



Australian
Human Rights
Commission

Social Justice and Native Title Report 2015

ABORIGINAL AND TORRES STRAIT ISLANDER
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander
Social Justice Commissioner

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Social Justice and Native Title Report 2015

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A full list of acknowledgements is contained at Appendix 1.

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Photo: Phoenix Wunba Briscoe, a proud Ku Ku Yalanji descendant. Photograph by Luke Briscoe (2013). The photo was taken at 'the Block', Redfern – an urban iconic meeting place and a symbol of hope for Aboriginal and Torres Strait Islander peoples.

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

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

The *Social Justice and Native Title Report 2015* was written on your lands and we honour you, the Gadigal people, by producing a record that advocates the human rights of Aboriginal and Torres Strait Islander peoples throughout Australia.



14 October 2015

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 2015

I am pleased to present to you the *Social Justice and Native Title Report 2015*, 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 2014 to 30 June 2015. In doing so, it provides an overview of the year with respect to Social Justice and Native Title issues.

The Report outlines major developments during the year, including the ongoing impact of the Indigenous Advancement Strategy, constitutional recognition, welfare and announcements regarding remote communities.

It also reflects on progress in land and native title, including the findings of major reviews and the feedback of Aboriginal and Torres Strait Islander peoples about the need for a new process of engagement. These views were expressed during the Broome Roundtable on Indigenous property rights, which you attended in May 2015. This process also identified a number of major barriers in the enjoyment of our rights to land and native title, which are explored in depth.

I also investigate two human rights issues facing Aboriginal and Torres Strait Islander peoples, namely that of disability and child protection. The Report details the nature and extent of disability in our communities as well as the experience of our people with the newly established National Disability Insurance Scheme. The chapter on child protection reveals what is one of the most challenging issues confronting our communities, including the value of reforms aimed at healing informed practice.

I look forward to discussing the Report with you.

Yours sincerely

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

Mick Gooda

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

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: 1999-2004
- 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. He is now in his 6th year in this position having commenced in February 2010.

Mick has worked in Aboriginal and Torres Strait Islander affairs for over 30 years having worked in remote, rural and urban environments throughout Australia at the community, regional, state and national levels.

As Commissioner, Mick builds on this experience to advocate for the human rights of Aboriginal and Torres Strait Islander peoples in Australia and to 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

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Executive summary

I am delighted to present my sixth *Social Justice and Native Title Report* as Aboriginal and Torres Strait Islander Social Justice Commissioner.

I am required to report every year to Parliament on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples. This also includes reporting on the operation of the *Native Title Act 1993* (Cth) and its effect on the exercise and enjoyment of our rights to land, territories and resources.

In 2015, I have again met these responsibilities through the creation of the combined *Social Justice and Native Title Report 2015* which covers significant human rights issues that have taken place during the reporting period of 1 July 2014 to 30 June 2015.

Chapter 1: The need for better engagement - Year in review

In this chapter, I have provided an overview of the key issues and developments that have affected Aboriginal and Torres Strait Islander peoples in the enjoyment and exercise of their human rights.

Discussion in this chapter takes place around:

- the continued impact of the Indigenous Advancement Strategