rights Commission Act 1986 (Cth), s 46PO.

45 Racial Discrimination Act 1975 (Cth), s 46PO.

46 *Walsh v Hanson* unreported, Human Rights and Equal Opportunity Commission, Commissioner Nader, 2 March 2000

47 *Kelly-Country v Beers* (2004) 207 ALR 421.

48 Australian Human Rights Commission, note 30.

49 *Eatock v Bolt* (2011) 197 FCR 261.

50 *Toben v Jones* (2003) 129 FCR 515.

51 Australian Human Rights Commission, note 30.

52 *Creek v Cairns Post* (2001) 112 FCR 352 para 16 (Kiefel J); see also French J in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, para 70.

2.4 Proposed amendments to the Racial Discrimination Act

During the 2013 election campaign, the Coalition promised to repeal the existing language of s 18C of the RDA to remove and change the protections against acts likely to offend, insult and humiliate on the grounds of race.

Attorney-General George Brandis announced the proposed changes in an exposure draft Bill on 25 March 2014.⁵³ The draft Bill, which called for public submissions, was released in order to remove limitations on and re-centre traditional liberal democratic notions of freedom of speech.⁵⁴

The proposed changes would repeal s 18C. Sections 18B, 18D and 18E would also be repealed. These provisions would be replaced with a section that would:

- retain the word 'intimidate', defining it as inciting hatred against a person, their property or a group of people
- add the word 'vilify', defining it as causing a person or people to fear physical harm
- introduce a 'community standards' test, under which the question of whether behaviour was reasonably likely to intimidate or vilify would be 'determined by the standards of an ordinary reasonable member of the Australian community, not by the standards of any particular group within the Australian community'
- remove the 'reasonably and in good faith' requirement
- introduce a new exemption, applying to 'words, sounds, images or writing spoken, broadcast, published or otherwise communicated in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter'.

The proposal followed on from a high-profile Federal Court case, *Eatock v Bolt*,⁵⁵ brought by nine Aboriginal and Torres Strait Islander Australians against News Corporation columnist Andrew Bolt.

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

The Federal Court found columnist Bolt to have breached s 18C of the RDA by the publication of two of his columns in 2009.⁵⁶ The Court rejected the argument that the columns fell under the freedom of expression exemption in s 18D.⁵⁷

53 *Freedom of Speech (repeal of s 18C) Bill 2014* (Cth).

54 J Wright, 'George Brandis to repeal 'Bolt laws' on racial discrimination', *Sydney Morning Herald*, 8 November 2013. At <http://www.smh.com.au/federal-politics/political-news/george-brandis-to-repeal-bolt-laws-on-racial-discrimination-20131108-2x50p.html> (viewed 29 September 2014)

55 *Eatock v Bolt* (2011) 197 FCR 261.

56 *Eatock v Bolt* (2011) 197 FCR 261, paras 452-453.

57 *Eatock v Bolt* (2011) 197 FCR 261, paras 336-451.

Justice Bromberg found that the articles in question contained:

untruthful facts and the distortion of the truth which I have identified, together with the derisive tone, the provocative and inflammatory language and the inclusion of gratuitous asides.⁵⁸

Consequently Justice Bromberg found that the articles were not done reasonably and lacked good faith, which are requirements of the freedom of expression exemption.⁵⁹

Commenting on the public debate about identity, I previously wrote about the damage that cases such as *Eatock v Bolt* and ensuing mainstream media coverage can cause to Aboriginal and Torres Strait Islander people by imposing colonialist notions of ‘authenticity’ on our peoples.⁶⁰

As I have explained publicly, anyone familiar with this nation’s history will know that colonial authorities used Aboriginality – and the extent to which anybody claimed it – as a powerful mechanism of control. These labels were invariably toxic, with ‘full-blood’, ‘half-caste’ and ‘quadroon’ becoming common parlance; people were herded and children removed on the basis of their skin colour, all as part of a legislated and unabashed policy to assimilate and, ultimately, to eliminate Aboriginal and Torres Strait Islander identity.⁶¹

In my view, the *Eatock v Bolt* case is an example of how the very core of self-determination – being able to define who you are – has been repeatedly taken from Aboriginal and Torres Strait Islanders by non-Indigenous others. Comments such as Bolt’s perpetuate colonial assumptions, add fuel to tensions that are the result of our colonial experience, and may contribute to the cycle of lateral violence. The public debate and positions taken by leadership that surrounded this Bill was disheartening. It promoted common misunderstandings of what racism does and does not look like.

58 *Eatock v Bolt* (2011) 197 FCR 261, para 425.

59 *Eatock v Bolt* (2011) 197 FCR 261, paras 425-429.

60 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), pp 58-60. At <http://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 8 October 2014).

61 M Gooda, ‘One’s identity is for the individual to determine’ *The Sydney Morning Herald Online*, 24 November 2011. At <http://www.smh.com.au/federal-politics/political-opinion/ones-identity-is-for-the-individual-to-determine-20111124-1nnew.html#ixzz3FcLaYZY8> (viewed 9 October 2014).

2.5 Impact of the proposed changes on Aboriginal and Torres Strait Islander peoples

Racism is an issue that affects many ethnically diverse populations in Australia. We know that one in five people have experienced race-hate talk, such as verbal abuse, racial slurs or name-calling, and around one in ten Australians have experienced race-based exclusion in the workplace or at social events.⁶² More than one in twenty Australians say they have also been physically attacked because of their race.⁶³

Unfortunately, the incidence of racism and racial discrimination is one that particularly impacts on the daily lives of Aboriginal and Torres Strait Islander peoples. It was recently reported that 97% of Aboriginal people in Victoria experienced at least one racist incident in the last 12 months alone.⁶⁴

As anybody who has experienced racism and racial discrimination will tell you, this is a deeply personal debate about real people and real pain.⁶⁵ As I will discuss below, the potential harm caused by racism can have very significant effects on the physical and mental health of Aboriginal and Torres Strait Islander people.

As I have already discussed, the RDA is a critical tool for addressing racism and racial discrimination. However, the draft Bill raises a number of concerns for Aboriginal and Torres Strait Islander people.

In particular, I will discuss the impact of the proposed changes on the health of Aboriginal and Torres Strait Islander people and their relationships with non-Indigenous Australians.

(a) Health impacts of racism

Research shows that there is significant evidence linking Aboriginal and Torres Strait Islander peoples' experience of racism with negative impacts on health.⁶⁶

This can have serious impacts on mental health, with over 56% of people who experienced racism reporting higher levels of psychological stress.⁶⁷ There is also evidence to suggest that racism can place Aboriginal and Torres Strait Islander people at greater risk of developing depression and anxiety, attempting suicide and substance use.⁶⁸

The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey shows that:

- racism at any level was associated with poorer mental health but that these effects are most significant for those who reported more than 11 racist incidents in a year

62 Australian Human Rights Commission, *Racism. It Stops With Me*, <http://itstopswithme.humanrights.gov.au/it-stops-with-me/why-racism#indexheading2> (viewed 3 October 2014).

63 Australian Human Rights Commission, above.

64 VicHealth, 'Vast majority of Aboriginals targets of racism: survey' (Media Release, 15 November 2012). At <http://www.vichealth.vic.gov.au/~media/ResourceCentre/MediaCentre/Media%20Releases/Mental%20health%20impacts%20of%20racial%20discrimination%20in%20Victorian%20Aboriginal%20Communities%20MEDIA%20RELEASE%2015%20November%202012.aspx> (viewed 3 October 2014).

65 See Commonwealth, *Parliamentary Debates*, Senate, 26 March 2014, p 2166 7 (Penny Wong, Leader of the Opposition in the Senate); G Chan, 'Race law debate touches emotional chord- in parliament and out', *The Guardian*, 28 March 2014. At <http://www.theguardian.com/world/2014/mar/28/race-law-debate-touches-emotional-chord-in-parliament-and-out> (viewed 28 September 2014).

66 Close the Gap Campaign Steering Committee, *Exposure Draft of the Freedom of Speech (Repeal of s.18c) Bill 2014: Submission to the Attorney-General's Department* (2014), p 7. At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/close-gap-campaign-submission-part-ii-a> (viewed 26 September 2014).

67 Beyondblue, *Stop, Think, Respect: Racial Discrimination and Mental Health*, <http://www.beyondblue.org.au/resources/for-me/stop-think-respect-home/the-invisible-discriminator/racial-discrimination-and-mental-health> (viewed 8 October 2014).

68 See N Priest and Y Paradies, 'Racism as a determinant of social and emotional wellbeing for Aboriginal Australian youth' (2011) 194(10) *Medical Journal of Australia* 546.

- 76% of people felt that racism had affected the lives of friends and family to a great or moderate extent
- 62% of those surveyed felt that racism had affected their life to a great or moderate extent.⁶⁹

This survey also demonstrated the cumulative effect of experiencing racism:

- when someone reaches a threshold of one racist incident per month their mental health significantly declines
- 65% of survey participants that had experienced 12 or more racist incidents reported high or very high levels of psychological distress (compared to 50% of all participants).

As a key social determinant of health, racism is a critical component of efforts to close the health and life expectancy gap between Aboriginal and Torres Strait Islanders and other Australians.⁷⁰

The impact of racial discrimination on Aboriginal and Torres Strait Islander people as I have just outlined, provides a strong case for maintaining the protections set out in the RDA and not proceeding with the types of changes that were proposed by the draft Bill.

(b) Concerns about changes to s 18C

The Bill could also have wider implications for the relationships between Aboriginal and Torres Strait Islander and non-Aboriginal Australians. I have always highlighted the importance of relationships in my advocacy and see the potential for these changes to undermine existing efforts towards a more reconciled nation.

These relationships have taken many years to build and the proposed changes to the existing legal protections could ‘pave the way to a less reconciled, just and equitable Australia’.⁷¹

Evidence from the Reconciliation Barometer consistently shows that there are low levels of trust and understanding between Aboriginal and Torres Strait Islander people and non-Aboriginal people.⁷² This combined with a lack of understanding and knowledge of Aboriginal and Torres Strait Islander culture can translate into stereotypes and strained relationships.⁷³

It is important to strike the correct balance between freedom of expression and freedom from racial vilification. However, effective laws against racial vilification send a strong message about civility and tolerance in a multicultural society and are necessary to ensure that victims of racial vilification have protection before the law.

It is clear that any changes to the existing legislation could have a potentially devastating impact on Aboriginal and Torres Strait Islander peoples. With this in mind, it is important that we retain strong anti-racism measures to combat the individual and systemic racism that our communities face.

69 A Ferdinand, Y Paradies & M Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: the Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, The Lowitja Institute (2013). At https://www.lowitja.org.au/sites/default/files/docs/LEAD%20Report-WEB_0.pdf (viewed 1 October 2014).

70 Close the Gap Campaign Steering Committee, note 66, p 3.

71 Reconciliation Australia, *Submission to the Attorney-General: Proposed amendments to the Racial Discrimination Act 1975 (Freedom of Speech (Repeal of S.18C) Bill 2014)* (2014), p 2. At http://www.reconciliation.org.au/wp-content/uploads/2014/04/RASubmission_RDA_amendments_30April2014.pdf (viewed 9 October 2014).

72 Reconciliation Australia, above, p 8.

73 Reconciliation Australia, above.

2.6 General concerns with the proposed changes

In this reporting period, the Commission provided a detailed submission covering our concerns with the proposed Bill.⁷⁴ I will briefly discuss these concerns with the scope of the changes, the free speech exemption and community standards here.

(a) Scope of the proposed changes

I accept that, for many in the community, the words ‘offend’ and ‘insult’ appear to set the bar too low. The legislation could be clarified to reflect the way it has actually been interpreted by the courts in a way that is ‘more serious than mere personal hurt, harm or fear’.⁷⁵

However, the draft Bill’s very narrow definitions of ‘intimidate’ and ‘vilify’ were of considerable concern, as they substantially reduced the possibility of words or conduct being found unlawful under the RDA’s racial hatred provisions. Further, the draft Bill included a very broad exemption. This could have had the effect of sanctioning racial vilification and intimidation in almost any public arena where it is part of a public discussion.⁷⁶

This would remove the protections currently provided under the RDA to those people who are the targets of racial discrimination, including Aboriginal and Torres Strait peoples. It is important to ensure that free speech is not synonymous with hate speech. Freedom of speech protections are available for anything said or done in genuine public debate and with reasonableness and good faith.⁷⁷

It is in this context that the proposal to delete requirements around accuracy, fair comment and that words or conduct must be ‘said or done reasonably and in good faith’ also raises significant concerns.⁷⁸

⁷⁴ See Australian Human Rights Commission, note 34.

⁷⁵ *Eatock v Bolt* (2011) 197 FCR 261, 263.

⁷⁶ G Triggs, *The freedom wars and the future of human rights in Australia* (Speech delivered to National Press Club, Canberra, 9 April 2014). At <https://www.humanrights.gov.au/news/speeches/freedom-wars-and-future-human-rights-australia> (viewed 9 October 2014).

⁷⁷ *Racial Discrimination Act 1975* (Cth), s 18D.

⁷⁸ Australian Human Rights Commission, note 34, para 140.

An example of racial hatred against an Aboriginal person that might no longer be unlawful under the Bill is found in Text Box 2.1.

Text Box 2.1:

Example of racial hatred against an Aboriginal person⁷⁹

The complainant, who is Aboriginal, claimed that he left his employment because, over a number months, he was racially abused by a work colleague while they were working in public areas. The alleged comments included ‘nigger’, ‘nigger c**t’, ‘abo’, ‘boong’, ‘f**king nigger’, ‘I’ve never worked with a nigger before’, ‘spear catcher’, ‘why don’t you go and sit with your black bastard family and get drunk’ and ‘get f**ked you nigger dog’. Following the cessation of his employment, the complainant was assessed by a psychiatrist and subsequently the company’s insurer accepted liability for the psychological injury the complainant had sustained arising from the alleged events.

The complaint was resolved through a conciliation process and the respondents agreed to pay the complainant \$45,000 and provide him with a statement of regret.

Sometimes there is a personal cost in confronting racism. Another example is that of Australian Football League player Mr Adam Goodes. Mr Goodes, the 2014 Australian of the Year, and a leading advocate of the ‘Racism. It Stops With Me’ Campaign, continues to experience racist abuse on and off the sporting field.

In its submission in relation to the Bill, the Commission observed that it was concerned about the proposed narrow definition to be given to ‘vilify’ as opposed to a wider and more commonly accepted meaning of the term. For instance, the Shorter Oxford English Dictionary defines ‘vilify’ as: to depreciate or disparage with abusive or slanderous language; to defame, revile or despise. It would be extremely difficult in these circumstances to prove the incitement of hatred in a third party.⁸⁰

With its definition of ‘intimidate’, the draft Bill disregarded substantial evidence that even apparently minor incidents of racism and racial intimidation can have severe and long-lasting effects on a person’s social, psychological and mental health.⁸¹ Of the hundreds of complaints received by the Commission every year alleging racial abuse, very few involve violence or fear of violence.⁸²

The Commission recommended that ‘humiliate’ be retained in an amended Part IIA, as it involves serious conduct.⁸³

79 Australian Human Rights Commission, note 34, paras 16-17.

80 Australian Human Rights Commission, note 34, paras 91-103.

81 Australian Human Rights Commission, note 34, para 111.

82 G Triggs, ‘Race law changes seriously undermine protections’, *The Australian*, 28 March 2014. At <http://www.theaustralian.com.au/opinion/race-law-changes-seriously-undermine-protections/story-e6frg6zo-1226866727210> (viewed 8 October 2014).

83 Australian Human Rights Commission, note 34, para 85.

(b) Community standards test

Currently, the standard against which racial vilification is assessed is that of the group which has experienced it. I strongly believe that this should not be replaced, as was proposed, with the standard of the broader community.

As the findings of the Australian Reconciliation Barometer have shown, perceptions can vary significantly between groups of people, and what seems like a minor incident to one group can be experienced very negatively by another. It is, therefore, important to measure the impact of racial vilification from the perspective of a reasonable member of the affected group.⁸⁴

While free speech is highly valued by Australian society, so too is protection from racial vilification. According to a Fairfax-Nielsen poll published on 14 April 2014, 88% of people believe it ought to be unlawful to offend, insult or humiliate someone because of their race or ethnicity.⁸⁵ Racial vilification can also impair its victims' freedom of speech and have the effect of silencing its targets. As Race Discrimination Commissioner Tim Soutphommasane has pointed out, 'this is one reason why we can't assume that good speech can overcome bad speech'.⁸⁶

84 Australian Human Rights Commission, note 34, para 115.

85 'Racial Discrimination Act changes receive little support in Nielsen poll', *ABC News*, 14 April 2014. At <http://www.abc.net.au/news/2014-04-14/race-law-changes-receive-little-support-in-new-poll/5387452> (viewed 20 September 2014).

86 T Soutphommasane, 'Beware any move to license racial hatred', *The Age*, 3 March 2014. At <http://www.theage.com.au/comment/beware-any-move-to-license-racial-hatred-20140302-33tsf.html> (viewed 25 September 2014).

2.7 Reaction to the draft Bill

The proposed amendments were not widely supported by the community.

According to documents obtained under freedom of information laws, more than 76% of 4 100 submissions received by the Attorney-General George Brandis argued against the changes, with only 20.5% in favour.⁸⁷

The amendments were strongly opposed by the organisations representing Australia's Aboriginal and Torres Strait Islander and minority ethnic communities. In an open letter to the Attorney-General in December 2013, 156 of these organisations⁸⁸ urged the Australian Government not to amend the RDA. The following community organisations subsequently endorsed a joint statement expressing opposition to the proposed changes:

- National Congress of Australia's First Peoples
- Executive Council of Australian Jews
- Australian Hellenic Council
- Armenian National Committee of Australia
- Arab Council Australia
- Korean Society of Sydney
- Chinese-Australian Forum
- Executive Council of Australian Jewry.⁸⁹

The collective stated that the RDA had 'long played a critical role in combating racial hatred and protecting individuals and groups against discrimination and hate speech'.⁹⁰

On a political level, the changes were opposed by the Australian Capital Territory, Victoria and New South Wales governments, federal Labor and the Greens. Several Coalition Members of Parliament voiced their opposition to the proposed changes.

The Indigenous Advisory Council Chair, Mr Warren Mundine, warned: 'We all know that from history, when you let people off the chain in regard to bigotry, then you start having problems'.⁹¹

87 H Aston, 'Few back changes to race laws', *Sydney Morning Herald*, 1 August 2014. At <http://www.smh.com.au/federal-politics/political-news/few-back-change-to-race-laws-20140731-3cx9a.html> (viewed 8 October 2014).

88 *Open Letter: Australia must retain strong and effective protections against racial vilification*, 10 December 2013. At <http://www.hrlc.org.au/wp-content/uploads/2013/12/Open-Letter-Racial-Vilification-Protections.pdf> (viewed 9 October 2014).

89 'Joint Statement: Leaders reject proposed changes to the RDA' (Media Release 18 March 2014). At <http://nationalcongress.com.au/joint-statement-race-hate-laws/> (viewed 7 October 2014).

90 Human Rights Law Centre, 'Aboriginal, ethnic, religious and community groups: Australia must retain strong and effective protections against racial vilification' (Media Release, 10 December 2013). At <http://hrlc.org.au/aboriginal-ethnic-religious-and-community-groups-australia-must-retain-strong-and-effective-protections-against-racial-vilification/> (viewed 9 October 2014).

91 Warren Mundine says changes would let bigots "off the chain", *The Guardian Online*, 26 March 2014. At <http://www.theguardian.com/world/2014/mar/26/warren-mundine-urges-tony-abbott-dont-change-discrimination-act> (viewed 9 October 2014).

2.8 Latest developments

On 5 August 2014, the Prime Minister announced that the draft Bill had been withdrawn.⁹²

The Australian Government has indicated that they do not intend to change s 18C.

I commend the Prime Minister for heeding the overwhelming community response to keep the strong measures against racism and racial vilification set out in the RDA.

I want to reiterate that any future changes regarding s 18C need to involve a number of considerations.

I have already spoken about the clarity that could be brought to the legislation to address the misconception that s 18C deals with 'profound and serious effects, not... mere slights'.⁹³

However, any future changes must also acknowledge that the RDA in its current form represents law that has been applied by the courts and administered by the Commission for over two decades and has successfully resolved hundreds of complaints.⁹⁴

Given the capacity for such changes to impact upon the human rights of all Australians,⁹⁵ particularly vulnerable groups such as Aboriginal and Torres Strait Islander peoples, extensive community consultation is critical.

I look forward to engaging further with any future proposal but cannot impress enough that any changes involving s 18C require much further discussion and justification.

92 T Abbott, G Brandis, J Bishop, Joint Press Conference (Canberra, 5 August). At <http://www.pm.gov.au/media/2014-08-05/joint-press-conference-canberra-0> (viewed 9 October 2014).

93 Australian Human Rights Commission, note 34, para 3.

94 Australian Human Rights Commission, note 34, para 3.

95 Australian Human Rights Commission, note 34, para 3.

2.9 Conclusion

It is difficult to have conversations about racism in Australia, particularly as it concerns the treatment of Aboriginal and Torres Strait Islander peoples. Our nation is still on a long path to healing and reconciling the past and there is still a lot of hurt and blame that can conflate these discussions.

However, we must begin to have these discussions as a nation, difficult as that might be. Part of this involves recognising that racism is a serious problem in Australia.

This conversation must also involve recognition, and ownership, of our past. Not for the purposes of laying blame, but to understand where we have come from, and the foundations of modern day prejudices.

Finally, this discussion must involve consideration of what needs to be done about the impact and prevalence of racism and racial discrimination. Laws are not enough to tackle racism and racial discrimination.

We also need education and awareness raising campaigns to promote a greater understanding of and respect for human rights and responsibilities. There are several campaigns that are leading examples of the education that is needed in this area.

This year I commended the beyondblue 'Invisible Discriminator'⁹⁶ campaign for accurately capturing the experience of our people when it comes to subtle racism. The health implications tell us that however subtle, racism can have very real and very devastating effects for Aboriginal and Torres Strait Islander peoples.

National campaigns such as 'Racism. It Stops with Me'⁹⁷ are also a key component of combating racism. This campaign now has approximately 300 organisational supporters, from across local and state governments, business, sporting organisations, the arts and civil society.

I hope that continued support for campaigns such as these will go some way to influencing how our actions can affect others in society, including Aboriginal and Torres Strait Islander peoples.

To move towards reconciliation and healing as a nation, rather than focusing on the 'right to be a bigot',⁹⁸ we need to educate all Australians about how our colonial past affects our modern day prejudices. We also need to educate Australians about the impact of racial discrimination on Aboriginal and Torres Strait Islander peoples.

This is already happening. The response from the community on the proposed s 18C changes shows a renewed vigour about the importance of racial harmony and a willingness to engage in this conversation.

Taking ownership of this issue together, as a nation, is the only way to achieve this change.

96 beyondblue, *Stop.Think.Respect: The Invisible Discriminator*, <http://www.beyondblue.org.au/resources/for-me/stop-think-respect-home/the-invisible-discriminator> (viewed 4 October 2014).

97 Australian Human Rights Commission, note 62.

98 Commonwealth, *Parliamentary Debates*, Senate, 24 March 2014, p 1797 (George Brandis, Minister for the Arts and Attorney-General).

Chapter 3:

Native title - Year in review

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3.1 Introduction

Section 209 of the *Native Title Act 1993* (Cth) (Native Title Act) requires the Aboriginal and Torres Strait Islander Social Justice Commissioner to report to Parliament on the impact of the Native Title Act on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples.

For 20 years, successive Aboriginal and Torres Strait Islander Social Justice Commissioners have identified the key human rights challenges and opportunities for Aboriginal and Torres Strait Islander peoples as they relate to native title, rights to land and water, and land justice.

Access to and enjoyment of our lands, territories and resources are not only a foundation of our identity as Aboriginal and Torres Strait Islander peoples, but also our social and economic development.

This Chapter will provide a brief overview of the significant issues that have arisen in native title during the reporting period (1 July 2013 to 30 June 2014). It considers the impact of these events on the exercise and enjoyment of our human rights as Aboriginal and Torres Strait Islander peoples.

As outlined in Chapter 1, this past year has been a time of great upheaval in Indigenous Affairs, and in particular in relation to program delivery. Despite this, programs relating to native title have remained relatively stable during this time. However, there have been a number of government reviews undertaken which may inform change in the future.

Building relationships and promoting effective engagement, both between governments and Aboriginal and Torres Strait Islander communities, has been a cornerstone of my advocacy.

With this in mind, my past reports have addressed the following issues concerning Aboriginal and Torres Strait Islander peoples' enjoyment and access to land, resources and waters:

- Lateral violence in native title
- Giving effect to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration)
- The importance of Aboriginal and Torres Strait Islander peoples' governance over land, territories and resources
- Meaningful and effective engagement and the issues of consultation, cooperation and free, prior and informed consent
- The legacy of the *Mabo (No 2)*¹ decision
- Ongoing challenges and deficiencies within the native title system
- Significant decisions in native title and land rights law
- Economic development and resource management.²

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

2 For access to previous Social Justice and Native Title Reports see: Australian Human Rights Commission, Publications – *Aboriginal and Torres Strait Islander Social Justice*, <https://www.humanrights.gov.au/publications/aboriginal-and-torres-strait-islander-social-justice?source=our-work> (viewed 8 October 2014).

3.2 Key trends in native title over the last five years

The Federal Court has identified the following trends in native title in the last five years:

- A decline in the number of new applications filed each financial year from a peak of 322 in 1995-96 to 40 new claims in 2013-14.
- A significant reduction in the median time for resolution of applications determined in 2013-14 compared to previous years,³ from an average of 12 years and 11 months in June 2013 to an average of two years and six months as at 30 June 2014.⁴
- A marked increase in the number of applications resolved by consent from 2010-11 onwards, from nine in 2008-09, to 10 in 2010-11, 28 in 2012-13 and 60 consent determinations in 2013-14.
- A decrease in the number of claims in mediation and an increase in the number of claims in active case management. Of the 416 claimant applications active as at 30 June 2011, 189 were referred to mediation and 177 were in case management before the Court. Of the 325 claimant applications active as at 30 June 2014, 28 were referred to mediation and 214 claims are in active case management before the Court.⁵

These figures show that the primary focus of the native title system has moved to the resolution of claims.

3 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 July 2014.

4 I Irving, Acting National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 19 August 2013.

5 I Irving, note 4.

3.3 Federal reviews of native title

There are a number of reviews into the operation of the native title system that have recently been undertaken. These include the:

- Australian Law Reform Commission's Inquiry into aspects of the Native Title Act, which is focused on connection requirements and the impact of authorisation and joinder provisions of the Native Title Act on access to justice.⁶
- Deloitte's Access Economics review of the roles and functions of Native Title Service Providers and Native Title Representative Bodies.⁷
- Taxation of Native Title and Traditional Owner Benefits and Governance Working Group.⁸
- Indigenous Land Corporation and Indigenous Business Australia Review by Ernst & Young.⁹

These reviews provide an appropriate opportunity to comprehensively consider how the system functions, and uncover any changes required in order to deliver outcomes for Aboriginal and Torres Strait Islander peoples. It is my hope that once these areas are identified that the necessary changes will be forthcoming.

I have previously welcomed the reviews.¹⁰ They are intended to clarify some of the sticking points in the native title system. However, they need to be coordinated so as to maximise the social, economic and cultural benefit to Aboriginal and Torres Strait Islander peoples. In the meantime, long identified problems with the Native Title Act remain in place. It is anticipated that when these reviews are finalised, there will be a period of consultation with native titleholders and other key stakeholders.¹¹

While I welcome such consultation, it is important that Aboriginal and Torres Strait Islander peoples are meaningfully included in this process and that their views are taken into account. It is also vital that, after years of inquiry and consultation, there is then action to address the concerns identified.

(a) Australian Law Reform Commission Inquiry

On 3 August 2013, then Attorney-General the Hon Mark Dreyfus QC MP announced that the Australian Law Reform Commission (ALRC) would commence an Inquiry into the operation of the Native Title Act. The Inquiry was tasked with reporting on particular areas of native title, specifically in regard to:

- connection requirements

6 Australian Law Reform Commission, *Review of the Native Title Act 1993* (IP 45). At <http://www.alrc.gov.au/publications/native-title-ip-45> (viewed 8 October 2014).

7 Deloitte Access Economics, *Review of roles and functions of Native Title Organisations*, <http://www.deloitteaccesseconomics.com.au/our-services/economic-analysis-and-policy/native+title/about+the+review> (viewed 8 October 2014).

8 Australian Government, The Treasury, *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government* (2013). At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title> (viewed 8 October 2014).

9 Ernst & Young, *Review of the Indigenous Land Corporation and Indigenous Business Australia* (2014). At http://www.dpmc.gov.au/publications/docs/EY_final_report_review_of_ILC_IBA.PDF (viewed 8 October 2014).

10 M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), p 105. At <https://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013> (viewed 8 October 2014).

11 N Scullion, Minister for Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 31 August 2014, p 5.

- any barriers imposed by the Native Title Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.¹²

The ALRC was required to consult broadly with government, Aboriginal and Torres Strait Islander groups, industry and other relevant groups, and invited submissions on the topic, which were due by 14 May 2014. Below, I set out some of the options for reform that were submitted as a part of this review.

The ALRC is expected to release a discussion paper with a second call for submissions, which will set out some proposals for reform, before submitting its final report to Government by March 2015.¹³

(i) Connection and continuity requirements

The connection requirements set out in the Native Title Act will be a focal point of the ALRC review, which will specifically look at particular options for reform, namely:

- whether there should be a presumption of continuity
- clarifying the definitions of 'traditional' and 'connection'
- whether native title rights can include rights of a commercial nature
- whether substantial interruptions to connection can be disregarded.¹⁴

Section 223 of the Native Title Act sets out the requirements that Aboriginal and Torres Strait Islander claimants have a connection with the land or waters that is the subject of the claim as a result of their traditional law and customs.¹⁵ The effect of this requirement has been to limit the enjoyment of our rights to native title, setting up onerous standards that minimise the impact of European settlement on Aboriginal and Torres Strait Islander peoples.

Establishing native title then is often a very stressful process that involves Aboriginal and Torres Strait Islander people going to extensive lengths to prove their identity and connection to country.¹⁶

I have consistently advocated for reforms that do not require a physical connection to the land, but rather traditions that are identifiable through time, so as to ensure that the current system is applied fairly and justly.¹⁷ My submission to the ALRC Inquiry also recommended that the Native Title Act be amended so that it is consistent with the Full Federal Court's ruling in *De Rose Hill v South Australia No 2*, which removed the requirements for a physical connection.¹⁸

I have advocated for reforms to establish a presumption of continuous connection in favour of native title claimants once the registration threshold has been met. This will remove the current high standards established in *Yorta Yorta v Victoria* (Yorta Yorta),¹⁹ requiring Aboriginal and Torres Strait Islander claimants to

12 M Dreyfus, *Terms of Reference – Review of the Native Title Act 1993* (8 October 2013). At <http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/ReviewoftheNativeTitleAct1993-finaltermsofreference-3August2013.PDF> (viewed 11 September 2014).

13 Australian Law Reform Commission, *Review of the Native Title Act - at a glance* (2014). At <http://www.alrc.gov.au/native-title-act-infosheet> (viewed 8 October 2014).

14 Australian Law Reform Commission, 'ALRC seeks input into Inquiry into the native title act', (Media Release, 20 March 2014). At <http://www.alrc.gov.au/news-media/media-release/alrc-seeks-input-inquiry-native-title-act> (viewed 8 October 2014).

15 *Native Title Act 1993* (Cth), s 223.

16 M Gooda, *Submission to the Australian Law Reform Commission Review of the Native Title Act* (14 May 2014), p 11. At: <https://www.humanrights.gov.au/submissions/alrc-review-native-title-act-1993> (viewed 8 October 2014).

17 M Gooda, above.

18 *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

19 *Yorta Yorta v Victoria* (2002) 214 CLR 422.

demonstrate a continuity of their laws and customs from colonisation to the present.

The expression that continuity be 'substantially uninterrupted' has not been settled and resulted in the courts requiring a literal continuous connection that ignores the impact of European settlement.²⁰

As the case involving the Larrakia people demonstrates, even relatively minimal interruptions, where the culture and traditions are subsequently revitalised, is not sufficient to establish claims of native title.²¹ It is for this reason that this issue needs further clarification, as reforms that shift the evidentiary burden of proof to respondents would not in itself be enough to overcome the connection and continuity requirements as set by Yorta Yorta.²²

I welcome the opportunity for greater consideration of the connection and continuity requirements within the context of the current system.

(ii) Ensuring consistency with international human rights standards

The international human rights system provides significant guidance on how governments can give effect to the human rights of Indigenous peoples to access and enjoy their traditional lands, territories and resources in line with existing international human rights standards.

These are contained within numerous instruments as ratified by Australia, such as the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and the *International Covenant on the Elimination of all Forms of Racial Discrimination* (ICERD). The Declaration also sets out the minimum standards for the enjoyment of human rights of Aboriginal and Torres Strait Islander peoples.

My Native Title reports from 2010-2012 have consistently called for the Declaration to guide the work in native title, with particular reference to the principles of self-determination; free, prior and informed consent; and, good faith negotiations.²³ This has been supported by various human rights bodies:

- In 2010, the United Nations Committee on the Elimination of Racial Discrimination expressed concern regarding the extreme evidentiary burden placed on Indigenous peoples.²⁴
- In 2009, then Special Rapporteur on the rights of Indigenous peoples, James Anaya, noted the incompatibility of the continuity and connection tests with the Declaration and other international instruments.²⁵

Any changes considered by the ALRC Inquiry should ensure that these reforms are consistent with the human rights instruments both ratified and supported by the Australian Government.

20 Justice A M North & T Goodwin, *Disconnection - the Gap between Law and Justice in Native Title, A proposal for reform* (Paper to the 10th Annual Native Title Conference, Melbourne, 2009), p 7; See also M Gooda, note 16.

21 *Risk v Northern Territory* (2007) 240 ALR 75.

22 *Risk v Northern Territory* (2007) 240 ALR 75.

23 For access to previous Social Justice and Native Title Reports see: Australian Human Rights Commission, *Publications - Aboriginal and Torres Strait Islander Social Justice*, <https://www.humanrights.gov.au/publications/aboriginal-and-torres-strait-islander-social-justice?source=our-work> (viewed 8 October 2014).

24 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD/C/AUS/CO/15-17&Lang=En (viewed 8 October 2014).

25 J Anaya, *Addendum - The situation of indigenous peoples in Australia*, Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to the Human Rights Council 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/CountryReports.aspx> (viewed 8 October).

(b) Deloitte Access Economics review

In December 2012, the then Labor Government commissioned Deloitte Access Economics to review the roles and functions of Registered Native Title Bodies Corporate (RNTBC), Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs).²⁶

The Australian Government released the final report of the Deloitte Review on the 21 May 2014.²⁷ The report provides a comprehensive account of the current native title system with particular emphasis on the need to strengthen both the capacity and governance of native title organisations in order to maximise greater social and economic opportunities for Aboriginal and Torres Strait Islander peoples.

The review made a series of findings relating to RNTBCs, NTRBs and NTSPs as follows:

- These bodies will continue to play a key role in the native title space both in pre and post determination contexts in the foreseeable future and should continue to be supported.²⁸
- Additional funding should be allocated to provide RNTBs with a basic level of support, and this could be achieved through a re-prioritisation of existing funds within the native title system.²⁹
- RNTBCs need initial transitional funding that secures independence and ongoing funding to allow them to meet their compliance and governance requirements.³⁰
- These bodies need to shift from a program delivery function to a fee for service model.³¹
- The chronic lack of capacity experienced, particularly by RNTBCs, constrains the effectiveness of native title bodies and the subsequent benefits to stakeholder groups.³²
- The recognition process for NTRBs and NTSPs could be removed or streamlined.³³
- There is a need for greater accountability and transparency concerning the role of private agents.³⁴

(i) Social and economic benefits of native title

The Deloitte review identified the native title system as an instrument with the potential to realise long term social and economic benefits for Aboriginal and Torres Strait Islander peoples, consistent with the Government's agenda of getting kids to school, adults to work and safe communities, and with Closing the Gap objectives. As the Council of Australian Governments has previously identified, the native title system presents as an opportunity to secure real and practical opportunities for Aboriginal and Torres Strait Islander peoples.³⁵

26 Australian Government Department of the Prime Minister and Cabinet, *Native Title Organisations Review*, http://www.dpmc.gov.au/PUBLICATIONS/native_title_review_2014/index.cfm (viewed 8 October 2014).

27 Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (2014), pages 1-4. At <http://www.deloitteaccessconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review> (viewed 8 October 2014).

28 Deloitte Access Economics, above, p 1, para 7.

29 Deloitte Access Economics, above, page 22, para 6 and page 24, para 1.

30 Deloitte Access Economics, above, p 22, para 1.

31 Deloitte Access Economics, above, p 30, para 2.

32 Deloitte Access Economics, above, p 2, para 3.

33 Deloitte Access Economics, above, p 4, para 4.

34 Deloitte Access Economics, above, p 4, para 7.

35 COAG Standing Council on Federal Financial Relations, *National Indigenous Reform Agreement* (2012), p 7. At http://www.federalfinancialrelations.gov.au/content/national_agreements.aspx (viewed 1 October 2014).

The review found that a system that is not functioning well could actually run counter-productive to the achievement of these broader policy objectives.³⁶

Part of addressing these issues is to respond to the considerable growth in the native title system over the last 20 years. It has evolved sizably since it was introduced. There are now more than 250 determined native title claims and 120 organisations responsible for holding and managing native title benefits.³⁷ With this in mind, it is vital that native title organisations are equipped to respond to the needs of all stakeholders, particularly Aboriginal and Torres Strait Islander peoples.

This presents a key opportunity for Aboriginal and Torres Strait Islander communities to realise the original 'beneficial intent' of the native title system as set out in the preamble of the Act.

Increased capacity and funding, together with better coordination of claims processes across state and federal lines are some of the improvements that will help realise the full enjoyment of our native title and associated social and economic benefits.

Legislative reform is another key feature in this process. However, significant changes need to happen in order to unlock the benefits of native title and associated socioeconomic benefits for Aboriginal and Torres Strait Islander peoples.

(ii) Private agents

I also welcome aspects of the report that aim to minimise the negative impact of private agents in the native title space.³⁸ Whilst services that provide legal, anthropological and commercial advice in this area are indispensable, they can also create an environment of undue stress for Aboriginal and Torres Strait Islander peoples. The introduction of mechanisms that call for greater transparency and accountability of these actors will be a welcome addition to the native title system.

The Government has said it will 'consider the findings of the review and respond at an appropriate time'.³⁹ It is my hope that the Government will take seriously the reforms identified in the review, and respond as needed.

(c) Taxation of Native Title and Traditional Owner Benefits and Governance Working Group

In my last report, I signalled that the Australian Government had established the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group (Native Title Working Group) on 18 March 2013.⁴⁰

The purpose of this group was to explore the tax treatment of native title payments and how these can benefit Aboriginal and Torres Strait Islander communities.⁴¹ Specifically, this also meant examining options to strengthen governance and sustainability for Indigenous Australians.⁴²

On 1 July 2013, the Native Title Working Group delivered its report outlining its recommendations to the

36 Deloitte Access Economics, note 27, page 1, para 4.

37 Minister for Indigenous Affairs, 'Native Title Organisations Review Released', (Media Release, 21 May 2014). At <http://nigelscullion.com/media-hub/indigenous-affairs/native-title-organisations-review-released> (viewed 8 October 2014).

38 Deloitte Access Economics, note 27, pages 4, 17-18.

39 Minister for Indigenous Affairs, 'Review highlights need for changes to native title organisations', (Media Release, 21 May 2014). At <http://minister.indigenous.gov.au/media/2014-05-21/review-highlights-need-changes-native-title-organisations> (viewed 8 October 2014).

40 M Gooda, note 10, p 210.

41 Australian Government, The Treasury, note 8.

42 Australian Government, The Treasury, above, p 5.

Australian Government. On 3 August 2013, the Australian Government released its response to the Working Group's recommendations, which gave their in-principle support⁴³ subject to further consultations.

The recommendations of the Native Title Working Group include:

- establishing a new not-for-profit body with income tax exempt status, called an Indigenous Community Development Corporation (ICDC) for use by Aboriginal and Torres Strait Islander communities
- regulating private agents involved in negotiating native title agreements
- considering establishing a statutory trust that would hold native title benefits where there was no other appropriate entity
- considering a process for the registration of native title agreements
- clarifying that the native title holding community is the beneficial holder of native title benefits.⁴⁴

(i) The Indigenous Community Development Corporation Model

The Indigenous Community Development Corporation Model (ICDC model) was a core consideration of the *Native Title Working Group Report*.⁴⁵ I have also previously reported on the idea of an ICDC model in both the *Native Title Report 2012* and the *Social Justice and Native Title Report 2013*.⁴⁶

This concept was a joint proposal of both the National Native Title Council (NNTC) and the Minerals Council of Australia (MCA)⁴⁷ as a not for profit entity with income tax exempt and Deductible Gift Recipient Status (DGR). Chief among its aims is to provide long term economic benefits to Aboriginal and Torres Strait Islander peoples by investing in community development.⁴⁸ This is achieved through the way in which the ICDC receives, generates, manages and applies land related funds.⁴⁹

An entity such as the ICDC could provide an alternative way of managing native title payments and benefits. This would take away difficulties in the way the tax system treats different types of payments and the status of entities receiving those payments.⁵⁰

Recognising the potential of a mechanism such as this requires a strong emphasis on governance, as well as the principles of self-determination and participation.

43 D Bradbury, J Macklin MP and M Dreyfus, 'Benefitting Indigenous Communities through Native Title Reform', (Media Release, 3 August 2013). At: <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/150.htm&pageID=003&min=djba&Year=&DocType> (viewed 8 October 2014).

44 Australian Government, The Treasury, note 8, p 6.

45 Australian Government, The Treasury, above, pages 25-27.

46 M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), pages 28-29. At https://www.humanrights.gov.au/sites/default/files/document/publication/native_title_report_2012.pdf (viewed 8 October 2014); M Gooda, note 10, p 210.

47 B Wyatt, *Native Title and Indigenous Affairs Policy* (Speech delivered at the Native Title Conference, 2014). At <http://50years.aiatsis.gov.au/native-title-and-indigenous-affairs-policy> (viewed 8 October 2014).

48 Australian Government, The Treasury, note 8, pages 25-27.

49 Australian Government, The Treasury, above, p 26.

50 Australian Government, The Treasury, above, p 39.

(d) Indigenous Land Corporation and Indigenous Business Australia Review

On 9 December 2013, the Government announced that they had commissioned consulting firm Ernst & Young to conduct the independent review of the Indigenous Land Corporation (ILC) and Indigenous Business Australia (IBA).⁵¹

The purpose of this review was to look at the two organisations to explore the effectiveness of the two statutory land and economic development bodies and how they are working to provide outcomes for Aboriginal and Torres Strait Islander peoples.⁵² This included exploring how duplication and overlap can be avoided and identifying what the optional structures are for driving economic development.⁵³

At the outset, the Government indicated that the Indigenous Land Account would not be a focus of the review. Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, stated earlier this year that this iconic fund needed to be maintained to 'provide a stable revenue stream to fund Indigenous land acquisition and management activities'.⁵⁴

A total of 26 public submissions were received before the deadline for submissions closed on 24 January 2014 and Ernst and Young delivered their report to the Government on 17 February 2014.⁵⁵

Key themes relating to native title in the report indicated:

- concerns over the speed of native title settlements
- that government or the IBA/ILC could enhance the level of coordination and investment in native title settlements across all Commonwealth government agencies and statutory authorities to better enable business development opportunities from native title agreements.⁵⁶

I note the mixed findings from the report, providing support for leaving the structures as two standalone organisations, or amalgamating the two.⁵⁷ The references to amalgamation echo the recent *National Commission of Audit* report which stressed the need for them to merge.⁵⁸

The Government is currently considering the report and is engaging with stakeholders on this issue. Updates on the implementation of the IBA and ILC review will be provided in the next *Social Justice and Native Title Report*.

51 Minister for Indigenous Affairs, 'Review into Indigenous Business Australia and Indigenous Land Corporation', (Media Release, 1 December 2013). At <http://www.nigelscullion.com/media-hub/indigenous-affairs/review-indigenous-business-australia-and-indigenous-land-corporation> (viewed 8 October 2014).

52 Minister for Indigenous Affairs, above.

53 Indigenous Business Australia, *Review of Indigenous Business Australia and the Indigenous Land Corporation*, <http://www.iba.gov.au/2014/01/review-indigenous-business-australia-indigenous-land-corporation> (viewed 8 October 2014).

54 Minister for Indigenous Affairs, 'Minister Scullion: Ernst & Young review ILC/IBA', (Media Release, 3 May 2014). At <http://www.indigenous.gov.au/minister-scullion-ernst-young-review-ilciba> (viewed 8 October 2014).

55 Ernst & Young, note 9, p 67.

56 Ernst & Young, above, p 71.

57 Ernst & Young, above.

58 T Shepherd, P Boxall, T Cole, R Fisher & A Vanstone, *Towards Responsible Government*, Australian Government, National Commission of Audit (2014), vol 2, ch 10.3, p 49. At <http://www.ncoa.gov.au/report/appendix-vol-2/10-3-indigenous-programmes.html> (viewed 8 October 2014).

3.4 Budget reforms

The Australian Government priority to reduce national debt has meant that savings measures have been applied broadly, and include the Indigenous Affairs portfolio. As outlined in Chapter 1, under the new Indigenous Advancement Strategy, the Australian Government has allocated \$4.8 billion over four years for all Indigenous programs which will be managed by the Department of Prime Minister and Cabinet (PM&C).

Cuts of 4.45% to funding, including to Indigenous legal policy and advocacy activities, have been made to Aboriginal and Torres Strait Islander policy and programs as a result of these changes.⁵⁹ However, the area of native title has been relatively exempt from these cuts and has actually received enhanced funding to carry out the native title respondent funding scheme.

The Australian Government provides funding to a number of the elements of the native title system, including the administrative framework, the Native Title Tribunal, the Federal Court, as well as its own participation in native title proceedings.⁶⁰ However, it also recently reinstated the native title respondent funding scheme (NTRFS), which had been cut by the former Labor Government in 2013.

This scheme is administered by the Attorney-General's Department with the aim of improving the participation of non-claimant parties and the effective resolution of matters in native title proceedings.

The Australian Government will provide \$2.2 million over two years to cover native title respondent costs. Taking into account additional funding approved by the Attorney-General, this will represent an injection of \$3.2 million over two calendar years.⁶¹

These funds are in line with the *Native Title (Assistance from Attorney-General) Amendment Guideline 2013* which commenced on 1 January 2014. This sets out broad eligibility tests for legal financial assistance as stipulated by s 213A of the Native Title Act.⁶²

I welcome actions to balance interests in the native title claims sector, provided that this funding assists the efficient resolution of claims for native title holders. I am hopeful that the current Australian Government reviews will bring a much needed increase to aid for native title claimants and representative bodies.

59 G Brandis, Attorney General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 4 September 2014, p 1.

60 T Calma, *Native Title Report 2007*, Australian Human Rights Commission (2007), p 81. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntrreport07/pdf/ntr2007.pdf (viewed 16 September 2014).

61 G Brandis, note 59.

62 *Native Title (Assistance from Attorney General) Amendment Guideline 2013* (Cth), s 213A. At <http://www.comlaw.gov.au/Details/F2013L02084> (viewed 8 October 2014).

3.5 Reinstating legislation to amend the Native Title Act

The Native Title Act fundamentally recognises the human rights of Aboriginal and Torres Strait Islander peoples to their land, waters and resources. The preamble to the Native Title Act makes it clear that the objectives of the legislation are to:

rectify the consequences of past injustices by the special measures contained in the Act ... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.⁶³

Despite these sentiments, the numerous amendments following the *Wik* decision have diminished the 'beneficial' intent of the Native Title Act,⁶⁴ and the extent to which the native title rights have been realised.

These changes have gone against the legal and moral foundation of the Native Title Act which, importantly, is aimed to 'redress historic inequities rather than to compound ones sanctioned by earlier acts'.⁶⁵

There have been a number of attempts in recent years to rebalance the native title framework to reform some of the more onerous aspects of the legislation, namely relating to:

- reversing burden of proof 'connection' requirements
- enabling historical extinguishment of native title to be set aside
- requiring stakeholders to negotiate in 'good faith'
- establishing a presumption of continuous connection
- streamlining the processes for Indigenous Land Use Agreements ILUAs.⁶⁶

I have consistently reported on attempts to reform the Native Title Act in my annual *Social Justice and Native Title reports*. In last year's report, I recommended that the *Native Title Amendment Bill 2012* (Cth), which lapsed at the dissolution of the 43rd Parliament on 5 August 2013, be reintroduced, and its passage supported through Parliament.⁶⁷

The amendments sought were consistent with the right to self-determination, and to enjoy and benefit from our culture, as set out through various international human rights instruments, such as the Declaration.⁶⁸

Unfortunately, I have been informed that the Government does not have any current plans to reintroduce the *Native Title Amendment Bill 2012* (Cth) while awaiting the outcome of various consultation processes into the native title system.⁶⁹

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

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

65 P Keating, 'Time to revisit Native Title Laws', *The Australian*, 1 June 2011. At <http://www.theaustralian.com.au/national-affairs/opinion/native-title-laws-retain-some-inequality/story-e6frgd0x-1226066685042> (viewed 8 October 2014).

66 M Gooda, note 16, para 33.

67 M Gooda, note 10, Recommendation 3.12.

68 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 3, 11 and 31.

69 G Brandis, Attorney General, note 59, p 3.

There have also been further efforts during the last reporting period to reinstate legislation to change the Native Title Act. On 4 March 2014, Greens Senator Rachel Siewert reintroduced the *Native Title Amendment (Reform) Bill 2014* (Cth) (Amendment Bill) which proposed reforms similar to those sought in 2011 and again in 2012.⁷⁰ These reforms are currently being considered by the Australian Law Reform Commission (ALRC) Inquiry, alongside submissions made by the Australian Human Rights Commission to introduce amendments to the Native Title Act as contained in the 2012 Amendment Bill.⁷¹

It is my hope that, following the completion of the reviews and inquiries being undertaken in this area, the Australian Government seriously considers introducing legislation that includes the proposed amendments contained in the *Native Title Amendment Bill 2012* (Cth).

This Bill represents key reforms that, if unaddressed, will continue to be the main challenges for Aboriginal and Torres Strait Islander peoples in realising their human right to native title.

70 Commonwealth, *Parliamentary Debates*, Senate, 4 March 2014, p 699 (R Siewert).

71 M Gooda, note 16.

3.6 Tax Laws Amendment Acts 2013

The *Tax Laws Amendment (2012 Measures No 6) Act 2013* (Cth) and *Tax Laws Amendment (2013 Measures No 2) Act 2013* (Cth) were passed by the Australian Parliament on the 25 and 28 June 2013.⁷² The measures amend the Income Tax Assessment Acts to clarify that payments received as a result of the extinguishment or impairment of native title are not subject to income tax, including capital gains tax.⁷³ The amendments also confirm that:

- Native title payments or benefits to Indigenous persons or an ‘indigenous holding entity’ are income tax exempt.⁷⁴
- Indigenous holding entities are defined as being distributing bodies or trusts whose beneficiaries can only be Indigenous persons or distributing bodies.⁷⁵
- ‘Registered charities’ be included in the definition of Indigenous holding entities and are income tax exempt for native title payments made to either Indigenous persons or Indigenous holding entities.⁷⁶
- Capital gains tax exemptions apply for losses or gains made by an Indigenous person or Indigenous holding entity as a result of a transfer, cancellation, surrender or creation of a trust with respect to native title rights.⁷⁷

These changes will be applied retrospectively to native title payments provided on or after 1 July 2008.⁷⁸

I welcome the passage of these amendments into law. They will provide greater certainty to Aboriginal and Torres Strait Islander peoples when they are negotiating native title agreements.

⁷² See *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (Cth).

⁷³ See *Tax Laws Amendment (2012 Measures No. 6) Bill 2012* (Cth).

⁷⁴ Explanatory Memorandum, *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (Cth), para 11.10

⁷⁵ Explanatory Memorandum, *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (Cth), para 11.11

⁷⁶ Explanatory Memorandum, *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (Cth), para 11.14

⁷⁷ Explanatory Memorandum, *Tax Laws Amendment (2012 Measures No. 6) Bill 2012* (Cth), para 1.34.

⁷⁸ *Tax Laws Amendment (2013 Measures No. 2) Bill 2013* (Cth), Schedule 11, Part 2, section 59-50.

3.7 Native title developments in Queensland

During the reporting period, significant developments impacting on native title and its enjoyment by Aboriginal and Torres Strait Islander peoples took place in Queensland. These developments relate to changes to legislation affecting Crown lands, Aboriginal lands and mining.

(a) Land and Other Legislation Amendment Bill 2014 (Queensland)

One of the most significant changes involves amendments to the *Land Act 1994* (Queensland) through the *Land and Other Legislation Amendment Act 2014* (Queensland) in May 2014. Under these changes, agricultural and pastoral leases, being tenure where native title has not been extinguished, may be changed to rolling leases.⁷⁹

Leases will now be extended for the term of the original lease; consequently, a 30 year lease will become a 60 year lease, and so on.⁸⁰ Whilst the extension cannot be longer than the original term of the lease, there are no limits to the amount of times the lease can be extended.⁸¹ This means that the land can be held in perpetuity, continually re-extended as long as the requirements of the legislation are met.

There is some contention as to whether the leases constitute ‘future acts’ and therefore would require native title holders to be both notified and compensated.⁸² However, the Government position is that no procedural rights are afforded to native title holders in these circumstances (as the extensions do not constitute future acts).

(b) Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Queensland)

The Queensland Parliament passed the *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Queensland), with the operative provisions of the legislation coming into force on 1 January 2015.⁸³

The legislation is particularly significant because it allows for land that has been previously managed and controlled by Aboriginal and Torres Strait Islander peoples to be transferred to freehold ownership. Notably, these changes only provide for the option to convert to freehold if deemed appropriate by the relevant community.⁸⁴

These measures have been established to introduce the option of freehold ownership to Aboriginal and Torres Strait Islander communities,⁸⁵ providing the same property rights afforded to all other Queenslanders.

This has implications for 34 Aboriginal and Torres Strait Islander shire and regional councils where the type of

79 A Cripps, Minister for Natural Resources and Mines, Correspondence to M Gooda, Aboriginal and Social Justice Commissioner, 26 August 2014, p 6.

80 Queensland, *Parliamentary Debates*, Legislative Assembly, 2014, p 712 (A Cripps).

81 Queensland, *Parliamentary Debates*, Legislative Assembly, 2014, p 712 (A Cripps).

82 I Kuch, CEO North Queensland Lands Council, Correspondence to M Gooda, Aboriginal and Social Justice Commissioner, 6 August 2014, p 3.

83 See *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld), ch 2, p 14.

84 See *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Act 2014* (Qld), Part 2A.

85 See *Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014*, Explanatory note.

land tenure under the *Lands Act 1994* (Queensland) is a Deed of Grant in Trust (DOGIT). DOGIT land is held in trust by Aboriginal and Torres Strait Islander councils and bodies corporate for the benefit of local Aboriginal and Torres Strait Islander communities.⁸⁶ However, because DOGIT land is held 'on trust' for communal benefit, it cannot be sold for the purposes of individual home ownership or commercial purposes.⁸⁷

The current changes open up possibilities not currently provided to Aboriginal and Torres Strait Islander peoples on DOGIT land.

Whilst I welcome the creation of options to freehold title and the benefits that might follow, I am concerned that these significant changes:

- require the surrender of native title without compensation other than that provided by individual ILUAs, not from government
- limit the requirements to consult with native title owners and stakeholders to trustees and not government
- might have implications for breaking up Aboriginal communities and diminishing their land ownership.

While I acknowledge the government consultations that took place between December 2012-April 2013 with various Indigenous land councils, NTRBs and PBCs,⁸⁸ I am concerned that the government has not heeded the recommendation to engage all community members.⁸⁹

These measures do not appear to have sufficiently taken into account the need to adequately consult with, or provide awareness to, Aboriginal and Torres Strait Islander communities themselves.

I am disappointed that government has not heeded the recommendations from the Queensland Parliamentary Committee for Agriculture, Resources and the Environment which indicated that an engagement program across the 34 communities, with elders, traditional owners, native title bodies and councils was important.⁹⁰

Transition to freehold title will also raise significant questions around ensuing consultation and consensus processes for Aboriginal and Torres Strait Islander communities.

The Queensland government have indicated that as these changes are optional, consultation processes are a matter for individual trustees and native titleholders in DOGIT communities.⁹¹ I hope that the requirements for consultation are met,⁹² that beyond evidence of local publication and public meetings,⁹³ the relevant Minister⁹⁴ ensures that processes are consistent with requirements articulated in the Declaration around Indigenous participation in decision-making.

I have previously set out in my *Social Justice and Native Title Reports* that our participation must be conducted in a manner informed by free, prior and informed consent, where:

86 *Lands Act 1994* (Qld), div 3.

87 M Geritz, *Freehold title within indigenous communities: the evolution of native title*, Clayton Utz Insights (2014). At http://www.claytonutz.com/publications/edition/15_may_2014/20140515/freehold_title_within_indigenous_communities_the_evolution_of_native_title.page (viewed 8 October 2014).

88 Australian Government, *The Treasury*, note 8, p 16.

89 Queensland Government, *Queensland Government Response on the Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014*, Report No 44 (2014). At <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2014/5414T5787.pdf> (viewed 8 October 2014).

90 Queensland Government, above.

91 A Cripps, note 79, p6.

92 Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld), s 321.

93 Aboriginal and Torres Strait Islander Land (Providing Freehold) and Other Legislation Amendment Bill 2014 (Qld), s 32L(5).

94 The Minister for Natural Resources and Mines.

- *Free* means there must be no force, intimidation, manipulation, coercion or pressure by any government or company.
- *Prior* means we must be given enough time to consider all the information and make a decision.
- *Informed* means we must be given all relevant information to make decisions. This must be in a language that is easily understood. We must have access to independent information and to experts on law and technical issues.
- *Consent* means that we must be allowed to say ‘yes’ or ‘no’ according to our own decision-making process.⁹⁵

In considering the impact of these changes, I am mindful of the wider implications for Aboriginal and Torres Strait Islander native title rights. Whilst individual home ownership can be seen as a great aspiration in its own right, it should not come at the cost of separating communities, or diminishing Aboriginal land ownership at the expense of native title rights.

Aboriginal and Torres Strait Islander people are required by legislation to hold any initial conversion to freehold title rights; this may subsequently be transferred to non-Aboriginal persons over time.⁹⁶

It is currently unclear what compensation, if any, is available to our communities in this process. There was suggestion from government of compensation being a matter for each discrete community and their respective ILUA.⁹⁷ This raises significant questions around whether the grant of freehold title is a form of compensation in lieu of monetary compensation⁹⁸ and whether this will be sufficient.

I would suggest that this conversion of native title rights into freehold land is a future act of the government, which may attract compensation in accordance with the Native Title Act. I say “at the expense of native title rights” because communities can only access freehold rights on the same footing as all other Queenslanders if they forfeit their unique rights to native title. It is for this reason that any consultation process held by the trustee with native title holders makes it abundantly clear what this process means for native title rights.

I can already see that these changes are likely to create some disagreement within and between communities and government.

As soon as possible, the government needs to clarify their position as to whether the conversion of land to freehold tenure attracts compensation from government, as distinct from ILUAs, before this legislation comes into effect in 2015.

95 See Human Rights Based Approach Portal, *UN Practitioners’ Portal on Human Rights Based Approaches to Programming*, <http://hrbaportal.org/> (viewed 8 October 2014).

96 I Kuch, note 82, p3.

97 A Cripps, note 79, p7.

98 I Kuch, note 82, p3.

(c) Quandamooka

I have previously written about the Quandamooka peoples in the *Native Title Report 2011*.⁹⁹ On 4 July 2011, after 16 long years, the Federal Court recognised their rights to native title over land and waters in North Stradbroke Island and Moreton Bay.¹⁰⁰

It was thought that this consent determination would bring about the end of 70-years of sand mining on North Stradbroke Island by 2025.¹⁰¹ However, a decision by the current Queensland Government to extend mining until 2035 reverses the decision of the previous Government.¹⁰²

The decision is disappointing for the Quandamooka people who are currently challenging this before the High Court.¹⁰³

I will be watching this case closely and will provide an update on developments in future *Social Justice and Native Title reports*.

99 M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011). At <http://www.humanrights.gov.au/publications/native-title-report-2011-chapter-2-lateral-violence-native-title-our-relationships-over#fn120> (viewed 8 October 2014).

100 *Delaney on behalf of the Quandamooka People vs State of Queensland* [2011] FCA 741

101 Minister for Environment, 'North Stradbroke Island Reference Group – community planning for the future', (Media Release, 25 August 2011). At <http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=76228> (viewed 8 October 2014).

102 J Kelly, 'Newman vows to push ahead with sand mining on Nth Stradbroke island', *ABC News*, 13 August 2013. At <http://www.abc.net.au/news/2013-08-20/call-for-federal-regulation-of-sand-mining-on-stradbroke-island/4899368> (viewed 8 October 2014).

103 AAP, 'Stradbroke Island mine fight in High Court', *SBS*, 6 June 2014. At <http://www.sbs.com.au/news/article/2014/06/06/stradbroke-island-mine-fight-high-court> (viewed 8 October 2014).

3.8 South Australia

The South Australian case of *De Rose Hill* is one of the most important native title developments of the reporting year, with potential national implications.¹⁰⁴

(a) De Rose Hill compensation case

I first raised the compensation application by native title holders in De Rose Hill, South Australia, in my *Native Title Report 2011*.

This case began on 9 December 1994 when 12 Yankunytjatjara and Pitjantjatjara or Antikirinya people made the original application on their own behalf with Nguraritja people for over 1865 square kilometres of land at De Rose Hill Station in South Australia.¹⁰⁵

A decision by the Full Court of the Federal Court on 8 June 2005 awarded non-exclusive native title to the Nguraritja people over certain parcels of the land, but not those where native title had been extinguished.¹⁰⁶

On 9 June 2011 the native title holders for De Rose Hill subsequently commenced a compensation claim for these supposedly extinguished native title rights. This application to the Federal Court concerned three specific parcels of land: a freehold lot, a car park and a public road (the Sturt Highway).¹⁰⁷

On 1 October 2013, the Federal Court delivered its landmark judgement in this matter, ordering the payment of compensation to the Nguraritja claim group. This decision is significant: after 20 years of the operation, it is the first time compensation has been awarded for the extinguishment of native title rights and interests under the Native Title Act. The previous case of *Jango* was the first time that a compensation case was litigated to judgement; however this was ultimately unsuccessful, failing on threshold issues.¹⁰⁸

(i) Compensation: legal entitlements and ‘just terms’

The legal right to compensation for native title holders for the extinguishment or impairment of their native title is extremely limited. As outlined in the *Mabo* case, there is no general common law ‘right to compensation’ for this extinguishment unless explicitly expressed by a statute.¹⁰⁹

However, compensation is available for acts of native title extinguishment occurring after the introduction of the *Racial Discrimination Act 1975* (Cth) (RDA) on 30 October that year, but not for acts of government prior to this time.

This effectively limits a great number of acts of extinguishment prior to this time, where compensation may have been payable to Aboriginal and Torres Strait Islander peoples. Compensation may be available, either as outlined in the Native Title Act, or in combination with both the Native Title Act and the RDA.¹¹⁰

104 *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290. At <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2005/2005fcafc01110> (viewed 8 October 2014)

105 Australian Institute of Aboriginal and Torres Strait Islander Studies, *De Rose v State of South Australia*. At http://www.aiatsis.gov.au/_files/ntru/resources/resourceissues/derose.pdf (viewed 8 October 2014).

106 *De Rose v South Australia No 2* (2005) 145 FCR 290; See South Australian Native Title Services, ‘De Rose Hill authorises first native title compensation application’ (2011) 44 *Aboriginal Way*, p 1.

107 See *De Rose v State of South Australia* [2013] FCA 988.

108 T Calma, note 60, p 167.

109 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 61.

110 T Calma, note 60, ch 8, p 170.

The Native Title Act provides a mechanism for compensating Aboriginal and Torres Strait Islander peoples where native title has been extinguished or impaired.¹¹¹ This entitlement arises when certain 'acts' are taken by the Commonwealth, State or Territory such as through:

- enacting legislation
- a grant of license or permits
- execution of executive power, or
- the creation of any interest in land or waters.

The legislation also sets out that the criteria for compensation must be on 'just terms' and consist of a monetary payment¹¹² for any 'loss, diminution, impairment or other effect the act has had on native title rights and interests'.¹¹³

The requirement for 'just terms' means that any compensation paid must not exceed any amount likely to be paid in the event that the extinguishing act was the compulsory acquisition of a freehold estate.¹¹⁴

Following the High Court decision in *Wik Peoples v The State of Queensland (1996)*,¹¹⁵ compensation is generally payable by liable Commonwealth, State or Territory governments for acts of extinguishment on or before 23 December 1996.

In the *De Rose Hill* case, the South Australian government were held to be liable for an undisclosed amount for a claim brought by the Ngururitja people for parcels of land on which, but for the prior extinguishing acts of government, they would have held native title.¹¹⁶

Whilst the parties entered into a confidential compensation agreement, a figure was reached in light of the freehold value of extinguished areas and ultimately endorsed as representing 'just terms' by the Federal Court.¹¹⁷ Importantly, although the State did not accept the valuation as necessarily an indication of the value of native title rights and interests lost,¹¹⁸ the parties ultimately agreed on an amount for compensation after some negotiation.¹¹⁹

(ii) Implications

Within the current Australian legal framework, and in the absence of any progress towards implementing the Declaration, there are very limited avenues for Aboriginal and Torres Strait Islander people to hold government to account for their human rights.

The *De Rose Hill* case may be an example of the positive realisation of the rights of Aboriginal and Torres Strait Islander peoples to land and waters within the native title system; however, it is one case among many. Whilst the case sets an encouraging example for potential future compensation claims under the Native Title Act, it provides limited clarity on the legal principles for calculating compensation.

111 *Native Title Act 1993* (Cth), s 61.

112 *Native Title Act 1993* (Cth) ss 51(5)-(6).

113 *Native Title Act 1993* (Cth), s 51(1).

114 *Native Title Act 1993* (Cth), s 51A.

115 See *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.

116 P Turner, A Wilton and A Rogers, 'De Rose v State of South Australia' *Johnson Winter & Slattery Lawyers* (2014). At http://www.jws.com.au/_files/f/6159/PGT%20-%20De%20Rose%20v%20State%20of%20South%20Australia.pdf (viewed 8 October 2014).

117 *De Rose v State of South Australia* [2013] FCA 988, para 71.

118 *De Rose v State of South Australia* [2013] FCA 988, para 69.

119 *De Rose v State of South Australia* [2013] FCA 988, para 71.

The confidential nature of the *De Rose Hill* matter meant that the amount of compensation was redacted from the court transcript, with Mansfield J holding that:

The disclosure of that figure, where there are presently no decisions addressing in a reasoned way how compensation under the NTA is to be assessed, may create expectations either on the part of other applicants or on the part of other States or Territories in other matters which private consensual agreement should not produce. In addition, the disclosure of that figure may be seen to set a tariff for other compensation.¹²⁰

The case therefore provides little judicial guidance or principles as to how compensation should be assessed in the future. Whilst the Court did not want to impede the negotiation of satisfactory outcomes in similar compensation cases, limited information about either the amount of compensation or method of calculation is not helpful for potential future claimants.

As I suggested to the ALRC inquiry into native title earlier this year, it might be helpful to consult with those involved in the *De Rose Hill* matter to establish legal principles which may shed some light on:

- what constitutes ‘just terms’ for the extinguishment of native title and
- what process should be established to determine which acts are compensable.¹²¹

Following the *De Rose Hill* decision, it is unclear whether this will lead to a raft of compensation matters being brought before the Federal Court. However, with only 37 compensation applications¹²² filed some two decades after the introduction of the native title system, this is unlikely to be the case.

The additional requirement for claimants to prove that they would have held native title over particular areas of land in the absence of any particular extinguishing act is another barrier faced by Aboriginal and Torres Strait Islander peoples. The onerous nature of s 223 of the Native Title Act, and the notion of ‘traditional’, has significantly limited the scope of Aboriginal and Torres Strait Islander people’s rights to native title¹²³.

(iii) Compensation under International Human Rights Law

As previous Social Justice Commissioners have outlined before me, the right to compensation for the deprivation of native title has its basis in various aspects of international human rights law.¹²⁴

Article 5(d) of the ICERD provides that, to arbitrarily deprive a particular race or ethnic group of their rights to property, is a breach of international law.

The principle of compensation is further embedded by the 2007 adoption of the *Declaration* by the United Nations General Assembly, with article 28 providing that:

(1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

120 *De Rose v State of South Australia* [2013] FCA 988, para 82.

121 M Gooda, note 16, p 17.

122 J Whittaker and T Bunker, ‘De Rose v South Australia – the First Approved Native Title Compensation Determination’ *Corrs Chambers Westgarth* (2013). At <http://www.corrs.com.au/publications/corrs-in-brief/de-rose-v-south-australia-the-first-approved-native-title-compensation-determination> (viewed 8 October 2014).

123 M Gooda, note 99.

124 M Gooda, above, p 16.

(2) Unless otherwise freely agreed upon by the parties concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

While the *De Rose Hill* case is a realisation of these rights, it is an example of the very limited circumstances where accessing these human rights has been successful within the native title framework. Despite being drafted as ‘beneficial legislation’, this framework has produced very limited human rights outcomes in terms of compensation for native title extinguishment to Aboriginal and Torres Strait Islander people. The Native Title Act, as it stands, particularly after the 1998 amendments, can only be used by Aboriginal and Torres Strait Islander people to access very limited and specific rights.

(iv) Snapshot of compensation applications

As indicated above, there have been a total of 37 compensation applications filed since the introduction of the Native Title Act in 1994.¹²⁵

There are 5 active compensation matters (Table 3.1), with 32 matters otherwise being determined, dismissed, discontinued or withdrawn during this time (Table 3.2).

Table 3.3 provides a snapshot of active compensation matters since 2007.

Table 3.1: Number of active complaints¹²⁶

There are currently five (5) active native title compensation applications before the Court. Please see Table 1 (below) for details of compensation activity since 2007.

30 June 2007	30 June 2008	30 June 2009	30 June 2010	30 June 2011	30 June 2012	30 June 2013	30 June 2014
11	9	7	7	8	9	9	5

125 National Native Title Tribunal, *Compensation Application register*, <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> (viewed 8 October 2014).

126 K Wilson, Native Title Case Manager, Federal Court of Australia, Correspondence to K Gray, Adviser to the Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 September 2014.

Table 3.2: Number of resolved/discontinued complaints ¹²⁷

Table 2 (below) provides information on the outcome of 32 compensation applications as resolved by the Court to date.

Determined	2
Discontinued/Withdrawn	21
Dismissed	9
Total	32

Table 3.3: Key developments in native title 2013-14

Overview

This appendix reviews the following key developments in native title over the reporting period from 1 July 2013 to 30 June 2014 (Reporting Period):

Native title determinations

Native title determinations for the period from 1 July 2013 to 30 June 2014¹²⁷

Native title consent determinations	60
Litigated native title determinations	7
Unopposed (non-claimant) native title determinations	1
Native title claims referred to mediation	23

Registration of Indigenous Land Use Agreements (ILUAs)

ILUA registration for the period 1 July 2013 to 30 June 2014¹²⁸

Body corporate agreements	67
Area agreements	68
Total	135

¹²⁷ K Wilson, above.

¹²⁸ I Irving, note 3, p 1.

¹²⁹ R Webb, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 July 2014.

Chapter 4:

Creating safe communities

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4.1 Introduction

The overrepresentation of Aboriginal and Torres Strait Islander peoples as both victims and offenders in the criminal justice system remains one of the most glaring disparities between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians. Indeed, in my view it is one of the most urgent human rights issues facing Australia.

I find it shocking that, as a society, we 'do better at keeping Aboriginal people in prison than in school or university'.¹ The Aboriginal re-imprisonment rate (58% within 10 years) is actually higher than the Aboriginal school retention rate from Year 7 to Year 12 (46.5%).² Nationally, Aboriginal and Torres Strait Islander adults are 15 times more likely to be imprisoned than non-Indigenous Australians,³ while around half of the young people in juvenile detention facilities are Aboriginal and Torres Strait Islander.⁴ It is also simply unacceptable that Aboriginal and Torres Strait Islander women are hospitalised for family violence related assault at 31 times the rate of non-Indigenous women.⁵

The key to addressing the overrepresentation of Aboriginal and Torres Strait Islander peoples as both victims and offenders is safer communities. This means creating communities where violence is not tolerated and where victims have access to the entire spectrum of support services. It also means trying to prevent crime and violence from happening in the first place.

Throughout my term as Aboriginal and Torres Strait Islander Social Justice Commissioner, I have made a priority of addressing this issue by advocating for justice reinvestment and justice targets. It is now five years since my predecessor, Dr Tom Calma AO, first called for justice reinvestment and justice targets for Aboriginal and Torres Strait Islander peoples.⁶

In particular, we have learnt a great deal about applications for justice reinvestment over the past five years. Justice reinvestment, once a radically new and unfamiliar idea, is now an influential part of criminal justice reform discourse in Australia.

This chapter will report on developments towards justice reinvestment in Australia, including ground-breaking community initiatives in Bourke and Cowra. It will also highlight some of the challenges for implementing justice reinvestment based on both the Australian context and international experience.

The concept of justice targets has also garnered significant interest, although unfortunately this has not yet resulted in government action. This chapter will extend the case for justice targets by presenting a range of options for developing and tracking targets.

1 C Cunneen, 'Time to arrest rising Aboriginal prison rates' (2013) 8 *Insight Issue* 22, p 24. At: <http://justicereinvestment.unsw.edu.au/node/34> (viewed 1 October 2014).

2 C Cunneen, 'Time to arrest rising Aboriginal prison rates', above.

3 Australian Bureau of Statistics, *Imprisonment Rates*, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4517.0main+features322013> (viewed 1 October 2014).

4 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2013* (2013), p vii. At <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129545393> (viewed 1 October 2014).

5 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage 2011*, Productivity Commission (2011), pp 4.123 - 4.124. At <http://www.pc.gov.au/gsp/overcoming-indigenous-disadvantage/key-indicators-2011> (viewed 1 October 2014).

6 T Calma, *Social Justice Report 2009*, Australian Human Rights Commission (2009), ch 2. At: <https://www.humanrights.gov.au/publications/social-justice-report-2009> (viewed 1 October 2014).

The lack of concerted government action on justice issues has frustrated Aboriginal and Torres Strait Islander peoples, as well as others involved in the criminal justice sector. This frustration and determination to challenge inaction has been the catalyst for a newly formed National Justice Coalition, comprising of Aboriginal and Torres Strait Islander and non-Indigenous peak bodies and leaders in the area of criminal justice and victim support. This chapter will report on the development of the National Justice Coalition and its priorities. Just as the Close the Gap Campaign for Indigenous health equality has gained broad-based support and government action, I am optimistic that the National Justice Coalition can be a similar circuit breaker in advocating for safer communities.

4.2 Justice reinvestment in Australia five years on

In the past five years, it has been encouraging to see so many different people and groups embrace justice reinvestment. However, in all of this enthusiasm we have seen some confusion around what justice reinvestment actually involves. Some academics have warned of the potential pitfalls if justice reinvestment becomes a:

catch-all buzz word to cover a range of post release, rehabilitative, restorative justice and other policies and programs and thus lose both any sense of internal coherence and the key characteristic that it involves a redirection of resources.⁷

In my view, it is not necessarily detrimental that advocates in Australia are already trying to adapt justice reinvestment for the Australian context. What works in the United States can be a powerful catalyst for action, but will require thoughtful adaptation to the Australian context. Nonetheless, if the Australian brand of justice reinvestment strays too far from the evidence we may lose some of the strength of this approach.

There is now a growing body of literature on justice reinvestment,⁸ so this chapter will only briefly summarise some of the key principles and processes of justice reinvestment to provide clarity and context.

(a) Justice reinvestment explained

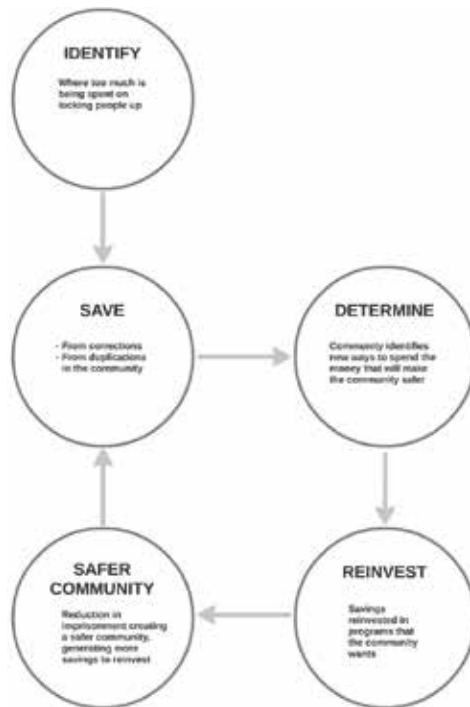
Justice reinvestment is a powerful crime prevention strategy that can help create safer communities by investing in evidence based prevention and treatment programs. Justice reinvestment looks beyond offenders to the needs of victims and communities.

Justice reinvestment diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities. Figure 4.1 illustrates the primary process of justice reinvestment.

7 D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment' (2012) 37(2) *Alternative Law Journal* 96, p 97.

8 J Austin and G Coventry, 'A Critical Analysis of Justice Reinvestment in the United States and Australia' (2014) 9(1) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice* 126; University of New South Wales, *Australian Orientated Sources*, <http://justicereinvestment.unsw.edu.au/node/31> (viewed 1 October 2014).

Figure 4.1:
Justice reinvestment



Justice reinvestment was developed in the United States by George Soros' Open Society Foundation. There are currently 30 states in the United States pursuing justice reinvestment at the state level, and at least 18 counties in six states undertaking justice reinvestment at the local level.⁹

While justice reinvestment approaches vary depending on the needs of communities, justice reinvestment does have a consistent methodology around analysis and mapping. This work is the basis for the justice reinvestment plan.¹⁰ Justice reinvestment approaches also require commitment to localism and budgetary devolution¹¹ and are only made possible through political bipartisan support.¹²

The success of justice reinvestment in the United States has been well documented.¹³ Moves to justice reinvestment are also underway in the United Kingdom.¹⁴

9 Australian Justice Reinvestment Project, *Newsletter* (July 2014). At <http://justicereinvestment.unsw.edu.au/sites/justicereinvestment.unsw.edu.au/files/AJRP%20Newsletter%20July%202014.pdf> (viewed 1 October 2014).
 10 Council of State Governments Justice Center, *Justice Reinvestment*, <http://csgjusticecenter.org/jr/> (viewed 1 October 2014).
 11 D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', note 7, p 97.
 12 D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', above, p 97.
 13 Council of State Governments Justice Center, *Facts and Trends*, <http://csgjusticecenter.org/justice-reinvestment-facts-and-trends/> (viewed 1 October 2014).
 14 D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment' (2012), note 7, p 98.

(b) Developments towards justice reinvestment

Since 2009, justice reinvestment has been the subject of significant community advocacy. There are organised campaigns for justice reinvestment under way at the national level, as well as in New South Wales, Victoria, Western Australia, South Australia, the Northern Territory, Queensland and the Australian Capital Territory.¹⁵

Supporters include grass roots community members, service providers, academics, lawyers, Police and judges.

Importantly, we have also seen support from victims' groups. Prominent victims' advocate Ken Marslew, has made supportive comments about justice reinvestment in the media:

Some people see it as a soft option, when in fact it is a very powerful tool. Some would be a little reluctant to see offenders have more money spent on them, but if we're going to look at the big picture we really need to develop justice reinvestment across our communities.¹⁶

Aboriginal and Torres Strait Islander victims' groups have also supported justice reinvestment.¹⁷

This wave of community support has been instrumental in placing justice reinvestment onto the political agenda. Justice reinvestment has been considered in at least six government inquiries in the past five years. In particular, the 2013 Senate *Inquiry into the Value of a justice reinvestment approach to criminal justice in Australia* received over 130 submissions.¹⁸ Table 4.1 contains a summary of all of these inquiries and their recommendations.

15 For Victoria see: Smart Justice Project, *Welcome to Smart justice*, <http://www.smartjustice.org.au/>; for Western Australia see: Deaths In Custody Watch Committee, *Build Communities Not Prisons Campaign*, <http://www.deathsincustody.org.au/build-communities-not-prisons-campaign>; for Queensland see: Project 10%, *Project 10%*, <http://www.project10percent.org.au/>; for the Australian Capital Territory see: Australian National University, Justice Reinvestment Forum: 2 August 2012, http://ncis.anu.edu.au/events/past/jr_forum.php (all pages viewed 1 October 2014).

16 C Heard, *The Future of Justice Reinvestment*, SBS TV (27 July 2013). At <http://www.sbs.com.au/news/article/2013/07/27/blog-future-justice-reinvestment> (viewed 1 October 2014).

17 Family Violence and Legal Services Prevention Services Victoria, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the value of justice reinvestment in Australia* (2013). At <http://www.fvpls.org/images/files/FVPLS%20Victoria%20-%20Justice%20Reinvestment%20Submission.pdf> (viewed 1 October 2014); See also North Australian Aboriginal Family Violence Legal Service, National Family Violence Prevention Legal Services, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the value of justice reinvestment in Australia* (2013). At http://www.nationalfvpls.org/images/files/National_FVPLS_Forum_-_Justice_Reinvestment_Submission.pdf (viewed 1 October 2014).

18 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index (viewed 1 October 2014).

Table 4.1: Government inquiries into justice reinvestment

Inquiry	Recommendations
<p>Parliament of Australia, Senate Legal and Constitutional Affairs Committee:</p> <p><i>Value of a justice reinvestment approach to criminal justice in Australia</i>¹⁹</p> <p>(2013)</p>	<p><i>Recommendation 1:</i> The committee recommends that the Commonwealth take a leading role in identifying the data required to implement a justice reinvestment approach and establish a national approach to the data collection of justice indicators.</p> <p><i>Recommendation 2:</i> The committee recommends that the Commonwealth make a commitment to sharing relevant data held by Commonwealth line agencies with justice reinvestment initiatives in other jurisdictions.</p> <p><i>Recommendation 3:</i> The committee recommends that the Commonwealth, State and Territory Governments recognise the importance of long term, sustainable funding for programs including adequate provision for robust evaluation.</p> <p><i>Recommendation 4:</i> The committee recommends that the Commonwealth consider the establishment of a justice reinvestment clearinghouse to compile, disseminate, and promote research and program evaluation in all communities.</p> <p><i>Recommendation 5:</i> The committee recommends that the Commonwealth adopt a leadership role in supporting the implementation of justice reinvestment, through the Council of Australian Governments.</p> <p><i>Recommendation 6:</i> The committee recommends that the Commonwealth commit to the establishment of a trial of justice reinvestment in Australia in conjunction with the relevant states and territories, using a place-based approach, and that at least one remote Indigenous community be included as a site. Further, the committee recommends that any trial actively involve local communities in the process, is conducted on the basis of rigorous justice mapping over a minimum time frame beyond the electoral cycle and be subject to a robust evaluation process.</p> <p><i>Recommendation 7:</i> The committee recommends that the Commonwealth provide funding for the trial of justice reinvestment in Australia.</p> <p><i>Recommendation 8:</i> The committee recommends that the Commonwealth, through the Standing Committee on Law and Justice, promote the establishment of an independent central coordinating body for justice reinvestment (roles outlined).</p>

19 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, above.

Inquiry	Recommendations
	<p><i>Recommendation 9:</i> The committee recommends that the Commonwealth refer to the Council of Australian Government justice targets for Aboriginal and Torres Strait Islander people as part of the Closing the Gap initiative, directed to reducing the imprisonment rate of Aboriginal and Torres Strait Islander people.</p> <p>A Minority Report was issued by Coalition Senators. While the Coalition Senators ‘warmly endorse the principles of justice reinvestment’,²⁰ they raised concerns around the lack of evidence base and possible over reach of the Commonwealth in the area of criminal law, which is traditionally the responsibility of the states and territories.</p>
<p>Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs:</p> <p><i>Doing Time –Time for Doing Report</i>²¹</p> <p>(2011)</p>	<p><i>Recommendation 40:</i> The Committee supports the principles of justice reinvestment and recommends that governments focus their efforts on early intervention and diversionary programs and that further research be conducted to investigate the justice reinvestment approach in Australia.</p> <p>The Australian Government accepted (in whole, in part or in principle) all of the Report’s recommendations.²²</p>

20 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Minority Report from Coalition Senators on the value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/d01 (viewed 1 October 2014).

21 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time –Time for Doing: Indigenous youth in the criminal justice system* (2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm (viewed 1 October 2014).

22 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time –Time for Doing*, above, p 36.

Inquiry	Recommendations
<p>Parliament of Western Australia, Community Development and Justice Standing Committee:</p> <p><i>Making our prisons work</i>²³</p> <p>(2010)</p>	<p><i>Recommendation 22:</i> The Committee recommends that as part of the implementation of the justice reinvestment strategies a mapping exercise be undertaken to identify those communities currently delivering the highest percentage of population to the prison system.</p> <p><i>Recommendation 23:</i> The Committee recommends that the government initiates a properly funded, evidence based, collaborative Justice Reinvestment strategy in one metropolitan and one regional ‘high stakes’ community identified by the recommended mapping exercise, as a pilot, to be evaluated against adequate performance measures. This pilot would measure the effectiveness of the role of each of the individual participating agencies as well as specific outcomes relating to the interagency collaboration on the ground.</p> <p><i>Recommendation 24:</i> The Committee recommends that government at the highest level charge a lead agency to establish the proposed pilot Justice Reinvestment strategy to:</p> <ul style="list-style-type: none"> – have an overarching responsibility for each of the agencies collaborating in the strategy insofar as their deliverables to the strategy are concerned; and – have control and be accountable for the pooled Justice Reinvestment budget.
<p>Parliament of New South Wales, Legal and Constitutional Affairs References Committee:</p> <p><i>Access to Justice</i>²⁴</p> <p>(2009)</p>	<p><i>Recommendation 21:</i> In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.</p>

23 Community Development and Justice Standing Committee, Parliament of Western Australia, *Making our prisons work: An inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies*, Report No. 6 (2010). At [http://www.parliament.wa.gov.au/parliament/commit.nsf/\(WebInquiries\)/6228E6A9C090FDB9482578310040D2B8?opendocument](http://www.parliament.wa.gov.au/parliament/commit.nsf/(WebInquiries)/6228E6A9C090FDB9482578310040D2B8?opendocument) (viewed 1 October 2014).

24 Legal and Constitutional Affairs References Committee, Parliament of New South Wales, *Access to Justice* (2009). At www.nswbar.asn.au/circulars/2009/dec09/access.pdf (viewed 1 October 2014).

Inquiry	Recommendations
<p>New South Wales Minister for Juvenile Justice, Strategic Review of the New South Wales Juvenile Justice System:</p> <p><i>Juvenile Justice Review Report</i>²⁵</p> <p>(2010)</p>	<p><i>Recommendation 52:</i> NSW Government adopt a Justice Reinvestment policy based on diverting funds that would otherwise be spent on additional juvenile justice centres, to preventative and early intervention programs that address the underlying causes of crimes in communities.</p> <p><i>Recommendation 75:</i> The NSW Government engage with Indigenous communities to develop long-term strategies to address the underlying causes of juvenile offending. Preventative and early intervention strategies are to be funded in local communities based on the Justice Reinvestment approach outlined in Recommendation 52.</p>

To date, the thinking around justice reinvestment in Australia has mainly been in relation to Aboriginal and Torres Strait Islander communities. There are persuasive arguments for trialling this approach in the Aboriginal and Torres Strait Islander contexts given the high levels of overrepresentation and disadvantage faced by these communities. The principles of a justice reinvestment approach include localism, community control and better cooperation between local services. These also align with what we know about human rights-based practice in Aboriginal and Torres Strait Islander service delivery.

Beyond these reasons, the reality is that if we were to map the locations with the highest concentrations of offenders, many of these locations would have very high numbers of Aboriginal and Torres Strait Islanders living in them.²⁶

(c) Community justice reinvestment initiatives

Governments have not yet adopted justice reinvestment in Australia. However, at the community level, we are seeing some very exciting work about what justice reinvestment could look like in Australia. This section will provide case studies for the Bourke Justice Reinvestment Project that I have been involved in, and for an innovative community research project in Cowra.

(i) Bourke Justice Reinvestment Project

Bourke is a small remote town in far western New South Wales with a population of nearly 3,000 people. 30% are Aboriginal and Torres Strait Islanders.²⁷ Like many similar communities, Bourke has a young population, high levels of unemployment and disengagement from education, and high imprisonment rates. Text Box 4.1 provides more detailed demographic information.

25 Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (April 2010). At http://www.djj.nsw.gov.au/pdf_html/publications/general/Juvenile%20Justice%20Review%20Report%20FINAL.pdf (viewed 1 October 2014).

26 D Brown, M Schwartz and L Boseley, 'The Promises of Justice Reinvestment', note 7, p 99.

27 Office of Communities, *Community Portrait, Bourke: A portrait of the Aboriginal community of Bourke, compared with NSW, from the 2011 and earlier Censuses*, Aboriginal Affairs NSW Government (2011). At <http://aboriginalaffairs.nsw.gov.au/wp-content/uploads/2013/09/130910-Community-Portrait-Bourke.pdf> (viewed 1 October 2014).

Text Box 4.1:

Snapshot of the Bourke Aboriginal community

Bourke is within the traditional lands of the Ngemba peoples - occupying the east bank of the Darling River around Bourke and Brewarrina. A recent mapping exercise identified the presence of Aboriginal people from over 20 language groups. The traditional owners, the Ngemba, are a minority alongside other major language groups including the Wanggamurra, Murrawari and Barkindji.²⁸

There is a marked gap between the life experiences of Aboriginal and Torres Strait Islander peoples and non-Indigenous residents. For instance:

- in 2011, the median income of Aboriginal and Torres Strait Islander adults living in Bourke was approximately \$416 per week, which was 39% less than the median income for all adults (\$678)²⁹
- 17% of the Aboriginal and Torres Strait Islander workforce were unemployed, compared with 2% of the non-Indigenous workforce in Bourke³⁰
- compared with non-Indigenous residents of Bourke of the same age, there were:
 - 31% fewer Aboriginal and Torres Strait Islander 15–19 year olds in education
 - 7% fewer Aboriginal and Torres Strait Islander 5–14 year olds in education.³¹

Bourke faces significant challenges in relation to community safety. According to the Bureau of Crime Statistics and Research (BOCSAR) the Bourke Local Government Area has consistently ranked highest in the state for the rate of recorded incidents of domestic violence, sexual assault and breach of bail in recent years.³²

Australian Bureau of Statistics (ABS) data in 2011 shows that out of a total 223 Aboriginal young people/young adults in the Bourke Local Government Area, almost a quarter (21%) were on remand or sentenced. This does not include others in contact with the criminal justice system, for instance, those charged and on bail, or those on non-custodial orders. Crimes identified with youth include:

- car related crimes (car theft, stealing from cars and breaking windows)
- breach of bail

28 A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW: a pilot study in Bourke and Lightning Ridge: Community Report November 2010*, Jumbunna Indigenous House of Learning University of Technology (2010). At <http://www.jumbunna.uts.edu.au/pdfs/research/FinalCommunityReportBLNov10.pdf> (viewed 1 October 2014).

29 A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

30 A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

31 A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, above.

32 Bureau of Crime Statistics and Research, *Trends and patterns in domestic violence assaults*, http://www.bocsar.nsw.gov.au/bocsar/bocsar_mr_bb61.html (viewed 1 October 2014).

33 A Vivian and E Schnierer, *Factors affecting crimes rates in Indigenous communities in NSW*, note 28.

34 NSW Ombudsman, *Inquiry into service provision to the Bourke and Brewarrina communities - A special report to Parliament under section 31 of the Ombudsman Act 1974* (2010). At http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0018/3348/SR_ServiceProvisionBourke_Dec10.pdf (viewed 1 October 2014).

- property crimes (criminal trespass, break and enter and malicious damage).³³

At the same time, service mapping shows there are over 50 community organisations servicing the area and 40 Police. The problems of service integration have been well documented by the New South Wales Ombudsman.³⁴

In February 2013, Bourke was the subject of the dubious headline, 'Bourke tops the list: more dangerous than any country in the world'.³⁵ While this media reporting lacked nuance and sensationalised issues in the community, there is no denying the depth of challenges that need to be addressed to create a safer community in Bourke.

The Aboriginal community leadership in Bourke has courageously stepped up to take on the challenge of creating a safer community. The Bourke Aboriginal Community Working Party (BACWP), led by Mr Alistair Ferguson, approached Just Reinvest NSW in October 2012. They told the organisation that they had been working over many years to build the capacity of the Aboriginal community. Based on this work, they felt ready to trial justice reinvestment to try and break the intergenerational cycle of offending and incarceration.

One of Bourke's strengths is the established local governance structure. Since 2002, the BACWP has been the peak representative organisation for the local Aboriginal community. The BACWP includes community members and representatives from 18 different organisations and receives funding from the New South Wales Government.

The Bourke Aboriginal leadership has also developed a comprehensive agenda for change. The strategy and structure is called Maranguka, a word from the language of the Ngemba Nation which, when translated into English, carries the meanings of 'to give to the people', 'caring' and 'offering help'. The first priority of Maranguka is to reduce Aboriginal contact with the criminal justice system.

I have visited Bourke four times since 2013 to undertake community consultations. I have been impressed with the significant community commitment to face these issues in an inclusive way for change.

The National Children's Commissioner, Megan Mitchell, has also been involved with these community consultations. I believe involvement from the National Children's Commissioner has helped to enable the young people to have a voice in this process. There was a watershed moment at the end of our community meeting in October 2013, when one of the Elders said that this was the first time she had seen the young people take part in a meeting like this, and how proud she was of them. You could see those young people sitting up straighter and feeling really valued and heard. This foundation of respect and inclusion will help broad community ownership of any justice reinvestment plan.

35 R Olding and N Ralston, 'Bourke tops list: more dangerous than any country in the world', *The Sydney Morning Herald*, 2 February 2013. At <http://www.smh.com.au/nsw/bourke-tops-list-more-dangerous-than-any-country-in-the-world-20130201-2dq3y.html> (viewed 1 October 2014).

As the project has evolved, the concept of 'collective impact' has come to inform the methodology for a justice reinvestment plan in Bourke. Text Box 4.2 provides a summary of collective impact.

Text Box 4.2: Collective impact explained

Collective impact can be summarised as diverse organisations from different sectors committing to a common agenda to solve a complex social problem. Collective impact is based on the premise that no single individual or organisation can create large-scale, lasting social change in isolation, and acknowledges that systematic social problems may only be solved by the coming together of organisations and programs.

There are five key elements underlying the collective impact model:

- a common agenda for change, including a shared understanding of the problem and joint approach
- shared measurement for alignment and accountability
- mutually reinforcing activities, whereby differentiated approaches are coordinated through a joint plan of action
- continuous communication focusing on building trust, and a backbone of support including the resources, skills and staff to convene
- the coordination of participating organisations.³⁶

Collective impact initiatives that have been employed around the world to address various social issues have shown substantive results. Some initiatives targeting complex social problems include those relating to education, healthcare, homelessness, the environment and community development.

Collective impact has synergies with community development and may translate the more conceptual elements of justice reinvestment to a practical level.

With the community support established, the BACWP, Just Reinvest NSW and the Australian Human Rights Commission developed a project proposal. In August 2013, this proposal was distributed to philanthropic, corporate and government sectors, and the Australian Human Rights Commission hosted an engagement meeting with funders and stakeholders.

This approach has been successful in establishing funding and in-kind support to commence the justice reinvestment project. Starting in March 2014, for a two-year period, a consortium of partners will work with, and alongside, the Bourke community to develop a watertight social and economic case for justice reinvestment to be implemented in Bourke. The Bourke Community, the champions and supporters of Just Reinvest NSW and others will then take that compelling case for change to the New South Wales Government for response and action.

36 Collective Impact Australia, *What is collective impact?*, <http://collectiveimpactaustralia.com/about/> (viewed 1 October 2014).

The Bourke Justice Reinvestment team now has the financial support and resources required to pursue this work. The team comprises of:

- **Executive Officer:** Alistair Ferguson is the Executive Officer in Community Development, and will be based in Bourke over the two-year project period. The position of Executive Officer is funded by the Vincent Fairfax Family Foundation and the Dusseldorp Skills Forum.
- **Facilitator:** Lend Lease is releasing Cath Brokenborough, Chair of Indigenous Engagement and Reconciliation, to fill the role of External Facilitator, and to be based in Bourke for three days per month.
- **Data Manager:** Aboriginal Affairs NSW has agreed to provide an in-house Data Manager to coordinate the collection and collation of data on Bourke.
- **Data Reference Group:** A Data Reference Group has been established, and includes representatives from the University of New South Wales (UNSW), the ABS and BOCSAR. Both the ABS and BOCSAR are providing data for this project. Aboriginal Affairs NSW will assist the Data Reference Group by conducting data relevant research for this project. As the project's university partner, UNSW will further provide advice on best practice responses to achieve the agreed shared measures.
- **Economic Modelling Team:** Over the next two years, KPMG will lead the work of costing the implementation of justice reinvestment in Bourke. KPMG will also produce an economic modelling of the cost savings for government observers.
- **Project Coordinator:** The project will be coordinated by Sarah Hopkins, Chair of Just Reinvest NSW.
- **Collective Impact Consultant:** Kerry Graham will provide advice on the collective impact framework.
- **New South Wales Police support:** Sergeant Mick Williams, a respected Aboriginal Police Officer and recipient of the Australian Police Medal, has been assigned to support the project and Maranguka more broadly.
- **Project Officer:** St Vincent De Paul has funded a Project Officer to assist Alistair Ferguson for a 12 month term.

The project team has engaged with a range of stakeholders in the community and is currently working with the Courts, Police and other community stakeholders to develop a number of initial circuit breakers. Proposals include an amnesty on warrants for young people in Bourke, and a set of protocols relating to the imposition of bail conditions and the circumstances in which bail will be breached by the Police. The initial focus of this collaborative work will lead to a dialogue on a variety of underlying issues that impact on imprisonment, such as housing, employment and education.

Why is the Bourke Justice Reinvestment Project different?

The Bourke Justice Reinvestment Project is an innovative example of communities taking control for positive change. So far, I have identified two key differences in the process.

Firstly, this project is not just about creating a community plan. In my many years in Indigenous Affairs, I have seen numerous community plans, often initiated by government. Despite good intentions, many of these plans languished because there was too much emphasis on the creation of the plan, and not enough on building the relationships and commonalities of the stakeholders. Actions always speak louder than words. Or in this case, actions and relationships speak louder than plans.

In the Bourke Justice Reinvestment Project, we are seeing this process reversed. It is no accident that we spent such a significant period of time building relationships and expectations before we commenced the project. This goodwill is allowing us to find common ground and shared goals, for instance, around the initial circuit breaker proposals. Developing from our projects, relationships and learning, will be a justice reinvestment plan. The crucial difference will be that it will be built on achievements, not just aspirations.

Secondly, the funding consortium for the Bourke Justice Reinvestment Project is different. While the government is providing support to the project, the major funding and pro bono services come from philanthropic and corporate sources. Government funding requirements can be complex and cumbersome to manage, while corporates and philanthropists recognise and reward innovation. Corporates and philanthropists can also be nimble enough to provide resources more quickly and flexibly. This approach gives the Bourke Justice Reinvestment Project the correct degree of support and flexibility over the next two years.

(ii) Cowra Justice Reinvestment Project

Researchers from the Australian National University, led by Dr Jill Guthrie, are conducting an exploratory study in Cowra to evaluate the theory, methodology and potential use of a justice reinvestment approach to addressing crime, and particularly the imprisonment of the town's young people.

Cowra is located in the central west region of New South Wales and has a population of 10,000 residents.³⁷ Aboriginal and Torres Strait Islander peoples make up 6.5% of the population.³⁸ While Cowra has not received the high level of attention for justice issues that Bourke has, Cowra has been described as an 'ideal case study site'³⁹ due to its stable population and middle range crime profile. Further to this, there is no direct economic benefit drawn from having a prison in the community. Although the impact of incarceration is far greater for Australian Indigenous populations, the study will focus on issues of incarceration of all young people from Cowra.

Dr Jill Guthrie explains the focus of the research:

This study is a conversation with the town to explore what are the conditions, the understandings, the agreements that would need to be in place in order to return those juveniles who are incarcerated in detention centres away from the town, back to the town, and to keep those juveniles who are at risk of incarceration from coming into contact with the criminal justice system.⁴⁰

Participation in the project by the Cowra community has enabled the team to identify issues underlying the incarceration of its young people. Specifically, community groups and organisations have been consulted throughout the project to assist in identifying effective alternatives to prison which ought to be invested in, such as holistic and long-term initiatives, and better integrated services. Young people will also be interviewed about their experiences and suggestions for change.

The project will continue until March 2016, having commenced in April 2013. The project's outcomes may lead to recommendations for addressing the levels of young people coming into contact with the criminal justice system. Similar to the Bourke Justice Reinvestment Project, the Cowra research will build an evidence base

37 Australian Bureau of Statistics, *2011 Census Quickstats*, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/POA2794?opendocument&navpos=220 (viewed 1 October 2014).

38 Australian Bureau of Statistics, *Cowra (A) LGA*, http://stat.abs.gov.au/itt/r.jsp?RegionSummary®ion=12350&dataset=ABS_NRP9_LGA&geoconcept=REGION&datasetASGS=ABS_NRP9_ASGS&datasetLGA=ABS_NRP9_LGA®ionLGA=REGION®ionASGS=REGION (viewed 1 October 2014).

39 'Rethinking the justice system', *Cowra Guardian*, 5 June 2013. At <http://www.cowraguardian.com.au/story/1552398/rethinking-the-justice-system/> (viewed 1 October 2014).

40 'Rethinking the justice system', *Cowra Guardian*, above.

for justice reinvestment that may be used for future advocacy.

(d) Challenges

Five years on, it is worth considering some of the challenges that lay ahead in adapting justice reinvestment for the Australian context, about how we move from the speculative to the practical and how we can learn from the international experiences.

(i) Learning from the United States

The United States is now nearly ten years down the track with justice reinvestment. Even in the five years since justice reinvestment was first introduced in Australia, the concept has evolved in the United States and there is now a growing body of evidence and analysis.

Australian researchers have also been applying a critical lens to the way justice reinvestment has developed in the United States, in the context of Australian adaptations. Text Box 4.3 provides a summary of the preliminary findings of this research project.

Text Box 4.3:

Australian Justice Reinvestment Project

The Australian Justice Reinvestment Project (AJR Project) is a two year Australian Research Council funded project which draws together senior researchers across the disciplines of law and criminology, to examine justice reinvestment in other countries, and to analyse whether such programs can be developed in Australia. Researchers recently visited six states (Texas, Rhode Island, North Carolina, Hawaii, South Dakota and New York) to examine implementation.

Researchers noted that 'justice reinvestment has come to mean different things in different contexts',⁴² with a mix of initiatives affiliated with the government funded Justice Reinvestment Initiative (JRI) of the Bureau of Justice Assistance, as well as newer local level initiatives.

At the state level, JRI:

tends to emphasise the passage of legislation enshrining general criminal justice reform and ... typically this is no place-based component and as such, the 'reinvestment in high-stakes' communities contemplated in the original vision of justice reinvestment is largely absent. Local level initiatives were more likely to take up a particular issue (eg housing for people involved with the criminal justice system).⁴³

Researchers note that 'worthwhile criminal justice reform is occurring under the justice reinvestment banner'⁴⁴ although it might be different to the original concept.

41 University of New South Wales, *Justice Reinvestment Project, Fact Sheet: JR in the USA – Fieldwork Reflections* (2014). At <http://justicereinvestment.unsw.edu.au/sites/justicereinvestment.unsw.edu.au/files/AJRP%20Fact%20Sheet%20Reflections%20CY.pdf> (viewed 1 October 2014).

42 University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

When we apply some of the research reflections to the development of justice reinvestment in Australia, what strikes me is that the community driven approach of justice reinvestment that we are seeing in Bourke is in fact closer to the pure principles of justice reinvestment than some of the initiatives that have emerged in the United States.

Despite the promise of a place-based approach with strong community engagement, the United States experience has become more focused on state-wide criminal justice reforms and investment into community corrections, such as probation and parole services. That is not to discount this approach or the reductions in imprisonment that have been achieved. However, to me at least, the real underlying power of justice reinvestment has always been in the place-based approach of community involvement and capacity building to create safer communities. In this respect, I believe we are on the right track in Australia.

The current lack of government initiatives in justice reinvestment in Australia may even be a blessing in disguise, as it gives the community the time to set up robust governance, sustainable systems and a 'watertight case' for justice reinvestment. With this in place, justice reinvestment will be on community, not government, terms.

Community governance, capacity and involvement are crucial in developing justice reinvestment plans with Aboriginal and Torres Strait Islander communities. Without these necessary elements, there is a risk that justice reinvestment will become yet another well-meaning plan that is rolled out by government but ultimately makes little difference.

This means that doing justice reinvestment well is not an overnight solution. It may take some time to see the returns of investing in social rather than corrective services. However, if communities are in control through this process, I believe the rewards will be deep seated and dramatic over time.

(ii) Bipartisan support for alternative to imprisonment

Bipartisan political support is unanimously cited as one of the greatest assets and challenges for justice reinvestment. All sides of politics need to put aside populist 'tough on crime' rhetoric and punitive policies in favour of an economically, socially and morally responsible approach to criminal justice issues.

Unfortunately, over the past five years we have seen a continuation and, in some cases, expansion of punitive policies. We have mandatory sentencing in New South Wales, Victoria, the Northern Territory, Western Australia, Queensland and South Australia.⁴⁵ Researchers also argue that tough bail legislation continues to contribute to imprisonment rates.⁴⁶

In the Northern Territory, we have seen some concerning legislation in relation to alcohol, which also reflects this mood of popular punitive policies. As I mentioned in last year's *Social Justice and Native Title Report*,⁴⁷ I am concerned about implications of Alcohol Mandatory Treatment and Alcohol Protection Orders. Both of these measures raise human rights concerns. Alcohol Protection Orders also have the potential to criminalise harmful alcohol use, and may lead to over policing of Aboriginal and Torres Strait Islander peoples, particularly those who are homeless.

At the same time, we have also seen considerable cuts to legal and prevention services. Aboriginal and Torres

43 University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

44 University of New South Wales, *Justice Reinvestment Project, Fact Sheet*, above.

45 Appendix 2 of this report has full details of the current mandatory sentencing legislation.

46 D Brown, 'Looking Behind the Increase in Custodial Remand Populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80. At <https://www.crimejusticejournal.com/article/view/84> (viewed 1 October 2014).

47 M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), ch 4. At <http://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013> (viewed 1 October 2014).

Strait Islander Legal Services are uniquely qualified to provide culturally secure services, and have the skills to ensure fair representation of Aboriginal and Torres Strait Islander defendants.

Punitive policies emerge because that is what politicians believe the public demands. There is no denying that there are times when heinous crimes do galvanise public opinion around punishment and deterrence, rather than rehabilitation and prevention. Indeed, I have always been clear that there are some people, including Aboriginal and Torres Strait Islander peoples, who need to be separated from society for a while.

However, I believe there is a serious need to reorientate the conversation towards safe communities. If we can create safer communities, this will lead to less offending which in turn means less people going to jail. This may show that imprisonment is not cost effective in these times of economic restraint. This, then, becomes something we can all agree on. Shifting this discourse is a major challenge but, as I will argue later in this chapter, I believe it is a challenge that we have the determination to tackle.

4.3 Justice targets

In the *Social Justice Report 2009*, Dr Tom Calma AO recommended that justice targets be added to the existing Closing the Gap targets. Like justice reinvestment, justice targets have now become one of the key advocacy points in addressing involvement with the criminal justice system.

In 2011, the Standing Committee on Aboriginal and Torres Strait Islander Affairs *Inquiry into Indigenous youth in the criminal justice system* recommended that justice targets be included in the Closing the Gap targets.⁴⁸ Justice targets were an area of further discussion at the July 2011 meeting of the Standing Committee of the Attorneys-General, where an agreement was made to:

- (a) significantly reduce the gap in Indigenous offending and victimisation and to accurately track and review progress with a view to reviewing the level of effort required to achieve outcomes
- (b) ask First Ministers to refer to COAG the possible adoption of justice specific Indigenous closing the gap targets, acknowledging that in many instances their relative occurrence are due to variable factors outside the justice system.⁴⁹

In August 2013, the Coalition committed to 'provide bipartisan support for Labor's proposed new Closing the Gap targets on incarceration rates'.⁵⁰ I welcome the Australian Government's position but unfortunately, we are yet to see any progress on this.

In my request for information for this report, the Minister for Indigenous Affairs Nigel Scullion provided the following response:

- The Government considered the inclusion of additional targets in the Closing the Gap framework, including a justice-related target. The Council of Australian Governments agreed to a new target on school attendance at its meeting in May this year.
- The Government does not support the development of more targets than have already been agreed at this time. It considers that the adoption of too many targets may result in a loss of impact and focus for the existing targets.
- The Government is focused on making a practical difference on the ground to the lives of Indigenous Australians. Getting children to school and adults to work is the most effective approach to improving community safety and reducing incarceration.
- The Government will seek to engage with State and Territory governments, Indigenous communities and other stakeholders about what else can be done to achieve better justice-related outcomes.⁵¹

I welcome the new targets on school attendance. However, I am severely disappointed that the Minister is backing away from his previous commitment to justice targets. As I will argue below, there remains a compelling case for holistic justice targets.

(a) What are justice targets and why are they important?

In policy terms, targets are 'goals which define the standard of success through assigning a value to an

48 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time –Time for Doing*, note 22.

49 Standing Committee of Attorneys-General, *Communique 21 & 22 July 2011* (2011). At http://www.lccsc.gov.au/agdbasev7wr/scj/documents/pdf/scag_communique_21-22_july_2011_final.pdf (viewed 1 October 2014).

50 N Scullion, 'Labor's Indigenous Affairs plans short on results' (Media Release, 8 August 2013).

51 N Scullion, *Correspondence to the Aboriginal and Torres Strait Islander Social Justice Commissioner*, 31 August 2014.

indicator that is expected to reach by a particular date'.⁵²

Over the past five years, justice targets have come to refer to targets to address the overrepresentation of Aboriginal and Torres Strait Islander peoples as both offenders and victims in the criminal justice system. For instance, the National Congress of Australia's First Peoples' Justice Policy recommended that targets be set to:

halve the gap in rates of incarceration for Aboriginal and Torres Strait Islander people [and] ...halve the rate at which Aboriginal and Torres Strait Islander people report having experienced physical or threatened violence in the past 12 months.⁵³

Targets, along with other performance measurement tools like performance indicators and benchmarking, are considered best practice in public policy development. Drawing on the perspective of developing health targets, the National Indigenous Health Equality Council states that:

Setting targets is one way to provide leadership, guidance and strategic direction. Targets can also be used effectively in monitoring progress towards strategic objectives.⁵⁴

Targets encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payer's money is being spent in a results-focused way.

There is also a compelling human rights argument to be made for justice targets. Progressive realisation is a human rights concept embedded in art 2 of the *International Covenant on Economic, Social and Cultural Rights* to which Australia is a party. It is recognised that achieving the full realisation of economic, social and cultural rights may take time, particularly for groups who have experienced historical patterns of discrimination. Progressive realisation means that States parties have an obligation to progressively work towards the realisation of a range of economic, social and cultural rights. Setting specific, time bound and verifiable targets is necessary to ensure progress is being made.

Many of these economic, social and cultural rights, for example the right to an adequate standard of living, the right to education, the right to work and the right to the highest standard of physical and mental health, are also linked to the underlying causes of crime.⁵⁵ Setting clear targets and timeframes for progression towards realisation of rights is one of the hall marks of the human rights-based approach.

(b) Lessons from Closing the Gap targets

There is much that we can learn from the process of setting targets, particularly in the health area, as part of Closing the Gap. I have been very supportive of the Closing the Gap targets for all the above reasons around accountability, strategic direction and leadership. While progress has been uneven in some areas, at the very least we know how we are tracking.

52 National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide* (2010), p 4.

53 National Congress of Australia's First Peoples, *National Justice Policy* (2013), p 16. At <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (viewed 1 October 2014).

54 National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, note 52, p 4.

55 Human Rights Law Centre, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the value of a justice reinvestment approach in Australia* (2013), p 10. At http://www.hrlc.org.au/wp-content/uploads/2013/04/HRLC_Submission_Justice_Reinvestment.pdf (viewed 1 October 2014).

Of course, it is not the targets in and of themselves that have led to changes but the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.

Targets have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians visible. This is exactly what needs to happen on the issue of overrepresentation with the criminal justice system as victims and offenders. I would argue that most Australians know little about this problem, but many would be alarmed at the statistics. Raising the profile of the issue through targets can help build sustained pressure for improvement.

Targets were not just pulled out of thin air. There was a considered and technical process which examined options for ambitious, but also realistic, targets. Based on this experience, the National Indigenous Health Equality Council has recommended the usage of the 'SMART' model for setting targets:

- **Specific**
- **Measurable**
- **Achievable**
- **Realistic**
- **Time-bound.**⁵⁶

The National Indigenous Health Equality Council has also identified the importance of consultation.⁵⁷ Aboriginal and Torres Strait Islander individuals and organisations had a central role in formulating health targets.

Finally, we have seen a high level of commitment to the Closing the Gap targets. The level of bipartisan support has been a significant key to the success of Closing the Gap.

(c) Options for developing justice targets

Part of the reason that justice targets have not been developed yet may be that setting targets can be both a complex and contested task. There are certainly challenges in data collection that would hamper measuring progress against targets.⁵⁸ Agreeing on the actual targets will also require stakeholder engagement and consensus building.

However, we are building on a strong base of empirical evidence to set justice targets. There is robust research identifying the underlying causes, or risk factors, for involvement with the criminal justice system. Dr Don Weatherburn argues that the key risk factors for Aboriginal and Torres Strait Islander involvement with the criminal justice system are:

- poor parenting, neglect and child abuse
- poor school attendance, performance and retention

56 National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, note 52, p 6.

57 National Indigenous Health Equality Council, *National Target Setting Instrument Evidence Based Best Practice Guide*, above, p 5.

58 National Congress of Australia's First Peoples, *National Justice Policy*, note 53.

- unemployment
- drug and alcohol abuse.⁵⁹

It is worth noting that these risk factors also apply to non-Indigenous individuals. However, research shows that Aboriginal and Torres Strait Islander people experience them at higher rates.⁶⁰ Dr Don Weatherburn argues that these risk factors form:

a vicious cycle. Parents exposed to financial or personal stress or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school. Poor school performance increases the risk of unemployment, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the chances of legitimate employment, while at the same time increasing the risk of drug and alcohol abuse.⁶¹

I quote this example not to paint a picture of despair, but to illustrate how the current range of targets in Closing the Gap will struggle to be achieved if we do not do something about the powerful undercurrents of the criminal justice system. For instance, you cannot expect to achieve targets around education, employment or health if you do not look holistically at justice risk factors as well. Similarly, you cannot expect to achieve a justice target, for instance, a reduction in the rate of imprisonment or victimisation, without addressing these underlying factors.

In last year's *Social Justice and Native Title Report*, I argued that justice targets:

need to include obvious indicators such as rates of imprisonment, recidivism and victimisation but to be really successful we need to look more holistically...I would like to see indicators such as involvement with the child protection system, use of diversionary programs, successful transitions to school and employment also considered.⁶²

(i) Overcoming Indigenous Disadvantage framework

Since 2002, the Steering Committee for Review of Government Services, within the Productivity Commission, has been regularly producing the *Overcoming Indigenous Disadvantage* report. These reports were originally commissioned by the Council of Australian Governments and provide a framework for reporting against key indicators of disadvantage. Reporting is based on a mixture of Census, survey and administrative data.⁶³

The Overcoming Indigenous Disadvantage framework, shown at Figure 4.2 sets out three tiers:

- priority outcomes
- headline indicators
- strategic areas for action.

59 D Weatherburn, *Arresting Incarceration - Pathways out of Indigenous Imprisonment* (2014), p 74.

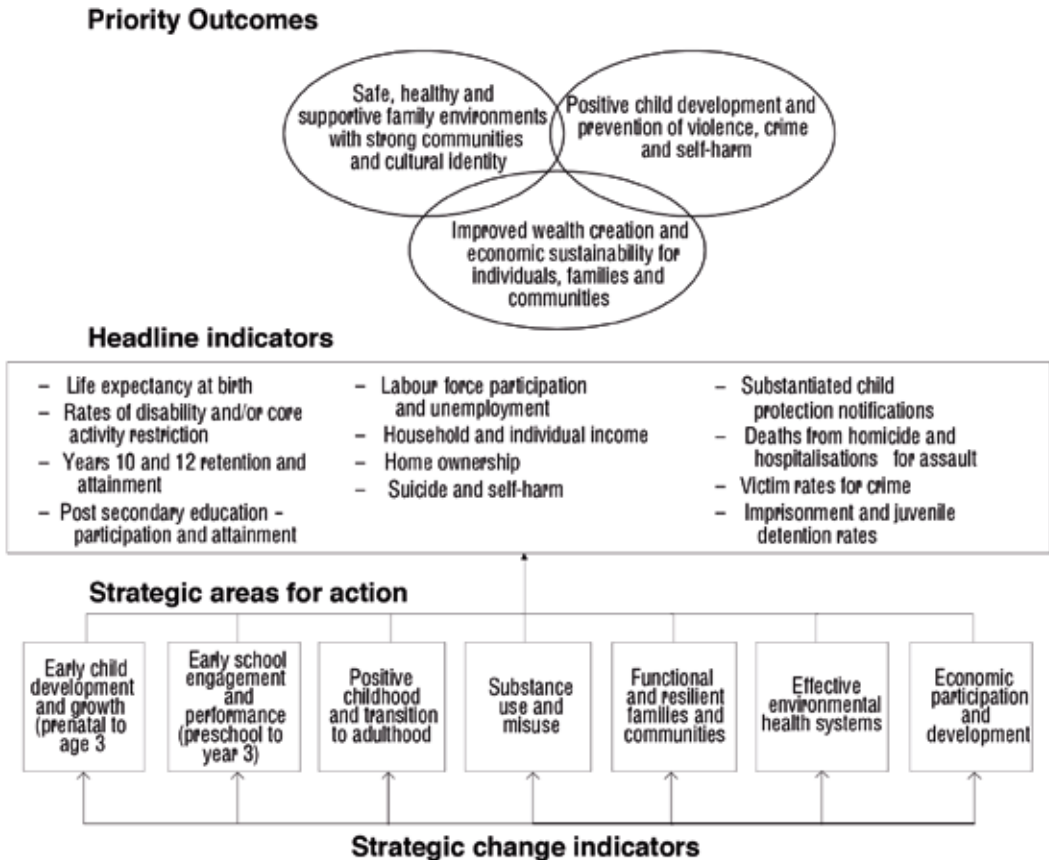
60 D Higgins and K Davis, *Law and justice: prevention and early intervention programs for Indigenous youth* (2014), Closing the Gap Clearinghouse Resource Sheet no. 34. At http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Our_publications/2014/ctg-rs34.pdf (viewed 1 October 2014).

61 D Weatherburn, *Arresting Incarceration*, note 59, pp 86-87.

62 M Gooda, *Social Justice and Native Title Report 2013*, note 47, ch 4.

63 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission (2003), p 4. At <http://www.pc.gov.au/gsp/overcoming-indigenous-disadvantage> (viewed 1 October 2014).

Figure 4.2:
The framework⁶⁴



64 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage*, above, p 4.

Under each of these headline indicators, there are measures which have been used in each report. Table 4.2 collates the relevant headline indicators and measures that loosely relate to the justice sector.

Table 4.2: Overcoming Indigenous Disadvantage headline indicators - 2011

Indicator	Measure
4.10 <i>Substantiated child abuse and neglect</i>	<ul style="list-style-type: none"> • child protection substantiations • child protection substantiations by type of abuse or neglect • children on care and protection orders, by jurisdiction • placement in accordance with the Aboriginal Child Placement Principle • diagnoses of sexually transmitted infection in children • number and rate of diagnoses of chlamydia, gonorrhoea, and syphilis in children by age group.
4.11 <i>Family and community violence</i>	<ul style="list-style-type: none"> • people who had been victims of physical or threatened violence, by state and territory • hospitalisation rates for family violence related assaults and other assaults, and by remoteness • homicide death rates by state and territory • homicide victims by state and territory, and by remoteness • Indigenous adults and children with a valid need met request for immediate Supported Accommodation Assistance Program (SAAP) accommodation, by state and territory and by remoteness • SAAP support periods: main reason clients sought support, by state and territory and by remoteness • victims of assault, sexual assault and robbery, including relationship of offender to victim.
4.12 <i>Imprisonment and juvenile detention</i>	<ul style="list-style-type: none"> • imprisonment rates, age standardised, by jurisdiction • crude imprisonment rates, by sex and jurisdiction • sentenced prisoners by most serious offence and expected time to serve • imprisonment rates by age group • prisoners by legal status • juvenile detention rates, people aged 10-17 years, by sex, age group and jurisdiction • juvenile detention rates by legal status.

The next tier, below, includes strategic areas for action. Again, there are some measures that are very relevant to the task of setting justice targets, as shown in Table 4.3. For the purposes of this analysis, I have only

included the measures that are outside the current Closing the Gap targets.

Table 4.3: Strategic areas for action

Strategic areas for action	Relevant measure
<i>Positive childhood and transition to adulthood</i>	<ul style="list-style-type: none"> • Indigenous cultural studies in the school curriculum and involvement of Indigenous peoples in the development and delivery of Indigenous studies • participation in organised sport, arts or community group activities • juvenile diversions as a proportion of all juvenile offenders • transition from school to work.
<i>Substance use and misuse</i>	<ul style="list-style-type: none"> • alcohol and tobacco consumption • alcohol related crime and hospital statistics • drug and other substance use.
<i>Functional and resilient families and communities</i>	<ul style="list-style-type: none"> • children on long term care and protection orders • repeat offending.

In the first instance, I believe that this list of indicators and measures provides a good basis for developing both ‘headline’ justice targets and a range of sub-targets or proxies. As we have seen from the experience of Closing the Gap, it is important to set both of these mechanisms. Headline targets will allow us to measure the overall outcome we want to achieve, while the sub-targets or proxies allow us to monitor how we are tracking towards the ‘headline target’.

Further, we can be confident that these indicators used by the Productivity Commission are based on robust data collections that are readily accessible.

A process of consultation with Aboriginal and Torres Strait Islander organisations and other experts in the justice sector will be needed to confirm the relevance of these indicators and/or suggest additional indicators. For instance, the provision of post-release support services could be included, or there could be information about the provision of victim support services. The important thing is that we are not starting with a blank piece of paper. Instead, we are building on existing and available data and indicators to start the conversation in a focused way. The next challenging task is actually setting the target, once the indicators are decided.

The involvement of Aboriginal and Torres Strait Islander peoples and experts in the justice sector will be crucial to achieve success. As I will discuss below, I believe we are well placed to provide this input in a strategic way.

I strongly urge the Minister for Indigenous Affairs to reconsider his advice to me for this report and return to the pre-election commitment to develop justice targets as outlined above.

4.4 National Justice Coalition

The need to create a new conversation about safer communities requires leadership and unity. Aboriginal and Torres Strait Islander advocates and others in the sector have been arguing tirelessly for criminal justice reform. However, our impact in this area may have been hampered by a lack of coordination and strategic approach.

For this reason, I am wholeheartedly throwing my support behind the newly formed National Justice Coalition (NJC).

The NJC consists of a group of peak Aboriginal, human rights and community organisations from across Australia, and was formed with the goal of reducing the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system by promoting safer communities.

Over the past year, significant work has been undertaken to form this coalition of leading Aboriginal and Torres Strait Islander human rights and community organisations from across Australia. They have made a joint commitment to work together to respond to this social crisis. The commitment to collaborate on this issue is unprecedented.

The NJC Co-Chairs are Mr Shane Duffy and Ms Kirstie Parker. Text Box 4.4 lists the founding organisations in the NJC.

Text Box 4.4:

National Justice Coalition members

- National Aboriginal and Torres Strait Islander Legal Services
- National Congress of Australia's First Peoples
- Secretariat of National Aboriginal and Islander Child Care
- Indigenous Doctors Association
- National Family Violence Prevention Legal Services
- National Indigenous Drug and Alcohol Committee
- National Aboriginal Community Controlled Health Organisation
- Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda
- Human Rights Law Centre
- Oxfam Australia
- Australian Council of Social Service
- ANTaR
- Amnesty International Australia
- Sisters Inside
- Federation of Community Legal Centres (VIC)
- Australian National Council on Drugs
- First Peoples Disability Network Australia.

The NJC has been successful in gaining philanthropic funding for a Principal Adviser for two years. This is a significant achievement and places the NJC in good stead to become a professional, resourced body that can develop a comprehensive workplan.

We are still in the formative phase of the NJC. The first formal planning workshop for the NJC took place in August 2014, and we anticipate that the position of Principal Adviser will be filled shortly. The NJC work plan and campaign is still being mapped out at the time of writing.

However, I am very optimistic that with the lessons that we have learnt from the successes of the Close the Gap Campaign for Indigenous health equality, we have a good chance of generating positive change. Firstly, there is a broad base of organisations involved in the group, able to bring their unique expertise and contacts to the campaign. Secondly, like the Close the Gap Campaign, we have not rushed the important process of relationship building and identification of common ground. This means there is a solid base to the NJC.

Having a strong, united voice on issues related to the criminal justice system will help raise the profile of this issue. The NJC will be able to champion the creation of safer communities, as well as suggest solutions based on members' extensive experience in the field. This will be invaluable as we continue to advocate for issues such as justice reinvestment and justice targets into the future.

4.5 Conclusion and recommendations

While the overall picture of Aboriginal and Torres Strait Islander peoples' involvement in the criminal justice system is a troubling one, there is nonetheless cause for real optimism. In the past five years, we have seen the concept of justice reinvestment being embraced as another tool to create safe communities, with communities Bourke and Cowra leading the way. This grass roots level of social change has exciting possibilities that could inform developments across the nation.

The support for justice targets in our communities, and with our advocates, remains strong. With the establishment of the National Justice Coalition, we are now getting to a place, like the Close the Gap campaign, where we will have the right mix of expertise and leadership to hopefully progress the push for justice targets. I am hopeful that the National Justice Coalition will be the circuit breaker we need to get safer communities on the national agenda so that we start to see real improvements on the ground in our communities all over Australia.

Recommendations

Recommendation 1: The Australian Government revises its current position on targets as part of Closing the Gap, to include holistic justice targets aimed at promoting safer communities.

Recommendation 2: The Australian Government actively consults and works with the National Justice Coalition on justice related issues.

Recommendation 3: The Australian Government takes a leadership role on justice reinvestment and works with states, territories and Aboriginal and Torres Strait Islander communities to identify further trial sites.

Chapter 5: Nations - Self- determination and a new era of Indigenous governance

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5.1 Introduction

Since the beginning of my term as Aboriginal and Torres Strait Islander Social Justice Commissioner, I have highlighted the need for stronger and deeper relationships between Aboriginal and Torres Strait Islander peoples, the broader Australian population and government. I have also noted the need for healing our own relationships within Aboriginal and Torres Strait Islander communities.

In 2012, I underlined the need for leadership in building and supporting effective Indigenous governance, and set out a framework for approaching this issue.¹ Effective, legitimate and culturally relevant Indigenous governance is crucial to realising the self-determination of our people.

I have also reinforced how the *United Nations Declaration on the Rights of Indigenous Peoples*² (the Declaration) can be used to improve relationships between Aboriginal and Torres Strait Islander peoples, the broader community and governments.³

This year I would like to shift our focus to Aboriginal and Torres Strait Islander nations.

The existence of nations in Australia is undisputed. There have been various names given to these collectives over time: peoples, tribes, clans, language groups, nations and mobs. For the purposes of this chapter, I will use the term 'Nations' as a representative title for all of these groups.

The concept of Aboriginal and Torres Strait Islander Nations is important to the identity, survival and self-determination of our peoples. 'Nation building' – that is, enhancing Aboriginal and Torres Strait Islander peoples' capacities for self-governance and self-determined economic development – is fundamental to this process. New research presented in this chapter shows that where local Aboriginal and Torres Strait Islander peoples, Nations, communities, authorities and organisations have power and control over decision making and resources, real change is achieved in a more sustainable way.

Change achieved by this style of governance, in line with the aims and values of our peoples, is a true reflection of self-determination. Similarly, Nation building guided by the Declaration, in my view, will lead to the realisation of Aboriginal and Torres Strait Islander rights, stronger communities and more meaningful engagement.

That being said, Nation building should happen alongside national engagement.

The past year has seen significant changes in the way that government is engaging with Aboriginal and Torres Strait Islander peoples. It is a time of upheaval, as discussed in Chapter 1, with the restructuring of programs and activities, establishing new advisory and engagement structures, and different grant administration processes. This is in addition to this year's budget which cut \$534.4 million from Indigenous programs in the departments of Prime Minister and Cabinet and the Department of Health alone.⁴

1 M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At https://www.humanrights.gov.au/sites/default/files/document/publication/social_justice_report_2012.pdf (viewed 1 October 2014).

2 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007.

3 M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), p 106. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport11/pdf/sjr2011.pdf (viewed 1 October 2014).

4 See discussion in Chapter 1.

Now, more than ever, is the time to ensure that our voices are heard by the Australian Government. We must remind the government of its obligation to consult and genuinely engage with Aboriginal and Torres Strait Islander peoples, and make sure that consultation is conducted in meaningful ways, renegotiating the current power imbalance.

I will discuss how Nations have the potential to be a unifying collective voice for advocacy and dispute resolution, as shown by the recent commitment of Aboriginal and Torres Strait Islander peoples to forming the Assembly of First Nations in Australia. This unification of separate and distinct Nations, geographically spread across Australia, is the missing link in current manifestations of Aboriginal and Torres Strait Islander representation in this country.

Whilst individual Nations certainly already exist, bringing them together strengthens our voice concerning the collective needs, aspirations and concerns of our peoples. This chapter will also consider how the Assembly of First Nations is a step towards more meaningful representation of our peoples at a national level - as a decision making body *with cultural authority*.

5.2 The importance of Nations

It is generally accepted that at the time of colonisation in 1788, Aboriginal and Torres Strait Islander peoples owned and inhabited Australian land and its surrounding islands:

Many of these groups formed distinct nations. There were about 200-250 distinct languages and many related dialects... They had developed sophisticated technologies, kinship systems, songs, dances and a variety of visual art forms. They had an effective and powerful legal system.⁵

The Australian Government estimates that there were over 500 different Nations in existence at this time.⁶ These Nations were not recognised by colonisers as legitimate – the basis of the concept of *terra nullius* - and almost all of the actions since taken by those in power, either explicitly or implicitly, have sought to dismantle these structures.⁷

In the hearts and minds of Aboriginal and Torres Strait Islander peoples, our 'nationhood' has always survived and continues to be acknowledged between us.

Some Nations remain strong, with traditional practice still being undertaken today.

Other Nations have adapted traditional ways to meet modern standards.

Sadly, some other Nations have been fractured or devastated.

There is a long history of advocacy and agitation for our peoples and their rights to be recognised by Australian Governments and the Australian population. This has occurred politically, as seen in William Coopers' petition,⁸ the Bark Petition,⁹ the Barunga Statement,¹⁰ the Tent Embassy,¹¹ the land rights campaigns¹² and of course our 'street campaigns', such as those run by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders.¹³

There has been activism around the Australian Constitution culminating in the 1967 Referendum,¹⁴ which gave power to the federal government to make laws with respect to Aboriginal and Torres Strait Islander peoples and finally allowed for the inclusion of our peoples in the Australian Census.

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- 5 Council for Aboriginal Reconciliation, *Walking Together: The First Steps, Report of the Council for Aboriginal Reconciliation 1991-94 to Federal Parliament* (1994), p 4.
 - 6 Australian Government, *About Australia - Our people*, <http://australia.gov.au/about-australia/our-country/our-people#Indigenouspeoplesandcultures> (viewed 1 October 2014).
 - 7 Council for Aboriginal Reconciliation, note 5, pp 4-5.
 - 8 Australian Institute of Aboriginal and Torres Strait Islander Studies, *The Day of Mourning – Background*, <http://www.aiatsis.gov.au/collections/exhibitions/dayofmourning/background.html> (viewed 1 October 2014).
 - 9 Australian Government, *Bark petitions: Indigenous art and reform for the rights of Indigenous Australians*, <http://australia.gov.au/about-australia/australian-story/bark-petitions-indigenous-art> (viewed 1 October 2014).
 - 10 For background see, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Treaty – Barunga Statement*, <http://www.aiatsis.gov.au/collections/exhibitions/treaty/barunga.html> (viewed 1 October 2014); for treaty text see, Council for Aboriginal Reconciliation, *Documents of Reconciliation*, <http://www.austlii.edu.au/au/orgs/car/docrec/policy/brief/attach.htm> (viewed 1 October 2014).
 - 11 National Museum of Australia, *Aboriginal Embassy, 1972*, http://indigenousrights.net.au/land_rights/aboriginal_embassy,_1972 (viewed 1 October 2014).
 - 12 National Museum of Australia, *Campaigning for land rights, 1963-68*, http://indigenousrights.net.au/land_rights/campaigning_for_land_rights,_1963-68 (viewed 1 October 2014).
 - 13 National Museum of Australia, *Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI)*, http://indigenousrights.net.au/organisations/pagination/federal_council_for_the_advancement_of_aborigines_and_torres_strait_islanders_fcaatsi (viewed 1 October 2014).
 - 14 National Museum of Australia, *The Referendum 1957-1967*, http://indigenousrights.net.au/civil_rights/the_referendum,_1957-67 (viewed 1 October 2014).

It has occurred using the judiciary, with landmark cases such as *Milirrpum v Nabalco Pty Ltd*,¹⁵ the Gove case brought by the Yolngu people against the Federal Government and the Nabalco Mining Company, *Mabo v Queensland*¹⁶ brought by Eddie (Koiki) Mabo and others that established native title, and the case of *Wik Peoples v Queensland*.¹⁷

It continues today in the Federal Court through native title determinations, and among the population at large with the campaign currently underway for Aboriginal and Torres Strait Islander peoples to be formally recognised in the Australian Constitution.

Currently there are several ways in which the concept of nationhood is manifested by Aboriginal and Torres Strait Islander peoples, including:

- **Nations self-identifying**, an identity recognised and respected by government, the private sector, the Nations' Aboriginal and Torres Strait Islander neighbours and non-Indigenous populations.
- **Nations are recognised formally by legislation**, such as the Kerrup-Jmara clan and Kirrae Whurrong clan in the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth).
- **Nations are recognised by the judiciary** in native title determinations, whether by consent or judicial decision.

By whichever of these means it is articulated, the concept of Aboriginal and Torres Strait Islander nationhood is alive and growing stronger.

As I have said previously, the exercise of self-determination can only be achieved with good community governance structures.¹⁸ At the July 2014 Indigenous Governance Development Forum,¹⁹ Professor Mick Dodson AM described self-determination as:

[T]he solution to governance – in an Indigenous sense – that actually delivers power and decision making to people, enables them to manage and organise, to be in charge of their social and economic development and to maintain their cultural values.²⁰

I agree that there is a strong synergy between organised, governing Nations and self-determination.

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

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

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

18 See M Gooda, 2012, note 1, pp 109-120.

19 This conference was held jointly by the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Australian Indigenous Governance Institute on 29-30 July 2014, Canberra.

20 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Self-determination key to Indigenous governance*, <http://50years.aiatsis.gov.au/news/2014/selfdetermination-key-indigenous-governance> (viewed 1 October 2014).

5.3 Framework for Indigenous governance

In the *Social Justice Report 2012*, after setting out the relevant domestic and international research on the issue, I proposed a framework for effective, legitimate and culturally relevant Indigenous governance, with three central components:

- **community governance** - how our peoples and our communities govern ourselves, through our traditional laws, customs, norms and values, as well as by contemporary methods;
- **organisational governance** - the ways that Aboriginal and Torres Strait Islander organisations operate and deliver services to our communities, and communicate with external stakeholders such as governments;
- **governance of governments** – how competent government and their staff are to work with Aboriginal and Torres Strait Islander peoples, the administrative burden of government on services for Aboriginal and Torres Strait Islander peoples, and how the power sharing arrangement between the government and our people is negotiated.²¹

I explained that effective governance for Aboriginal and Torres Strait Islander communities depends greatly on the quality and effectiveness of relationships between each of the actors involved at each of these levels.²² Further, I noted the importance in this process of the principles of self-determination; participation in decision-making, good faith, and free, prior and informed consent; respect for and protection of culture; and non-discrimination and equality.²³

This framework sets out that effective governance necessarily begins with community governance, based on the principles self-determination and the right to participate in decisions that affect us.²⁴

It is up to our people to decide what our goals are and the way in which we develop our structures and processes to achieve these. I urged all communities – remote, traditional, urban, regional and national – to invest in rebuilding or creating new community governance structures and mechanisms.

In 2012, I made the following recommendations to the Australian Government:

- That the Australian Government acknowledges that effective Indigenous governance is central to sustainable development in Aboriginal and Torres Strait Islander communities.
- That the Australian Government builds its own capacity to enable and support effective Indigenous governance.
- That all governments properly resource Aboriginal and Torres Strait Islander communities to strengthen their contemporary governance structures. This resourcing must be part of a new relationship between Aboriginal and Torres Strait Islander peoples and governments based on genuine power-sharing and partnership.²⁵

I advocated that the Declaration be used as a tool to strengthen relationships, not only between government and Aboriginal and Torres Strait Islander peoples, but within our own communities as well.²⁶

21 See M Gooda, 2012, note 1, pp 109-120.

22 M Gooda, above, p 109.

23 M Gooda, above.

24 See M Gooda, above, pp 101-105.

25 M Gooda, above, p 121.

26 M Gooda, above, p 106.

This year I will advocate a concept that all structures seeking to engage, advocate and agitate on our issues must be built on the foundation of community governance. This begins with Nations.

As stated above, there are two important areas of recent development in this context that will be discussed in this chapter:

- At a local level, there is new research to show how some Nations are governing themselves in successful and innovative ways.
- At a national level, there are steps being taken for Nations to band together to jointly negotiate and advocate with government and other bodies, in the format of a national Assembly of First Nations.

These are both examples of what I mentioned in the *Social Justice Report 2012* as 'community governance'.²⁷

These two processes are not mutually exclusive and, in reality, need to happen simultaneously. I see the Assembly of First Nations as a natural progression from the strengthening of Nations, but I also believe that having an Assembly will encourage lesser developed Nations to strengthen their governance structures, so that they too can participate.

27 M Gooda, 2012, note 1, p 111.

5.4 Community governance: a Nation building approach

'Nation building' has been described as 'the process by which a Native nation enhances its own foundational capacity for effective self-governance and for self-determined community and economic development.'²⁸

In recent years, there has been significant progression in research in this area.

(a) Development in Indigenous Nation building research and practice

Leading the way was the Harvard Project on American Indian Economic Development (Harvard Project).²⁹ I outlined the Harvard Project's Nation building approach to achieving development in Indigenous communities in the *Social Justice Report 2012*.³⁰

Guided by the Harvard Project, the Indigenous Community Governance Project (ICGP)³¹ was founded in Australia – a partnership between the Centre for Aboriginal Economic Policy Research and Reconciliation Australia. This project undertook research over five years on Indigenous governance with participating Aboriginal and Torres Strait Islander communities, regional organisations and leaders across Australia. The ICGP was established to understand the effectiveness of different forms of governance and their consequences for Indigenous policy, service delivery, self-determination and socio-economic development. The project aimed to:

[E]xplore the diverse conditions and attributes of Australian Indigenous community governance arrangements, elucidate culturally based foundations of Indigenous governance and extricate broad universal principles of what constitutes effective, legitimate Indigenous governance, identifying transferable lessons to contribute to policy formulation.³²

In a ground breaking development in 2010, the Native Nations Institute (NNI) at the University of Arizona (an outgrowth of the Harvard Project) was invited to partner with the Jumbunna Indigenous House of Learning (IHL) at the University of Technology, Sydney on an Australian Research Council (ARC) Discovery grant to undertake studies on Australian Aboriginal and Torres Strait Islander Nation building (the Jumbunna-NNI Discovery Project).

At the same time, another ARC Discovery Project had commenced – *Negotiating a space in the nation: the case of Ngarrindjeri*.³³ Building on this and the Jumbunna-NNI ARC Projects, an expanded research team was awarded an ARC Linkage grant for the *Indigenous nationhood in the absence of recognition: Self-*

28 M Jorgensen, 'Editor's Introduction' in M Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (2007), p xii.

29 For an overview, see M Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (2007).

30 M Gooda, 2012, note 1, pp 93-94; Human Rights and Equal Opportunity Commission, *Native Title Report 2006* (2007), p 135. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/nt_report/ntreport06/pdf/ntr_full.pdf (viewed 16 October 2014); Human Rights and Equal Opportunity Commission, *Social Justice Report 2002* (2002), p 41. At https://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport02/Social_Justice_Report02.pdf (viewed 1 October 2014).

31 For the ICGP research findings, see J Hunt & D Smith, *Building Indigenous community governance in Australia: Preliminary research findings*, Centre for Aboriginal Economic Policy Research, Australian National University, Working Paper No 31 (2006); J Hunt & D Smith, *Indigenous Community Governance Project: Year Two Research Findings*, Centre for Aboriginal Economic Policy Research, Australian National University, Working Paper No 36 (2007); J Hunt et al, *Contested Governance: Culture, power and institutions in Indigenous Australia*, Centre for Aboriginal Economic Policy Research, Australian National University, Research Monograph No 29 (2008).

32 D Smith, *Researching Australian Indigenous Governance: A Methodological and Conceptual Framework*, Centre for Aboriginal Economic Policy Research, Australian National University (2005), pp 1-4.

33 Led by Professor Daryle Rigney & Associate Professor Steve Hemming, Flinders University.

*governance strategies and insights from three Aboriginal communities*³⁴ project, as well as a Melbourne School of Government Research Cluster grant for the project, *Indigenous Nation Building: Theory, practice and its emergence in Australia's public policy discourse*.³⁵

This work brings together three Aboriginal Nations, the Gunditjmara People in Victoria,³⁶ Ngarrindjeri Nation in South Australia,³⁷ and individuals and groups from the Wiradjuri Nation; with Australian and international academic researchers from seven universities, University of Technology Sydney,³⁸ University of Arizona,³⁹ University of Melbourne,⁴⁰ Flinders University,⁴¹ Charles Sturt University,⁴² RMIT University,⁴³ and the Australian National University.⁴⁴ Combined, this research team can be described as the 'Indigenous Nation Building Collaboration'.

The Jumbunna-NNI Discovery Project and the Indigenous Nation Building Collaboration each explore whether Aboriginal and Torres Strait Islander communities are undertaking comprehensive political governance (what I describe as 'community governance') and if so, whether the principles of North American Indigenous Nation building are helpful in this process.

The Australian Institute of Aboriginal and Torres Strait Islander Studies also has a strong focus on governance research.⁴⁵ This research focuses on how Aboriginal and Torres Strait Islander peoples are 'making choices and decisions together, holding decision-makers accountable, managing disputes and mobilising action, negotiating with outsiders, and assessing where they are at'.⁴⁶

Over the last year, the Australian Indigenous Governance Institute (AIGI) was established. The AIGI supports Aboriginal and Torres Strait Islander peoples in their efforts to determine and strengthen their own sustainable, effective and culturally legitimate systems of governance for projects, organisations, corporations and Nation building. The AIGI aims to fulfil this vision by operating as a national centre of governance excellence.⁴⁷

The most recent research is canvassed in a new, unpublished paper,⁴⁸ from the Indigenous Nation Building Collaboration. This work compares the results of the Harvard Project with Australian studies, and finds similarities. I am grateful to Dr Mark McMillan, Dr Miriam Jorgensen and Dr Alison Vivian for allowing me to share an insight into this new work prior to its formal release.

The following sections present some of the findings of this new work.

34 Led by Chief Investigator Professor Larissa Behrendt, Director of Research at IHL, University of Technology, Sydney.

35 Led by Chief Investigator Dr Mark McMillan, University of Melbourne.

36 Led by Partner Investigator Damein Bell.

37 Led by Partner Investigator Tim Hartman.

38 Professor Larissa Behrendt & Dr Alison Vivian.

39 Professor Stephen Cornell & Dr Miriam Jorgensen.

40 Dr Mark McMillan & Dr Raymond Orr.

41 Professor Daryle Rigney & Associate Professor Steve Hemming.

42 Ms Faye McMillan & Ms Debra Evans.

43 Dr Yoko Akama & Mr Peter West.

44 Dr Asmi Wood.

45 Led by Senior Research Fellow Toni Bauman with researcher, Dr Christiane Keller.

46 See Australian Institute of Aboriginal and Torres Strait Islander Studies, *AIATSIS Research: Governance and Public Policy*, <http://www.aiatsis.gov.au/research/governance.html> (viewed 1 October 2014).

47 See Australian Indigenous Governance Institute, *About us – history*, <http://www.aigi.com.au/about-us/history/> (viewed 1 October 2014).

48 M Jorgensen & A Vivian, 'Challenging Indigenous Australia Inc: Indigenous Community Political Governance' (forthcoming).

(b) Indigenous Nation building

The Harvard Project contrasts the ‘Indigenous Nation building approach’ with the ‘standard approach’ to developing Indigenous governance, identifying key characteristics of both.⁴⁹

Text Box 5.1:

Approaches to Indigenous governance⁵⁰

Indigenous Nation building Approach	Standard Approach
Indigenous Nations comprehensively assert decision-making power	Persons or organisations other than the Indigenous Nations set the development agenda
They back up decision-making with effective governing institutions	Development is primarily treated as an economic problem
Their governing institutions match their political culture	Indigenous culture is viewed as an obstacle to development
Decision-making is strategic	Decision-making is short term and non-strategic
Leaders serve as Nation builders and mobilisers	Elected leadership serves primarily as a distributor of resources

When Indigenous communities pursue the Nation building approach, institutional structures, decision rules, outcomes and metrics are reformed and re-aligned:

- decision making is ‘proactive, long term, systemic’⁵¹
- Indigenous Nation agendas ‘reflect tribal interests, perceptions and cultures’⁵²
- the decision making structure promotes accountability that ‘marries decisions and consequences’⁵³
- outcomes are measured against the Indigenous Nation’s objectives, which may not align with those of external decision makers⁵⁴

49 S Cornell & J P Kalt, ‘Two Approaches to the Development of Native Nations: One Works, the Other Doesn’t’ in M Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (2007) 3, pp 7, 19.

50 S Cornell & J P Kalt, above.
51 Cornell & Kalt, note 49, p 26.

52 Cornell & Kalt, above, p 21.

53 Cornell & Kalt, above.

54 Cornell & Kalt, above.

- Nations are ‘bearing the costs of mistakes and enjoying the rewards of their successes’, noting that ‘decision-making improves with experience’⁵⁵
- governing institutions are not only self-determined and self-ruling but also ‘stable, protect business enterprises and service delivery from political interference, have independent dispute resolution and provide reliable administration’.⁵⁶

Harvard Project researchers further observe that in the United States, every instance of sustained economic development in Indigenous communities (of which they are aware) has had the Native nation in control of the decisions on ‘development strategy, resource use or internal organisation’.⁵⁷ To achieve these ends, the challenge for today’s Indigenous societies is to create governance structures that ‘still resonate with deeply held community principles and beliefs about authority but which also meet contemporary needs’.⁵⁸

Research in Australia, such as findings of the ICGP and of the Indigenous Nation Building Collaboration, mirrors the Harvard Project results. Hunt and Smith conclude that:

[W]hen Indigenous governance is based on genuine decision-making powers, practical capacity and legitimate leadership at the local level, it provides a critical foundation for ongoing socioeconomic development and resilience.⁵⁹

Jorgensen and Vivian, whose specific area of inquiry is Indigenous community political governance, find that Aboriginal and Torres Strait Islander Nations are better able to achieve their goals when they also are in control of decision making concerning the pathway and progress toward those goals.⁶⁰ Both sets of studies recognise the central role of ‘public spirited’ leadership in creating change and in Nation building.⁶¹ Further, Australian and North American research each underline the importance of legitimacy in Indigenous governance, which can be understood as a ‘cultural match’ between how political governance processes occur and how the community believes they should occur.⁶² A process controlled by Aboriginal and Torres Strait Islander peoples can, in itself, be a source of legitimacy.⁶³

(c) Comments on Nation building

The Nation building approach is consistent with the factors that I have previously set out in 2012 in relation to strengthening Indigenous governance arrangements:

- drawing on their unique governance cultures and traditions, and working from a basis of respect for, and protection of, culture

55 Cornell & Kalt, above.

56 Cornell & Kalt, above, p 23.

57 Cornell & Kalt, above, p 22.

58 Cornell & Kalt, above, p 25.

59 J Hunt & D Smith, ‘Understanding and Engaging with Indigenous Governance – Research Evidence and Possibilities for Engaging with Australian Governments’ (2011) 14(2-3) *Journal of Australian Indigenous Issues* 30, p 31.

60 Jorgensen & Vivian, note 48.

61 Jorgensen & Vivian, above, citing M A Begay et al, ‘Rebuilding Native Nations: What Do Leaders Do?’ in M Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (2007) 275; Hunt & Smith, 2007, note 31, pp 8-12.

62 Jorgensen & Vivian, note 48, citing Hunt & Smith, 2007, note 31, pp 12-14, 21, 24, 27; Cornell & Kalt, note 49, pp 24-25.

63 Jorgensen & Vivian, note 48, citing D E Smith, *From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory*, Centre for Aboriginal Economic Policy Research, Australian National University, Working Paper No 265 (2004), p 27; S Cornell, ‘Remaking the Tools of Governance: Colonial Legacies, Indigenous Solutions’ in M Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (2007) 57, p 73.

- determining what constitutes legitimacy for each community – who can speak when, for whom, to whom, and regarding what? This includes ensuring the vulnerable within communities are represented and have a voice
- establishing processes:
 - for the community to participate in decision-making to determine priorities and aspirations
 - for engaging with the broader governance environment
 - that ensure accountability to community
- incorporating what communities decide regarding legitimacy and representation into the structures and functions of community organisations
- insisting on the community governance culture being respected in relationships with other parties in the Indigenous governance environment.⁶⁴

A crucial aspect of Nation building is that the decision making control is in the hands of the Nation. As discussed above, the research from both Australia and the United States shows that the more control that is given to the Nation, the more effectively sustainable development is achieved.

In addition, I urge Nations who are developing their processes of governance to use the Declaration as a framework. Relevantly, art 18 of the Declaration clearly sets out the importance of Indigenous governance:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.⁶⁵

Further, art 21(1) of the Declaration establishes that Aboriginal and Torres Strait Islander peoples have the right to ‘maintain and develop their political, economic and social systems or institutions’. In terms of the level of control that should be divested to our peoples, the Declaration is clear:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.⁶⁶

Before adopting and implementing new policies or legislation that may affect our peoples, government has an obligation to consult and cooperate in good faith with Aboriginal and Torres Strait Islander peoples *through our own representative institutions* to obtain their free, prior and informed consent.⁶⁷ It can be seen that Nation building is an important means of giving effect to the Declaration.

The Declaration is founded on the principles of self-determination, participation and free, prior and informed consent, respect and protection of culture, equality and non-discrimination. While it is likely that Nations will base their processes on these foundational rights, explicitly doing so can only lead to better and more effective governance as well as increased awareness among Aboriginal and Torres Strait Islander communities of their rights. If our communities are founding local governance on the Declaration, this will also encourage governments to do the same.

64 M Gooda, 2012, note 1, pp 118-119.

65 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art 18.

66 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art 23.

67 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, art 19.

5.5 Australian accounts of successful Nation building

The Indigenous Nation Building Collaboration (Collaboration) approached the Gunditjmara People and the Ngarrindjeri Nation to join them as research partners. The Collaboration had identified that each possessed a 'clear identity, a history of self-determination and capable, contemporary governing institutions'.⁶⁸ The Collaboration undertook extensive fieldwork to inquire into, among other things, the several aspects of the two Nations, namely their:

- formal and informal institutions
- decision making and dispute resolution processes
- interactions with other Australian governments
- protocols and co-management arrangements
- opportunities for economic development.

Jorgensen and Vivian contend that the Gunditjmara People and Ngarrindjeri Nation present outstanding examples of Aboriginal Nations which are in the process of creating institutions of their own design to govern their communities.⁶⁹ These institutions allow the Gunditjmara and Ngarrindjeri people to address a broad set of issues, expand the exercise of their power and achieve their major goals, instead of being restricted to the limits of an organisation or corporation.

These efforts also demonstrate that Aboriginal governing systems are being used to shape the nature of dealings between Indigenous and non-Indigenous governments. Relationships that are formed between Nations and governments through this process are based on mutual respect; the Nation's values become 'integral to these partnerships'.⁷⁰ Finally, Jorgensen and Vivian note that both Nations are outstanding innovators, having adopted markedly different strategies and institutions to achieve their ambitions.

The following accounts of Ngarrindjeri and Gunditjmara governance are extracted (footnotes omitted) from the as yet unpublished Jorgensen and Vivian paper.⁷¹

68 Jorgensen & Vivian, note 48.

69 Jorgensen & Vivian, above.

70 Jorgensen & Vivian, above.

71 Jorgensen & Vivian, above.

Text Box 5.2:

The Ngarrindjeri Nation

Ngarrindjeri *Yarluwar-Ruwe* (Sea Country) is located in the River Murray, Coorong and Encounter Bay region of what is now South Australia; its form was shaped when Ngurunderi (the Ngarrindjeri Spiritual Ancestor) chased Pondi, the giant Murray Cod, from the junction of the Murray and Darling Rivers to the coast. The Murray River was then a small stream and as Pondi crashed through the landscape, his huge body made the river. Ngurunderi shaped the land and waters during the Kaldowinyeri (Creation), making the rivers, lakes, waterways, landforms, fish and resources. He imbued the Ngarrindjeri with their *Miwi* – their spiritual connection to lands, waters, each other and all living things, and the stories, meanings and laws for their lands and waters. He also gave each *lakalinyeri* (clan) its identity, *Ruwe* (country) and *Ngartjis* (totems).

Ruwar/Ruwe describes the ‘inseparable relation between lands, waters, body, spirit and all living things’, and includes the spirits of Ngarrindjeri ancestors. This inseparable relationship generates the Ngarrindjeri People’s responsibility to uphold the Law and respect and honour the lands, waters and all living things. This responsibility is expressed in the Ngarrindjeri vision for country:

Our Lands, Our Waters, Our People, All Living Things are connected. We implore people to respect our Ruwe (Country) as it was created in the Kaldowinyeri (the Creation). We long for sparkling, clean waters, healthy land and people and all living things. We long for the Yarluwar-Ruwe (Sea Country) of our ancestors. Our vision is all people Caring, Sharing, Knowing and Respecting the lands, the waters and all living things.

Ngarrindjeri governance

The Ngarrindjeri Nation can be understood as a confederacy of *lakalinyeri*, each with defined territory and responsibility for country, but which share a common language and law and are linked through creation stories. Before invasion, each part of Ngarrindjeri Ruwe/Ruwar had its own government, a parliament-like body called a Tendi, led by a Rupelli, that was responsible for making and interpreting Ngarrindjeri Law. The Tendi also was the mechanism for dispute resolution and arbitration, especially in relation to cultural matters. The leaders of each *lakalinyeri* had responsibility (and ultimate decision-making authority) for their Ruwe, noting however that all Ngarrindjeri country is interconnected (lands/waters/body/spirit) so that responsibility for country has a broad and narrow sense. When matters affected Ruwar/Ruwe and the Nation as a whole, Rupelli (with responsibility for country and Ngartjis) met to resolve the issues (a Nation Tendi). This system has a strong degree of continuity to the present. As one senior Elder noted, Ngarrindjeri governance has been ‘interfered with by colonialism’, and the Tendi continues in an altered form. The Tendi continues to provide a model for legitimate exercise of authority or responsibility, and the Rupelli of the Ngarrindjeri Tendi was the inaugural Chair of the existing peak body – the Ngarrindjeri Regional Authority.

Discussions about contemporary Ngarrindjeri governance typically begin with the Kumarangk Bridge crisis, described as ‘one of the most complex and bitterly litigated racial conflicts in Australian history’. The Ngarrindjeri had sought protection under state and federal cultural heritage legislation for culturally and spiritually significant lands and waters, which ultimately had them denounced by a South Australian Royal Commission as ‘fabricators’ of sacred cultural traditions to prevent construction of the bridge. The protection sought resulted in Federal Court and High Court litigation, the Hindmarsh Island Royal Commission and culminated in specific Commonwealth legislation which suspended heritage protection in relation to construction of the bridge and the operation of the *Racial Discrimination Act 1975* (Cth). The vitriol and accusations of lying and fabrication caused deep and bitter divisions within the Ngarrindjeri Nation, and opened ‘huge rifts in the professions of anthropology and history’, with

professional reputations savaged.

The Ngarrindjeri women, who challenged the building of the bridge on the basis of restricted women's knowledge, were ultimately vindicated by Justice Von Doussa in a 2001 Federal Court judgment, when he held that he was not satisfied that the 'restricted women's knowledge was fabricated or that it was not part of genuine Aboriginal tradition'. The discovery of a Ngarrindjeri burial site during excavation for additional construction in the same area also supported the women's claims. Alexandrina Council ultimately apologised to the Ngarrindjeri, acknowledged their rights as the traditional owners of the country and entered into the first Kungun Ngarrindjeri Yunnan (Listen to Ngarrindjeri Speaking) or KNY Agreement. Finally, on 6 July 2010, the South Australian Government formally acknowledged that the Ngarrindjeri women were genuine when they said that construction would violate their most sacred beliefs and effectively apologised to the women for denigrating their claims as a hoax and a fabrication. Nonetheless, some – particularly those involved in alleging and publishing the 'fabrication' – continue to argue that the claim was fabricated.

Ngarrindjeri leaders describe the 'hard lessons' to be learned from the Kumarangk Bridge crisis, not least the ease with which governments and developers caused division within the Ngarrindjeri Nation. The crisis demonstrated that the legislative environment and associated government policies, purportedly in existence to protect Indigenous interests, 'provided a mechanism for the recycling and reinvigoration of the archive of colonial myths about cultural extinction' in applying 'problematic tests of cultural authenticity run on Settler terms.' This gave impetus to a group of senior Ngarrindjeri leaders and advisers to begin development of a long term strategy for a 'sustainable future for the Ngarrindjeri nation on Ngarrindjeri Yarlularu-Ruwe.'

The chief vehicles for Nation-level Ngarrindjeri representation were a number of committees, including the Tendi Inc, Native Title Management Committee and Ngarrindjeri Heritage Committee, chaired by George Trevorrow, Matt Rigney, and Tom Trevorrow respectively. These provided the vehicles for collective action and were the Ngarrindjeri signatories to the first KNY Agreements, negotiated on behalf of the Nation. Building on these existing structures, these three senior leaders, and others began to consider options for a new central governing body, which led to the formation of the Ngarrindjeri Regional Authority (NRA).

The Ngarrindjeri Regional Authority

The NRA committee is a peak body composed of leadership representatives from Ngarrindjeri community organisations and four elected community members. As its founders intended, the NRA is emerging as the governing body of the Ngarrindjeri Nation. As one senior Elder explained, it is anticipated that it will eventually evolve into a 'fourth tier of government'. While not a 'government' as yet, it is a regional body with considerable authority within the Nation and is highly respected for its skill in inter-governmental relations. The NRA has been successful in a great many of its aims – securing funding for the governing body, inserting Ngarrindjeri interests into government planning mechanisms, and entering into a range of partnerships with non-Indigenous governments and government departments, businesses and corporate entities and universities – but its leaders also recognise that there are a broad range of aspirations for the NRA yet to achieve.

Seven years after its establishment and with broad consensus, the NRA is undergoing a review of its structure and operations, in part through engagement with the Indigenous Nation Building Collaboration. As it becomes more 'successful', it is also faced with increasing community expectation, and one of its challenges is to assess whether its existing structure can continue to meet the needs of the Nation. Another challenge is how the NRA can engage with entities that represent sectors of the Ngarrindjeri Nation, including Raukkan Community Council and Mannum Aboriginal Community Association Inc, as governing bodies in their own right.

The Ngarrindjeri have, in persisting with governance and land claims in the face of unfounded attacks on their credibility and legitimacy, proven that nationhood based on cultural authority can build resilience and reinforce collective strength.

The Collaboration also considered the governance structures of the Gunditjmara People. A significant feature of the Gunditjmara People is that they have separated service delivery bodies from decision making bodies. Interestingly, this shows an aspiration for greater control over service delivery, but as 'distinct from core nation business.'⁷²

Text Box 5.3:

The Gunditjmara People

Gunditjmara conceptions of Country reflect the interconnectivity of place, people, plants and animals. Country for the Gunditjmara is the relationship between those elements, ties that direct how Gunditjmara people care for and fulfil their obligations to Country. Country and the connected nature of the people to Country is illustrated by connections to sacred places, proud languages, vibrant ceremonies, strong totems, ancient art, unique clan groupings, and law and lore. Gunditjmara governing also is reflected in these connections, in the movement of the six seasons of Gunditjmara (Big Dry, Early Wet, Big Wet, Flowering Time, Fattening Up and Drying Out Time) and in peoples' participation during those seasons in distinct areas of the Country (Bocara Woorrowarook Mirring – River Forest Country; Tungatt Mirring – Stone Country; Woorrowarook Mirring – Forest Country; and Koonang Mirring – Sea Country).

Bounded on three sides by rivers (Glenelg, Hopkins and Wannon) and the coast on the fourth, Gunditjmara country lies in what is now south western Victoria. It is dramatic and resource rich, encompassing volcanic plains, a rugged coastline, sea country, limestone caves, forests and rivers, underground aquifers that support permanent freshwater courses and coastal geothermal energy that provides heated groundwater. Volcanic activity was relatively recent, and eruptions, earthquakes and tsunamis are a part of Gunditjmara oral history. An ancestral creation being revealed himself in the centre of this landscape, and his forehead is the mountain Budj Bim (Mt Eccles), the source of the extensive Tyrendarra lava flow. Offshore, the island Deen Marr (Lady Percy Island), is where Gunditjmara dead wait to be reborn.

Dating back thousands of years, the Gunditjmara have used stone from the Tyrendarra lava flow to modify their landscape, creating a sophisticated and vast, 100 square kilometre aquaculture network. Comprising weirs and an engineered system of ponds, channels, fishtraps and wetlands, this network continued to be operational regardless of water levels and protected the Gunditjmara against seasonal variation and drought. Juvenile eels were diverted into artificial holding ponds and wetlands and later harvested or smoked for food or trade, providing the economic basis for permanent settlements. Creating conditions for fish husbandry, this engineered system is markedly different from contemporaneous freshwater fish traps in other parts of Australia. Dispelling the myth that all Aboriginal peoples were nomadic foragers prior to European invasion, the area demonstrated high population densities (potentially 6,000-10,000) represented by the remains of villages of 2-16 circular stone huts that form part of the same cultural complex as the aquaculture system.

72 Jorgensen & Vivian, note 48.

Gunditjmara governance

Prior to European invasion, 57 Gunditjmara clans had responsibility for specific tracts of land (estates), sustained by the resources within the extraordinarily rich landscape, which they engineered into permanent settlements within the aquaculture complex. 'Bands' comprising a number of clans shared a hunting and gathering range. Pre-invasion Gunditjmara society was hierarchical and stratified, engaged in complex resource ownership and exchange. Clans were ruled by headmen called Wungit, the leadership role being hereditary but not automatically so, and headmen were required to demonstrate competence to rule. Clans came together to discuss issues that affected the nation as a whole, and gatherings of up to 1000 people occurred when the Gunditjmara and other language groups congregated to organise marriages, trade, settle disputes, dance, conduct ceremony and play sport.

Arguably, clan groups continue to be the fundamental units of the Gunditjmara nation, although they are no longer the sole decision-makers for their estates. The Gunditjmara fiercely resisted incursion into their territory but contact with Europeans – first with whalers and sealers and later with 'settlers' – had a devastating impact on the Gunditjmara population, especially along the coast, resulting in transfers of responsibility for country between clans. Forcible dispossession, relocation to the two missions and deliberate suppression of Gunditjmara culture and identity further diminished the authority of clans. As a result, contemporary decision-making typically occurs at the nation level rather than at the clan level. For example, native title rights and interests are held by the Gunditjmara People and not individual clans. Rights and responsibilities are exercised by the entire society over all of Gunditjmara country, with the understanding that particular clan issues might emerge in relation to particular areas, and the Full Group must consider those concerns in decision making.

The Gunditjmara nation has not established a formal contemporary 'government' or governing system as such—but it does have a widely accepted decision making structure for conducting the nation's affairs. This structure is a monthly meeting known as the 'Full Group Meeting'. Established almost 15 years ago as a means of generating instructions for the native title process. The Full Group Meeting followed the tradition set by the Kerrup Jmara Elders Corporation and its governance model of 27 family representatives. Full Group Meeting has evolved into a forum for deliberation and decision-making on a variety of topics. It currently operates under the auspices of Gunditj Mirring Traditional Owners Aboriginal Corporation, although it previously was hosted by other parties and organisations of the Nation. Certainly, elders and other respected persons remain important decision makers, but Full Group Meeting is the primary decision-maker for issues that affect the community as a whole.

Technically, Full Group Meeting consists of two meetings – the meeting of the Gunditj Mirring membership and a meeting of Gunditjmara native titleholders and claimants, which is a larger constituency than the Gunditj Mirring membership. Reflecting this overlap, meetings are attended by members and non-members of Gunditj Mirring who participate in discussions and decision-making. Thus, the Gunditjmara People use Gunditj Mirring as a corporate vehicle for land holding, funding and negotiation with governments and other parties, and use the opportunity to meet on these issues as a broader opportunity to meet together on other nation issues as well.

Transparency and free, prior and informed consent are the two most prominent features of decision-making at the Full Group Meeting, and there is an expectation that Gunditjmara and non-Gunditjmara should comply with Full Group Meeting's deliberative processes. The meeting is held during the first week of every month, with all Gunditj Mirring members having been sent the agenda and supporting documents for the issues to be address well in advance. Issues are thoroughly canvassed and opinions forcefully and, at times, passionately put, yet there appears to be little impetus for manipulation. Participation is an intergenerational enterprise, and it is common for four generations of Gunditjmara to attend Full Group Meetings. Elders are accorded respect for their experience, but

everyone is entitled to have input, making decision-making is an inclusive process. Decisions require a consensus of 75% of members present to ensure their broad acceptance by the community. Once made, decisions are not revisited unless a change of circumstances requires that they be reassessed and renewed. With meeting times and agendas well known, it is not acceptable for people to attend a Full Group Meeting, claim that they weren't aware of a particular issue that has been decided and ask that it be reconsidered.

In essence, the Full Group Meeting serves as a kind of legislature for the Gunditjmarra People, making the major decisions on a range of issues. Implementation then occurs through organisations and corporations that serve the nation. With respect to native title business, for example, Gunditj Mirring takes responsibility. Senior Gunditj Mirring office bearers have stressed that their role is to implement the instructions of the Full Group Meeting; they are not themselves significant decision-makers. Winda-Mara Aboriginal Corporation, which is governed by an elected Board of Directors and a service delivery organisation and administers Aboriginal service programs funded by other government programs, is not formally bound by the decisions of the Full Group Meeting; nonetheless, it considers the decisions made and sentiments expressed in the meeting into account. Together, these two organisations, Gunditj Mirring and Winda-Mara, bring Gunditjmarra collective action into effect and provide the central framework for nation action. The Full Group Meeting also undertakes a judicial function where 'wrongdoing' by Gunditjmarra people in relation to matters of culture or country is deliberated. Penalties are imposed with the expectation of compliance.

As is the case for all representative political systems, support for the Full Group Meeting varies. While all Gunditjmarra are entitled to attend the Full Group Meeting and have their views heard, there are some who do not recognise it as having authority over them or their particular country. Others object to the consensus style of decision-making and argue that particular families should have exclusive authority over particular country. However, increased attendance at Full Group Meetings at which contentious issues are discussed and the intensity of debate at those times suggests that the decision-making process is scrutinised and that there is engagement when nation members consider it warranted.

(a) Similarities between the two accounts

Both Nations had to respond to the issue of cultural match and legitimacy. Jorgensen and Vivian explain:

Careful consideration was given to appropriate structure. For the Ngarrindjeri this involved the acceptance of an interim structure that accommodated the political realities of the time – both Australian and Ngarrindjeri. For the Gunditjmarra, this involved rejecting imposed principles of 'corporate governance' that many believe contributed to the failure of a previous community organisation, in favour of principles of Gunditjmarra governance.⁷³

Interestingly, both Nations seek to govern under one body, which in each case is a structure that is a continuation of the 'collective political identity' that existed prior to invasion, modified to suit modern governmental demands.⁷⁴ This research suggests that as the effectiveness of their governing structures increases, so will the political legitimacy of those structures and their appeal to diverse constituencies.

73 Jorgensen & Vivian, note 48.

74 Jorgensen & Vivian, above.

There are other similarities between the two Nations' governance. For example, control is important for both nations: 'As one Ngarrindjeri Elder explained, "We just find that things work better when we do it ourselves."⁷⁵ Other similarities identified by Jorgensen and Vivian include:

- Both Nations have forms of dispute resolution; at this time, these mainly deal with matters of cultural concern.
- Each Nation benefits from clear sighted, public spirited leadership, potentially at great personal cost, and seek and follow expert advice.
- These Nations are reframing the negotiation space with non-Indigenous governments and are entering into partnerships that privilege their values and concerns.
- They have remarkable, self-reflective processes of strategic planning that build incrementally toward long term goals, which are achieved, in part, through the creation of mutually beneficial relationships with non-Indigenous people.⁷⁶

A factor that may have affected the success of these governing structures, according to Jorgensen and Vivian, is that despite the impact of colonisation, the majority of Ngarrindjeri and Gunditjmarra populations have 'continued to live on country, or were directly connected to country through family relationships'.⁷⁷ However, they also hypothesise that political governance is possible for a range of Aboriginal and Torres Strait Islander communities and collectives in Australia.

These accounts of Indigenous political governance show that Nations are capable of creating and implementing creative governing structures that are culturally relevant and successful at achieving the aims of their peoples with minimal governmental interference. The Gunditjmarra People and Ngarrindjeri Nation are leading examples of 'self-identifying political collectives, each of which is in the process of institutionalising a governing system to better undertake responsibilities for country and for what occurs within its borders'.⁷⁸

(b) Commentary on the accounts of Nation building

I believe these accounts are excellent examples of Nations whose governance remains culturally tailored (and therefore, legitimate to our peoples) while fulfilling the demands of modern, colonial society. Notably, both have done so without the intervention of government.

I look forward with great interest to the future findings of the Indigenous Nation building Collaboration, and I thank them for undertaking this important work.

While these Nations have not explicitly adopted the Declaration as their framework for governance structures, it is clear that principles of the Declaration are reflected in each system. For example, transparency and free, prior and informed consent have been identified by the Gunditjmarra People as principles central to their Indigenous governance.

These examples also show that Nations can use Indigenous governance to achieve the rights set out in the Declaration. The Ngarrindjeri Regional Authority has successfully secured funding, recognition of Ngarrindjeri interests in government planning mechanisms, and entered into partnerships with a range of actors with a view to realising the rights of their people.

75 Jorgensen & Vivian, above.

76 Jorgensen & Vivian, note 48.

77 Jorgensen & Vivian, above.

78 Jorgensen & Vivian, above.

As we have seen, Nations are not necessarily governing themselves in identical ways. There is not a 'one size fits all' model – it is up to Nations to decide. Decisions around matters like where funding comes from and how services are coordinated should be decided by each Nation.

But it seems a natural consequence of increased Nation building, and therefore stronger and more organised Nations, that they might come together on a national level to resolve disputes between Nations and to advocate to the Australian Government on issues that impact upon all Nations. Importantly, Nations have cultural authority, and so any national decision making body founded by and representative of Nations will also have cultural authority.

I will now discuss how Nations have already begun to organise in this way, by creating an Assembly of First Nations.

5.6 Voices of Nations, not just national voices

Alongside the Nation building efforts, such as those mentioned in the accounts above, the concept of an assembly of first Nations peoples has been the subject of an ongoing discussion for many years.

(a) Background to the Assembly of First Nations

Mr Tony McAvoy, a Wirldi man from Clermont in Central Queensland, leading Aboriginal barrister and respected advocate, first publicly presented the idea of an Assembly of First Nations (the Assembly) for discussion at the National Native Title Conference in Alice Springs in 2013.⁷⁹ I will use the language ‘First Nations’ to describe the Assembly in this Chapter, however it should be noted that the particular language to be used is still being debated.

In his presentation, Mr McAvoy argued the time is right for this discussion because of the work being undertaken around Nation building, and the emergence of the Prescribed Bodies Corporates (PBCs) resulting from native title settlements. These have provided a degree of certainty around membership and boundaries upon which Nations can be built. As at 23 June 2014, there were 127 registered PBCs nation-wide.⁸⁰

He further observed that although there was a need for it, this increased sense of local nationhood has never resulted in the establishment of a national organisation with cultural authority.

The presentation received widespread support, which was followed by a side event. There was unanimous endorsement to form a working group to develop this concept further.

(b) Progress towards establishing an Assembly of First Nations

At this year’s National Native Title Conference in Coffs Harbour, Mr McAvoy presented another proposal which encapsulated the work that had been done in the intervening year, including an Interim Charter of the Assembly of First Nations (the Interim Charter).⁸¹

Mr McAvoy’s presentation advocated that the similarities between First Nations – in their governing systems, cultural practices and shared history of colonisation – far outweighed the differences to provide a solid foundation for collective advocacy.

As such the Assembly should be based on the recognition that First Nations have continued to exist, governed by legal systems which have changed over time but have their origins ‘rooted in the spiritual and ancestral connections with their lands and waters’.⁸²

This view is supported by the work undertaken with the Indigenous Nation building Collaboration (see above discussion of this work). It was agreed that this project will provide general direction to Nations as they go about their establishment and as such was integral to the development of the Assembly.

79 T McAvoy, ‘Building an Assembly of First Nations’ (Powerpoint presented at the National Native Title Conference, Alice Springs, 3-5 June 2013).

80 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Registered Native Title Bodies Corporate (RNTBC) & Prescribed Bodies Corporate (PBC) Summary* (2014), p 1. At <http://www.aiatsis.gov.au/ntru/issues.html> (viewed 1 October 2014).

81 T McAvoy, ‘Interim Charter of the Assembly of First Nations’ in T McAvoy, *An Assembly of First Nations and a Treaty* (Powerpoint presented at the National Native Title Conference, Coffs Harbour, 2 June 2014). At http://www.aiatsis.gov.au/_files/conferences/national_native_title_conference_2014/tony_mcavoy.pdf (viewed 1 October 2014).

82 T McAvoy, above.

Mr McAvoy further suggested, as a starting point, that the purpose of the Assembly of First Nations would be to:

- a. 'Promote, advocate and develop mechanisms' for issues such as, recognition of each First Nation and its citizens, just and equitable settlement of historical and present day grievances and ongoing dialogue and engagement between the First Nations, and between the First Nations and all levels of the Australian government and industry.
- b. Develop and facilitate the development and implementation of mechanisms to achieve the aspirations of the members of the Assembly of First Nations and the purposes set out in the Charter of the Assembly of First Nations.⁸³

It should be understood that while a significant amount of work has been done around the building of nations, as articulated above by the Indigenous Nation building Project, not much has been done on the concept of an Assembly to bring these Nations together at the national level.

Therefore it was not surprising that much of the discussion at Coffs Harbour centred around a number of fundamental issues with agreement finally reached on the following:

- that an Assembly of First Nations concept was worthy of further development
- the Interim Charter is a good starting point
- membership should be made up initially of Nations, be they self-identifying (such as the accounts above of the Gunditjmara People and the Ngarrindjeri Nation) or emerging from PBCs or any other local development process
- the development of the Assembly would be guided by Aboriginal and Torres Strait Islander individuals, Nations and organisations
- the Assembly should be developed independently of government funding
- the development would be over the longer term, five to ten years, and would be an iterative process, that is, we learn as we go.

Importantly, it was also recognised that the national level is crowded and sometimes highly contested with national bodies representing sector interests such as the National Community Controlled Health Organisation (NACCHO) in health and the National Aboriginal and Torres Strait Islander Legal Service (ATSILS) in justice, advisory bodies such as the Indigenous Advisory Council, and representative bodies such as the National Congress of Australia's First Peoples.

The development of the Assembly concept was not about replacing or usurping the role these bodies play, nor is it about competition. The Assembly is being pursued with the cultural authority of Nations at its foundation, something that has not been achieved at the national level before.

Given that the development of the Assembly is a long term endeavour, there will be adequate time to work out its own place over the next five to ten years including where it fits amongst the bodies mentioned above.

In any event, commitments were made at the Native Title Conference to come together again at next year's conference to address these issues, endorse the Charter of and establish the Assembly of First Nations, with a view to holding the first Assembly in 2016.

83 T McAvoy, above.

To work on the matters mentioned above, a Steering Committee made up of representatives of Nations, each State and Territory jurisdiction has been established.

Finally, it was agreed that the development of the Charter and the establishment of Assembly of First Nations would be guided by the principles set out in the text box below.

Text Box 5.4:

Principles to guide the development of the Assembly of First Nations⁸⁴

Self Determination:

In line with various articles in the Declaration on the Rights of Indigenous Peoples we:

- determine our own political status (art 3)
- exercise autonomy or self-government in matters relating to our internal and local affairs (art 4)
- maintain and strengthen our distinct political, legal, economic, social and cultural institutions (art 5)
- exercise our right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned (art 9)
- participate in decision-making in matters which would affect our rights, through representatives chosen by ourselves (art 18)
- will determine our own identity or membership in accordance with our customs and traditions (art 33)
- will determine the responsibilities of individuals to their communities (art 35).

Respect for and protection of culture:

We will:

- act and behave with respect for the cultural authority of each Nation
- recognise and respect the right of each Nation to be different
- work in ways that strengthen the inherent right of each Nation to exercise self-determination as outlined above
- engage respectfully with each Nation and with each other.

Inclusiveness:

All Aboriginal and Torres Strait Islander peoples can contribute to and participate in the development of the Assembly.

We will facilitate the engagement with and contribution from as many Aboriginal and Torres Strait Islander peoples as practicable.

84 M Gooda, *Draft Outcomes of the Meeting to Establish an Assembly of First Nations*, 3 June 2014, Coffs Harbour, unpublished.

All information on the development of the Assembly will be shared with interested Aboriginal and Torres Strait Islander peoples as quickly as practicable.

Independence:

The development of the Assembly will be driven and directed by Aboriginal and Torres Strait Islander peoples and will be independent of Government.

Consensus:

Decisions within the development process will be by consensus. This means that we will act in ways that are:

- collaborative
- cooperative
- inclusive
- participatory.

The first meeting of the Steering Committee was held on 28 August, and will continue to meet with a view to preparing a research brief, identifying and making initial contact with key stake holders and developing a communication strategy between the participants, the Working Group, the Steering Committee and key stakeholders.

5.7 Conclusions and recommendations

I am heartened by these developments - of Nations governing themselves and also coming together as a national Assembly – because this shows Aboriginal and Torres Strait Islander peoples taking control of our destiny, and accepting responsibility for leadership and tackling the difficult issues. This is the true form of self-determination, as opposed to looking to government to provide a solution.

Of course, that is not to say that government has no role in Indigenous Affairs. We do not have the resources to achieve sustainable development on our own, due to colonisation and past discriminatory policies that have stripped us of our power, our land, our children and our wages.

Government has a crucial role to play in fostering reconciliation and healing our country. On a practical level, we rely on government to engage with us, consult us, invest in us, respond to our needs and to build tolerance and respect for our cultures. In many ways, the government has power over Aboriginal and Torres Strait Islander peoples and it is only when that power imbalance is renegotiated that our peoples have a real chance at changing their futures.

(a) Government and Nation building

Vivian and Jorgensen suggest that perhaps ‘the greatest hurdle for governments is recognising that success is most likely achieved when the Indigenous governance building process is under Indigenous control.’⁸⁵ This echoes my comments in 2012, when I called for a new, genuine power-sharing relationship to be negotiated between governments and our peoples, which necessarily involves the governments committing to relinquishing some of their power.⁸⁶

On a local level, the Australian Government should commit to supporting and facilitating Nation building. The research I have presented in this chapter shows that Nations who govern are in the best position to achieve sustainable development in their communities. I repeat here my message from 2012: that the governance of governments is the major impediment to Aboriginal and Torres Strait Islander peoples developing and sustaining our own governance arrangements.⁸⁷ There are at least 127 registered PBCs - that is, Nations formally recognised by judicial processes, or in the process of land claims.⁸⁸ I repeat my call in the past to adequately provide PBCs with sufficient funding levels to meet their administrative, legal and financial functions. There are also many Nations who are not yet formally recognised or as developed in terms of organisation and leadership.

The Australian Government should be looking at ways that they assist Nations in their quest to self-govern, and also looking at ways that government can devolve power to Nations who are already self-governing. This may require looking into ways to build capacity, providing resources, supporting research of Nation building, reducing the administrative burden of government and designing programs and policies in a way that allows the greatest flexibility for implementation at the Nation level.

85 Jorgensen & Vivian, note 48.

86 M Gooda, 2012, note 1, p 117.

87 M Gooda, above, pp 113-117.

88 Australian Institute of Aboriginal and Torres Strait Islander Studies, 2014, note 80, p 1.

(b) Government engaging with Nations

In Chapter 1, I referred to the creation of the Indigenous Advisory Council (IAC), the defunding of Congress and the continuation of the Empowered Communities Initiative after the federal election. At first glance, the political environment seems saturated with bodies formed to engage Aboriginal and Torres Strait Islander communities with government.

While I welcome the government establishing and engaging with groups such as the IAC, that group is not representative of Aboriginal and Torres Strait Islander peoples. The membership of that group is selective. The IAC members comprise both Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians, selected by the Prime Minister following consultation with the Minister for Indigenous Affairs.⁸⁹ It is essentially a policy advisory group that is concerned with the governance of government⁹⁰ at the national level.

Empowered Communities is a region-based representation model, including members from service providers, Indigenous leadership sectoral interests such as health, employment, education.⁹¹ Empowered Communities is currently finalising their reform proposal, but their purpose as currently articulated is to share best practice and develop a policy reform agenda for Aboriginal and Torres Strait Islander policy.⁹² In contrast, the Assembly of First Nations aspires to be directly representative of Nations at a national level.

The National Congress of Australia's First Peoples (Congress) is closer to being a truly representative body of Aboriginal and Torres Strait Islander peoples.⁹³ Congress involves an elected Board of six Directors and two Co-chairs directly elected by Congress. The National Congress comprises 120 delegates, elected to three Chambers, with membership from Aboriginal and Torres Strait Islander peak bodies and organisations and individual Aboriginal and Torres Strait Islander people.

Congress aims to be representative of a diverse cross section of Indigenous polity, including participation from groups organising around and those affected by, for example, stolen generations, land claims and issues specific to youth and women. This kind of representation might be viewed as 'issue based' representation as opposed to 'Nation based' representation; there is not a guarantee that every Nation will have a delegate at Congress. Some Nations are represented in Congress, as some land councils and PBCs have opted into participating in Chamber 2 as an organisation. While there was initially a suggestion that the Assembly of First Nations might become a new chamber of Congress, this is obviously an issue that will be the subject of further discussion as the Assembly develops. In the meantime, the two bodies can continue in parallel without affecting the other's membership base or functions, and further, complement the other's work.

All of these different ways of engaging with government are important. It is not a matter of picking and choosing one advisory or representative body over another, but of recognising where there are gaps. Nations are the missing piece of the puzzle. Congress is needed so that individual voices are heard and for strong advocacy on particular issues, led by organisations working on those issues and by individuals affected by them. Groups like the IAC and Empowered Communities are crucial to ensuring policy formation that is sensitive to the needs of our peoples and reflective of the work happening in our regions. But the Assembly of First Nations presents - for the first time - an opportunity for the Australian Government, and local

89 See Department of Prime Minister and Cabinet, *Prime Minister's Indigenous Advisory Council*, https://www.dpmc.gov.au/indigenous_affairs/indigenous_advisory_council/index.cfm (viewed 1 October 2014).

90 M Gooda, note 1, pp 113-117.

91 A Tudge, Department of Prime Minister and Cabinet, 'Parliamentary Secretary Tudge: Project launched to "Empower Communities"', 6 February 2014. At <http://www.indigenous.gov.au/parliamentary-secretary-tudge-project-launched-to-empower-communities> (viewed 1 October 2014).

92 Cape York Institute for Policy and Leadership, *Empowered Communities Proposal*, <http://cyi.org.au/empowered-communities> (viewed 1 October 2014).

93 M Gooda, note 1, pp 183 - 198.

governments, to engage with a body representative of Aboriginal and Torres Strait Islander communities *with cultural authority*.

The Australian Government should explore ways to engage more effectively with Nations. As a first step, this involves acknowledging the decision by Aboriginal and Torres Strait Islander peoples to establish an Assembly of First Nations. The Australian Government need not be directly involved in this process – rather, the Assembly has been and should continue to be a process controlled by First Nations. The Australian Government should consider ways that it can engage with and recognise the cultural authority of the Assembly of First Nations once it becomes functional, and how the various national Aboriginal and Torres Strait Islander bodies that have been established to engage with government can work together. A holistic approach by the Australian Government – engagement processes that connect with representatives from all sectors of Aboriginal and Torres Strait Islander peoples – has the most promise for meaningful engagement and dialogue.

Recommendations

4. The Australian Government:

- acknowledges that effective local community governance is central to achieving sustainable development in Aboriginal and Torres Strait Islander communities
- acknowledges the Nation building efforts to date and engages with those Nations as a means of linking with local Aboriginal and Torres Strait Islander peoples
- continues to resource and support research into the concept of nationhood, such as the Indigenous Nation building Collaboration.

Chapter 6: Giving effect to the Declaration

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6.1 Introduction

Throughout my term, I have continually emphasised the importance of the *United Nations Declaration on the Rights of Indigenous Peoples*¹ (the Declaration).

The Declaration is the most comprehensive and advanced international instrument dealing with Indigenous peoples' rights.² It defines the minimum standards necessary for the survival, dignity and well-being of indigenous peoples of the world.³

Importantly, the Declaration was drafted collaboratively between Indigenous peoples and governments from around the world.⁴ In this way, the Declaration is a very empowering document for our peoples – it is our document, written by us, for us, as an expression of our right to self-determination.

I have said previously that the Declaration is a compass to guide the future of our communities.⁵ We need to assist our communities to be in a position where they can breathe life into the Declaration and make it a useful tool for our everyday lives.

This chapter sets out a path for advancing the implementation of the Declaration within Australia, and the benefits that will result from this.

It reflects on the Declaration Dialogues that have been held by the Australian Human Rights Commission (the Commission) and the National Congress of Australia's First Peoples in Aboriginal and Torres Strait Islander communities across the country over the past year.⁶

It also highlights the need for improved engagement and concrete action to embed the Declaration in activities by all sectors of society: by governments, civil society, the private sector, and by Aboriginal and Torres Strait Islander communities.

1 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007.

2 C Charters and R Stavenhagen, 'The UN Declaration on the Rights of Indigenous Peoples: How It Came to be and What it Heralds' in C Charters and R Stavenhagen (eds), *Making the Declaration Work – The United Nations Declaration on the Rights of Indigenous Peoples* (2009), p 10. At <http://www.internationalfund.org/documents/MakingtheDeclarationWork.pdf> (viewed 1 October 2014).

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

4 J Bishop, *Address to the United Nations World Conference on Indigenous Peoples* (Speech delivered at the World Conference on Indigenous Peoples, New York, 23 September 2014), para 10. At http://www.foreignminister.gov.au/speeches/Pages/2014/jb_sp_140923.aspx (viewed 1 October 2014).

5 M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission (2013), p 91. At <https://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013> (viewed 1 October 2014).

6 For an overview of this see: Australian Human Rights Commission, *Declaration Dialogue Series – Discussion Paper 1: Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Giving Full Effect to the Declaration – A National Strategy* (July 2013) p 8. At: https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_1_Strategy.pdf (viewed 1 October 2014).

6.2 Steps taken by the Australian Government to implement the Declaration

Five years have now passed since Australia made its formal commitment to the Declaration on 3 April 2009.⁷

In 2013, I felt the Australian Government had finally accepted that it has a moral, if not legal, obligation to implement the Declaration in Australia.⁸

This was marked by a joint statement between the Commission and the Australian Government at the United Nations Permanent Forum on Indigenous Issues, formally committing the government to work with the Commission and the National Congress to:

Increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done.⁹

In recent years, we have seen a range of positive commitments from successive Australian Governments to implement the provisions of the Declaration.

The Labour Government introduced the *National Action Plan on Human Rights*,¹⁰ which contains a number of commitments that relate to the Declaration. The same government also presented its interim report to the Human Rights Council's Universal Periodical Review on 10 June 2013.

In May 2014, the current Australian Government identified the steps that they have taken to implement the Declaration at the United Nations Permanent Forum on Indigenous Issues.¹¹

At the time of preparing this report in September 2014,¹² the Australian Government played a leading role at the World Conference on Indigenous Peoples (the World Conference). The World Conference Outcomes Document commits Member States to develop, in consultation and cooperation with Indigenous peoples, national measures to achieve the ends of the Declaration.

Australia agreed to this Outcomes Document, which is a collective commitment by Member States to focused action on the Declaration and Indigenous rights:

We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples and to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service.

7 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 (viewed 1 October 2014).

8 M Gooda, note 5, pp 91-92.

9 M Doherty and J Bedford, *Joint Statement by the Australian Government and the Australian Human Rights Commission on Agenda Item 7: Implementing the Declaration* (Delivered at the 12th session of the United Nations Permanent Forum on Indigenous Issues, New York, 20-31 May 2013). At <http://www.docip.org/greenstone/collect/cendocdo/index/assoc/HASH016e/e5a98b96.dir/PF13mandy116.pdf#search='Mandy DOHERTY'> (viewed 1 October 2014).

10 Commonwealth of Australia, *Australia's National Human Rights Action Plan* (2012). At http://www.ag.gov.au%2FConsultations%2FDocuments%2FNationalHumanRightsActionPlan%2FNational%2520Human%2520Rights%2520Action%2520Plan.doc&ei=hKk8VMqjCtP88AXrp4GwDQ&usg=AFQjCNGkeXOGeDFuKju_GJqhBDF3ZgUIA&bvm=bv.77161500,d.dGc (viewed 1 October 2014).

11 T Rishniw, *Australian Government Statement to the United Nations Permanent Forum on Indigenous Issues* (Delivered at the thirteenth session of the United Nations Permanent Forum on Indigenous Issues, New York, 21 May 2014). At <http://papersmart.unmeetings.org/media2/3346197/australia.pdf> (viewed 1 October 2014).

12 Whilst outside of the reporting period, it is an important development impacting the implementation of the Declaration and was therefore included in this report.

We commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration.¹³

While this commitment is significant and builds on an already strong and supportive relationship between the Commission and the Australian Government, there is further work to do.

I note the recent publication of *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians*¹⁴ which is a practical guideline for better understanding the Declaration, providing practical ideas for its implementation and best practice examples from across the world.

In this report, I have already noted my concern about the lack of respectful engagement with the Aboriginal and Torres Strait Islander peoples in relation to recent budget cuts and the national restructure of programs and services.

I also repeat my call for the Declaration to be included in the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).¹⁵

Significantly, we still have much work to do to implement the Declaration at the local level. There is a particular need for practical guidance to achieve this.

And we still lack a distinct, targeted and tangible plan setting out the way forward.

13 Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples, GA Res 66, UN Doc No A/69/L.1, 2014, paras 7-8. At <http://wqip2014.org/wp-content/uploads/2014/09/N1453491-WCIP-FINAL-DOCUMENT-EN.pdf> (viewed 1 October 2014).

14 Inter Parliamentary Union, *Handbook for Parliamentarians*, note 3, p 4. This was launched outside of the reporting period in September 2014, in conjunction with the World Conference on Indigenous Peoples.

15 M Gooda, note 5, p 95. See also Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Human Rights (Parliamentary Scrutiny) Bill 2010 and the Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010* (7 July 2010), para 17. At <https://www.humanrights.gov.au/human-rights-parliamentary-scrutiny-bill-2010-and-human-rights-parliamentary-scrutiny-consequential> (viewed 1 October 2014).

6.3 Giving effect to the Declaration

As I have discussed previously, there are four mechanisms that can be used to give effect to the Declaration in Australia:

- **The ‘principled’ approach:** This involves identifying the key, underlying principles of the Declaration and creating practical guidance on how each article can be brought into effect.
- **Duties of States:** This involves making the Australian Government accountable for directly implementing the Declaration. There are at least 19 articles which impose duties on governments to undertake a range of cultural, consultative and legislative measures.
- **Referencing the Declaration:** This approach promotes the referencing of the Declaration at every available opportunity – from inclusion in government plans and strategy, to its use in Indigenous governance structures and relationships.
- **Auditing compliance:** This involves scrutinising existing legislation, policies and programs to ensure compliance with the identified underpinning principles of the Declaration.¹⁶

The four main principles that underpin the Declaration are: self-determination; participation in decision-making, underpinned by free, prior and informed consent and good faith; respect for and protection of culture; and equality and non-discrimination.¹⁷

While the ‘principled’ approach is a good starting point to increase understanding about the Declaration and its potential impact, the other mechanisms are also necessary to properly give effect to the Declaration.

While, to some extent, these mechanisms are already used by the Australian Government, the Declaration should be the basis of *all* of the work that government does with Aboriginal and Torres Strait Islander peoples. The Declaration should be the building block for policies, legislation and programs. The same point applies equally to business and community organisations in their dealings with our peoples.

To this end, I highlight again the need for a National Implementation Strategy (National Strategy) setting out a plan to give effect to the Declaration in Australia.

To discuss what a National Strategy means for us in the Australian context, last year I flagged that the Commission would work with Congress to conduct Declaration Dialogues with our communities and organisations, all levels of government, businesses and non-governmental organisations.

¹⁶ M Gooda, note 5, p 93.

¹⁷ I have written extensively about these principles in the *Social Justice and Native Title Reports* over the past three years. For example, see M Gooda, *Social Justice Report 2011*, Australian Human Rights Commission (2011), ch 3. At <https://www.humanrights.gov.au/publications/social-justice-report-2011> (viewed 1 October 2014); M Gooda, *Native Title Report 2011*, Australian Human Rights Commission (2011), ch 3. At <https://www.humanrights.gov.au/publications/native-title-report-2011> (viewed 1 October 2014); M Gooda, *Social Justice Report 2012*, Australian Human Rights Commission (2012), ch 2. At <https://www.humanrights.gov.au/publications/social-justice-report-2012> (viewed 1 October 2014); M Gooda, *Native Title Report 2012*, Australian Human Rights Commission (2012), ch 2. At <https://www.humanrights.gov.au/publications/native-title-report-2012> (viewed 1 October 2014); M Gooda, note 5, ch 3.

(a) The Declaration Dialogues

I am pleased to report that these Declaration Dialogues occurred during this reporting period.

To date, approximately 260 people have attended 14 Dialogues held in 6 states and territories.¹⁸ Participants have included people who have self-identified as Traditional Owners, Elders, land councils, academics, education providers, medical service providers, large non-governmental organisations and government workers, as well as interested individuals and community members.

In preparation for the Declaration Dialogues, the Commission produced community education and engagement materials to raise awareness of the Declaration (with generous support from philanthropic funders).¹⁹ These resources include a plain-English community guide, posters, a DVD and an interactive website,²⁰ aimed at Aboriginal and Torres Strait Islander communities, government, the private sector and civil society.

Following this, we produced a set of papers on the Declaration to guide the Declaration Dialogue consultations. These papers were based around the development of a National Strategy,²¹ self-determination,²² participation,²³ protection of culture²⁴ and equality and non-discrimination.²⁵ Tools were then produced to support the delivery of the discussions.

The Declaration Dialogues were then carried out across the country in partnership with the National Congress of Australia's First Peoples (Congress). I thank Congress for their dedication to, and facilitation of, this important project.

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- 18 The dialogues were held in Perth, Western Australia (Youth Specific, 20 August 2013), Perth, Western Australia (General, 21 August 2013), Thursday Island, Queensland (29 August 2013), Broome, Western Australia (20 September 2013), Alice Springs, Northern Territory (14 October 2013), Darwin, Northern Territory (11 November 2013), Wagga Wagga, New South Wales (18 November 2013), Cairns, Queensland (22 November 2013), National Youth-specific, Randwick New South Wales (12 February 2014), Canberra, Australian Capital Territory (27 May 2014), Coffs Harbour, New South Wales (4 June 2014), Brisbane, Queensland (13 June 2014), Port Augusta, South Australia (17 June 2014) and Adelaide, South Australia (19 June 2014).
- 19 Funded by The Christensen Fund, Oxfam and Congress from 2012-2014: a pocket-sized version of the Declaration, a plain-English community guide, a summary community guide (pamphlet style), a double-sided poster that includes the full text of the Declaration, an introductory DVD (12 minutes) to the Declaration, the Declaration interactive website, the Declaration Twitter account (#getiknowituseit). The social media account was established and is administered by the Commission. At https://twitter.com/get_know_use_it (viewed 1 October 2014).
- 20 The website was developed by and is administered by the Australian Human Rights Commission. At: <http://declaration.humanrights.gov.au> (viewed 1 October 2014).
- 21 Australian Human Rights Commission, note 6.
- 22 Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No. 2 – Self-determination – the fundamental right of Aboriginal and Torres Strait Islander peoples to shape our own lives* (July 2013). At https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_2_Self-determination.pdf (viewed 1 October 2014).
- 23 Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No.3 – We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith* (July 2013). At https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_3_Consent.pdf (viewed 1 October 2014).
- 24 Australian Human Rights Commission, *The Declaration Dialogue Series: Discussion Paper 4: Ensuring the ongoing survival of the oldest living culture in the world* (July 2013). At https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_4_Culture.pdf (viewed 1 October 2014).
- 25 Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No 5 – Equality and Non-Discrimination* (July 2013). At https://www.humanrights.gov.au/sites/default/files/2014_AHRC_DD_5_Equality.pdf (viewed 1 October 2014).

In summary, the purpose of the Declaration Dialogues was to:

- raise awareness of the Declaration
- develop an agreed approach to give full effect to the Declaration
- facilitate discussion between Aboriginal and Torres Strait Islander peoples, governments and other relevant stakeholders
- develop a National Strategy on the Declaration.²⁶

It is hoped that once the National Strategy has been reached by consensus, it will be adopted by all relevant stakeholders at a National Summit.²⁷

(b) Findings of the Declaration Dialogues

At each Dialogue, presentations and group workshops were conducted to inform people about the content of the Declaration. The key message was: 'Get It. Know It. Use It'. The questions asked in the Dialogues are included in Appendix 3.²⁸

I have identified a number of benefits of the Declaration Dialogues.

(i) Raising awareness

The Declaration Dialogues were well attended and received. I believe this is an excellent model for raising awareness about the Declaration. While most of the data collection has occurred for the purposes of developing the National Strategy, the Commission looks forward to working with any sectors or communities that wish to run a Declaration Dialogue, as part of an ongoing awareness raising strategy.

The Declaration Dialogues built awareness and understanding amongst Aboriginal and Torres Strait Islander peoples.

26 For the full aims and objectives, see Australian Human Rights Commission, note 6, p 8.

27 For more, see Australian Human Rights Commission, above.

28 Additional presenters included Congress Board of Directors T Solonec, V Curnow, G Moore and Dr M McMillan, and K Kiss (Director Strategic Projects, now with PwC Indigenous Consulting). Key presenters from the Commission included M Gooda (Social Justice Commissioner), Dr T Soutphommasane (Race Discrimination Commissioner), R Nissim (Principal Advisor) and J Bedford (Principal Advisor). Congress Co-Chair L Malezer did not officially present, however his contributions at some dialogues were extremely valuable and provided background to discussions and questions. Staff from the Commission and Congress also presented at a number of Dialogues, including M Edwards, M Higgins and T Tipps-Webster.

Text Box 6.1:

Quotes from participants at Declaration Dialogues about their awareness

'Now I understand my rights much more and can formulate a stronger argument when they are violated'
(Youth-specific participant)

'I have got it, I know more and I will use it.'
(Port Augusta Dialogue participant)

'I am now aware that the Declaration exists and I think it is important for more First Nations peoples to come to future workshops. I now understand where to go for support in regards to my rights.'
(Brisbane Dialogue participant)

'I have learnt the importance of implementing the Declaration whenever I can in the workplace and using it to guide my behaviour in the workplace.'
(Port Augusta Dialogue participant)

'Thank you - I have learnt that I have more rights than I thought I had.'
(Wagga Wagga Dialogue participant)

'Through the Declaration Articles I will be more forthright... in my resolve to improve the life of [my peoples].'
(Cairns Dialogue participant)

It is uplifting to see our peoples take ownership of the Declaration, and to begin to use it in everyday life.

(ii) Identifying areas of improvement for a National Strategy

The Declaration Dialogues collected information which will be used to develop a strategy to give effect to the rights contained in the Declaration. These included:

Leadership: People told me that we need appropriate levels of Aboriginal and Torres Strait Islander representation in all levels of government. Our mob wants to lead the conversations rather than just be included. We need to nurture our future leaders.

We need people to be part of the change from the inside, not critical from the outside.

Canberra Dialogue participant

Governance: I heard that our communities want to choose and determine their own structures for decision-making and governance. This includes bodies like Congress, our peak organisations, as well as recognition of pre-colonisation structures. Aboriginal and Torres Strait Islander peoples want more management of our own affairs, resources and economies.

Self-determination can be described as a car. The government has taken the keys to that car by colonising this Country and its First Peoples. Because they have the keys does not mean they own the car. We still own the car; we just need to take back the keys!

Perth Dialogue participant

All sectors need to improve on responsibility and accountability. People told me that they also recognise the need for organisation and cooperation amongst ourselves.

We need to have a structure to our meetings, aimed at reaching a decision or consensus. Otherwise meetings can be de-railed and we fail to progress issues, and decisions get made without us.

Coffs Harbour Dialogue participants

Legislation and policy: Legislation and policy reform are important to realising all of the underpinning principles of the Declaration. Participants discussed the need for reform by introducing legislation to give effect to the Declaration and ratifying the *International Labour Organisation Convention No. 169*. Our people want existing protections, such as those in s 18C of the Racial Discrimination Act and in native title legislation, to be preserved and not 'watered down'.

Aboriginal and Torres Strait Islander peoples want legislation that specifically protects cultural heritage to be consistent across jurisdictions, and more work done to protect Indigenous languages. Our peoples would like to see a discussion about establishing a national Indigenous cultural authority.

To have self-determination, you need to know who you are. Keeping our cultural identity, language and values can't be measured in price. It is priceless. If we don't maintain our languages and cultural values then we are nobody.

Broome Dialogue participant

Relationships and engagement: I heard from participants that we need to heal relationships within our communities, and also between our communities, governments and business.

Repeatedly I heard that in order to build better relationships and have more meaningful engagement, governments, businesses and service providers need leaders, employees and contractors that are more culturally competent. All sectors need to respect the particular cultural protocols of each community, ask for permission and make sure that they speak to the entire community.

We need to empower communities to say No. The bottom line is that if you don't respect our culture and rights, we will not engage with you or do business with you.

Canberra Dialogue participant

Our communities also said that we need to improve relationships with each other, and this required reconciling our own communities, building community cohesion, respect and working together in a unified way.

Internal processes: All sectors need to reduce the administrative burden and simplify their reporting structures for communities and community organisations. All sectors need to obtain 'free, prior and informed consent' from our communities about decisions that affect us. This includes allowing a flexible amount of time to engage in meaningful consultation.

Governments, mining companies and developers are full of talk. But they need to walk the walk.

Cairns Dialogue participant

Capacity building: Building capacity at a governmental and business level means increasing cultural competency at all levels. For communities, it means improving individual and organisational capability, and being confident to use the Declaration to lobby for improvements.

The 'Care bear' organisations (e.g. non-Aboriginal service providers like Anglicare, Uniting Care, Centrecare, etc) must have culturally aware staff so that our people can feel comfortable talking to them and using their services.

Brisbane Dialogue participant

Our people warn against governments and service providers implementing pre- designed programs or services. One size does not fit all and communities want to be consulted about the design and implementation of programs and services.

Resources: Participants raised lack of funding as an impediment to the improvements that they wished to implement. They commented on the need for long term funding cycles combined with streamlined application, monitoring and reporting.

(iii) The business sector and the Declaration

In 2000, the United Nations Global Compact²⁹ (Global Compact) formed as the United Nations' (and the world's largest) corporate citizenship and sustainability initiative.³⁰

Text Box 6.2:

The Global Compact Network Australia and the Indigenous Engagement Working Group

The Global Compact encourages businesses to align their operations and strategies with ten principles to develop and implement sustainable practices and policies.³¹

More than 111 Australian organisations have publicly committed to supporting and respecting human rights within their business practices by becoming signatories to the Global Compact.³²

In December 2013, the Global Compact launched the *Business Reference Guide to the United Nations Declaration on the Rights of Indigenous Peoples* (Business Reference Guide), which provides practical guidance to businesses seeking to respect and support the human rights of Indigenous peoples.³³

The Global Compact Network Australia (GCNA) aims to help Australian Global Compact signatories to integrate and operationalise the 'ten principles of the Global Compact within their business practices and strategy and to support broader UN goals'.³⁴

29 Australian Human Rights Commission, *How does the Commission engage with the business community to improve human rights?*, <https://www.humanrights.gov.au/business-and-human-rights#s3> (viewed 1 October 2014).

30 Global Compact Network Australia, *UN Global Compact*, <http://www.unglobalcompact.org.au/about-us/un-global-compact-2/> (viewed 1 October 2014).

31 Global Compact Network Australia, above.

32 United Nations Global Compact, *Participant search*, <https://www.unglobalcompact.org/participants/search?commit=t&country%5B%5D=10> (viewed 1 October 2014).

33 United Nations Global Compact, *United Nations Declaration on the Rights of Indigenous Peoples: a Business Reference Guide* (2013). At http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html (viewed 1 October 2014).

34 Global Compact Network Australia, *Global Compact Network Australia*, <http://www.unglobalcompact.org.au/about-us/global-compact-network-australia/> (viewed 1 October 2014).

In support of their membership and commitment to the global compact principles, some Australian companies incorporate human rights into their annual reporting and their policies and practices.³⁵

The GCNA has established an Indigenous Engagement Working Group (IEWG),³⁶ which the Commission is a member of, alongside a number of Australian businesses. The IEWG promotes the importance of positive Indigenous engagement, provides a platform for Australian businesses to share leading practices and collectively advance Indigenous rights in Australia.

The GCNA and the Commission recently partnered to hold the National Dialogue on Business and Human Rights.³⁷ This was the first national Australian multi-sector, multi-stakeholder dialogue on business and human rights, which brought together over 100 representatives of business, civil society and government to discuss human rights and business. A specific session was held on the Declaration and a rights-based approach to Indigenous engagement.

Participants agreed that we need to move the conversation along actively and meaningfully. There was also consensus that the conversation has largely moved beyond ‘why’ business should respect Indigenous and human rights, to the practical questions about ‘how’ to effectively do so, including through implementing the Declaration in Australia.³⁸

The Dialogue highlighted the positive work that many Australian businesses are undertaking through their Reconciliation Action Plans and community engagement. It is important to continue the constructive dialogue and share stories of how businesses are taking action to respect and support the rights of Aboriginal and Torres Strait Islander peoples.

Australian businesses are key players in the realisation and enjoyment of human rights. It is therefore critical to involve the business sector in the development of the National Strategy and secure their support for a plan to give effect to the Declaration. Engaging with business on human rights is a priority in the *Commission’s 2014-2018 Strategic Plan*.³⁹

Discussions have commenced, being led by KPMG Australia, who contributed to the Global Compact taskforce and Expert Group convened to develop the Business Reference Guide. Plans are underway to convene an Industry-specific Dialogue in 2014-15 to start discussions about the National Strategy.⁴⁰

My office has also held a number of engagement meetings with key industry representatives such as KPMG Australia, Lend Lease, Qantas and Westpac in relation to furthering the Industry-specific Dialogue.

35 Australian Human Rights Commission, *Good practice, good business - Integrating human rights into Australian business practice, Fact Sheet 1* (2009). At www.humanrights.gov.au/human_rights/corporate_social_responsibility (viewed 1 October 2014).

36 Global Compact Network Australia, *Indigenous Engagement Working Group*, <http://www.unglobalcompact.org.au/new/leadership-groups/indigenous-engagement-working-group/> (viewed 1 October 2014).

37 Australian Human Rights Commission, ‘Advancing the national agenda on business and human rights’ (Media Release, 4 August 2014). At <https://www.humanrights.gov.au/news/stories/advancing-national-agenda-business-and-human-rights> (viewed 1 October 2014).

38 Global Compact Network Australia and Australian Human Rights Commission, *Australian Dialogue on Business and Human Rights - Summary and Outcomes Document* (2014). At http://www.humanrights.gov.au/education/business-and-human-rights#s3_facilitate (viewed 1 October 2014).

39 Australian Human Rights Commission, *Strategic Plan 2014-2018* (2014). At <https://www.humanrights.gov.au/publications/strategic-plan-2014-2018> (viewed 1 October 2014).

40 Global Compact Network Australia and Australian Human Rights Commission, note 38.

6.4 Conclusion and recommendations

Momentum is building towards realising the rights contained in the Declaration in Australia.

Our Declaration Dialogues have shown that communities find the Declaration to be an empowering tool that they can use to assert their rights in everyday life.

Hundreds of businesses are demonstrating their willingness and commitment to use the Declaration as a basis for their engagement with Aboriginal and Torres Strait Islander communities. The Global Compact, GCNA and IEWG are a solid foundation to build this work.

Having said this, we still have work to do.

The time is right to develop a National Strategy to give effect to the Declaration, with governments and the community sector. While some of these representatives have attended our Declaration Dialogues, direct engagement about implementation needs to occur.

I am confident that progress can be made in the coming year. This is as a result of the positive engagement from the Dialogues to date and from engagement with the business sector, together with the Government's support of the World Conference Outcome Document.

In saying this, I encourage the Australian Government to build on the relationships nurtured in the World Conference consultation process and use the Declaration as a foundation for future relationships and engagement.

Recommendations

Recommendation 5: The Australian Government agrees to engage with the National Implementation Strategy to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 6: The Australian Government amends the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include the *United Nations Declaration on the Rights of Indigenous Peoples* in the definition of human rights.

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Appendix 1

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Appendix 2

Mandatory sentencing laws as at July 2014

State/ Terr	Overview
NSW	<p>Crimes Act 1900 (NSW)</p> <ul style="list-style-type: none">• Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014 (NSW)¹<ul style="list-style-type: none">◦ Commenced on assent on 31 January 2014◦ Inserts new ss 25A and 25B into the <i>Crimes Act</i>◦ Section 25A creates a basic and aggravated form of the offence of assault causing death<ul style="list-style-type: none">• Section 25A(1) sets out the basic form of the offence• Section 25A(2) sets out the aggravated form of the s 25A(1) offence. A person aged 18 years or above who commits an offence under s 25A(1) whilst he or she is intoxicated commits an offence under s 25A(2)◦ Section 25B(1) sets a mandatory minimum for the offence<ul style="list-style-type: none">• Provides that a court is required to impose a sentence of imprisonment of not less than eight years on a person guilty of an offence under s 25A(2)²◦ This offence of unlawful fatal assault, where the offender was intoxicated by alcohol and/or drugs when the offence was committed, has become known as 'one punch' laws³◦ The current proposals in NSW to introduce minimum sentences for alcohol-related violence have been both criticised⁴ and commended⁵ by members of the legal community

1 Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014..

2 Judicial Commission of New South Wales, *Special Bulletin 6*, http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/special_bulletin_06.html (viewed 16 July 2014).

3 NSW Parliament E-brief, 'Mandatory sentencing laws', January 2014; Parliament of Victoria, *Crimes Amendment (Gross Violence) Bill 2012 Research Paper*. At <http://www.parliament.vic.gov.au/publications/research-papers/8491-crimes-amendment-gross-violence-bill-2012> (viewed 25 June 2014); B O'Farrell, 'Lockouts and mandatory minimums to be introduced to tackle drug and alcohol violence' (Media Release, 21 January 2014); A Clennell, 'Barry O'Farrell gets tough: mandatory sentences on the way for gang shooters', *The Telegraph* (7 November 2013).

4 M Whitbourn, 'Lawyers condemn knee-jerk mandatory jail term changes' *Sydney Morning Herald*, 22 January 2014; "'One-punch laws: mandatory sentences for drunken violence 'a recipe for injustice', say NSW legal experts', *ABC News online*, 23 January 2014. At <http://www.abc.net.au/news/2014-01-22/one-punch-mandatory-sentences-27a-recipe-for-injustice27/5212462> (viewed 25 June 2014).

5 M Bagaric, 'New chapter for crime and punishment begins with a sentence from Barry O'Farrell', *Sydney Morning Herald*, 23 January 2014.

- *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW)
 - Provides for mandatory life sentences to be imposed on persons convicted of murdering police officers in the course of his or her duty: s 19B

***Crimes (Sentencing Procedure) Act 1999* (NSW)**

- Section 61 sets out mandatory life sentences for certain offences⁶

VIC *Sentencing Act 1991 (Vic) and Crimes Act 1958* (Vic)

- *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic)
 - Two new offences carrying a mandatory minimum non-parole period of four years for intentionally or recklessly causing serious injury in circumstances of gross violence:
 - Causing serious injury intentionally or recklessly in circumstances of gross violence: s 15A and 15B of the *Crimes Act 1958* (Vic)
 - Custodial sentences must be imposed for offences of gross violence under ss 15A and 15B of the *Crimes Act*: s 10 of the *Sentencing Act 1991* (Vic); special reasons relevant to sentencing for gross violence offences: s 10A
 - The new provisions will apply to offences committed after 1 January 2014⁷

NT *Sentencing Act 1995* (NT)

- *Sentencing Amendment (Mandatory Minimum Sentence) Act 2013* (NT)
 - Inserts five new levels of violent offence and their corresponding mandatory sentences: s 78CA
 - Introduces new mandatory minimum sentences of three or 12 months depending on the level of offence: sub-div 2
 - The mandatory minimum imprisonment terms apply when the court is sentencing an offender for specific violent offences
 - Adds more Criminal Code offences to Schedule 2 as violent offences. The offences listed in Schedule 2 can be taken into account to form a Level 1 to 5 offence or as a previous conviction for a violent offence (see footnote 7, Fact Sheet, for list of types of offences)
 - The new provisions commenced on 1 May 2013 - applies to offences committed after that date

⁶ See http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s61.html for list of 'certain offences'.

⁷ Parliament of Victoria, *Crimes Amendment (Gross Violence) Bill 2012 Research Paper*. At <http://www.parliament.vic.gov.au/publications/research-papers/8491-crimes-amendment-gross-violence-bill-2012> (viewed 1 October 2014); NSW Parliament E-brief, 'Mandatory sentencing laws', January 2014; Lawyers Picnic: a feast for fresh legal news, *Mandatory Minimum Sentences for Gross Violence*. At <http://www.lawyerspicnic.com/mandatory-minimum-sentences-for-gross-violence/> (viewed 25 June 2014).

- •Exceptions to the application of the mandatory sentences
 - Where a youth is sentenced under the *Sentencing Act* (and not under the *Youth Justice Act*), the mandatory minimum imprisonment terms do not apply, however, the court must still sentence the youth to actual imprisonment (i.e. the court has discretion as to the duration of imprisonment)
 - The mandatory minimum imprisonment terms may not apply if the court considers there are exceptional circumstances in the case of the particular offender, and the court must sentence the offender to actual imprisonment
 - Intoxication by alcohol or drugs is not to be considered as an exceptional circumstance⁸

Criminal Code (NT)

- •Mandatory life imprisonment for manslaughter: s 161

WA

Criminal Code 1913 (WA)

- •*Criminal Code Amendment Act (No 2) 1996 (WA)*
 - If a person is a repeat offender at the time of committing a home burglary, adult and juvenile offenders must be sentenced to a minimum of 12 months imprisonment: s 401(4)
 - In November 2001, the Government released a review of the provisions, which concluded that they had had little effect on the criminal justice system⁹
- •*Criminal Code Amendment Act 2009 (WA)*
 - Mandatory sentencing for:
 - serious assault: s 318A(2)-(5)
 - grievous bodily harm: s 297(5)-(8)
 - murder: ss 279(4),(6)¹⁰
- •*Criminal Code Amendment Act (No. 2) 2013 (WA)*
 - Extended the application of the above mandatory sentencing provisions to include assault and grievous bodily harm offences committed against youth custodial officers: ss 297, 318

8 Department of Attorney General and Justice, *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013 (NT)*, Fact Sheet. At [http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFJAA&url=http%3A%2F%2Fwww.nt.gov.au%2Fjustice%2Fpolicycoord%2Fdocuments%2Fflawmake%2F2013%2FFact_sheet_Sentencing_Amendment_\(Mandatory_minimum_sentences\)_Act_2013.pdf&ei=ARTHU_q9Gc768QXAh4CwBA&usg=AFQjCNHaOVYIWXyoyj6VCpykODZnvAv1ffw](http://www.google.com.au/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&uact=8&ved=0CBwQFJAA&url=http%3A%2F%2Fwww.nt.gov.au%2Fjustice%2Fpolicycoord%2Fdocuments%2Fflawmake%2F2013%2FFact_sheet_Sentencing_Amendment_(Mandatory_minimum_sentences)_Act_2013.pdf&ei=ARTHU_q9Gc768QXAh4CwBA&usg=AFQjCNHaOVYIWXyoyj6VCpykODZnvAv1ffw) (viewed 1 October 2014); NSW Parliament E-brief, 'Mandatory sentencing laws', January 2014, p10.

9 The findings of the review are outlined in more detail in R Johns, *Sentencing Law: A Review of Developments in 1998-2001*, NSW Parliamentary Research Service, Briefing Paper 2/02, January 2002, p76-78.

10 *Criminal Code Act Compilation Act 1913 – notes (WA)*, ss 279(4),(6). At http://www.austlii.edu.au/au/legis/wa/consol_act/ccaca1913252/notes.html (viewed 1 October 2014).

- The minimum term for adults ranges from six months to 12 months, while the minimum term for young persons aged 16 or over is three months imprisonment or juvenile detention, or an intensive youth supervision order (IYSO)
- *Criminal Organisations Control Act 2012 (WA)*
 - s173 amends the *Criminal Code*
 - Minimum terms of imprisonment for adult offenders who commit certain offences at the direction of, in association with or for the benefit of a declared criminal organisation: ss 221E, 221F of the *Criminal Code WA*¹¹

QLD *Corrective Services Act 2006 (Qld)*

- *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld)*
 - Imposes mandatory terms of life imprisonment (with a 20-year non-parole period) for repeat serious child sex offenders: s 181A

Penalties and Sentences Act 1992 (Qld)

- *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld)*
 - Mandatory life sentence for repeat serious child sex offence: s 161E
- *Weapons and Other Legislation Amendment Act 2012 (Qld)*
 - Minimum sentencing provisions in relation to some serious firearms offences:
 - Sentences of imprisonment between 12 months and 18 months for possession and use of a firearm in certain offences: s 50(1)(d)
 - Sentences of imprisonment from two and a half years for unlawful supply of weapons: s 50B(1)(d)
 - Sentences of imprisonment between three and a half years and five years unlawful trafficking of weapons: s 65

Vicious Lawless Association Disestablishment Act 2013 (Qld)

- Provides for mandatory additional terms of imprisonment for ‘declared offences’ committed by ‘vicious lawless associates’ (VLAs): s 7

Criminal Code 1899 (Qld)

- *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld)*
 - Minimum terms of imprisonment of six months or 12 months for several new offences involving participants in a criminal organisation:
 - Participants in a criminal organisation, knowingly present in public places with two or more persons who are also participants in a criminal organisation: s 60A

11 NSW Parliament E-brief, ‘Mandatory sentencing laws’, January 2014, pp 8-9; *Criminal Code Act Compilation Act 1913* – notes (WA), above, ss 221E, 221F.

- Participants in criminal organisations entering prescribed places and attending prescribed events: s 60B
- Participants in criminal organisations recruiting persons to become participants in the organisation: s 60C
- •The penalty for murder is mandatory life imprisonment or an indefinite sentence: s 305(1)
 - The effect of an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld) is that after the offender has served the minimum term for life imprisonment (either 15 or 20 years) the offender is subject to continuing incarceration and regular reviews
- •Mandatory life imprisonment for manslaughter: s 310

SA *Criminal Law Consolidation Act 1935 (SA)*

- •Mandatory life imprisonment for manslaughter: s 13(1)

Young Offenders Act 1993 (SA)

- •The penalty for murder for a child offender is mandatory life imprisonment: s29(4)

Appendix 3

Declaration Dialogues: questions asked at workshops

Principle	Questions workshopped by participant groups at Declaration dialogues
Self-determination	<ol style="list-style-type: none">1. What do Aboriginal and Torres Strait Islander peoples mean by 'self-determination'? What does this look like in a practical sense?2. What changes need to happen in communities to facilitate self-determination?3. What changes need to happen in the policy/legislative environment to facilitate Aboriginal and Torres Strait Islander self-determination?
Effective participation	<ol style="list-style-type: none">1. What changes do Aboriginal and Torres Strait Islander peoples feel are required to achieve better participation in the decisions that affect them?2. What does it look like when governments, service providers and businesses consult/do business respectfully?
Respect for and protection of culture	<ol style="list-style-type: none">1. What changes do Aboriginal and Torres Strait Islander peoples feel are required to achieve respect for and protection of culture?2. What positive behaviours can government and business make?3. What positive behaviours can communities make?
Equality and non-discrimination	<ol style="list-style-type: none">1. What changes do Aboriginal and Torres Strait Islander peoples feel are required to achieve non-discrimination and racial equality?

Note: Terminology

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

The word '**peoples**' recognises that Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.¹

There is a growing debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.²

Accordingly, the terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this Report.

Sources quoted in this Report use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. International documents frequently use the term 'indigenous peoples' when referring to the Indigenous peoples of the world. To ensure consistency, these usages are preserved in quotations, extracts and in the names of documents.

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- 1 GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 14 October 2014).
 - 2 See Steering Committee for the creation of a new National Representative Body, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Australian Human Rights Commission (2009), pp 15, 43. At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 1 October 2014).

Further Information

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To learn more about the *United Nations Declaration on the Rights of Indigenous Peoples*, or to order publications on the Declaration, please go to <http://declaration.humanrights.gov.au/>

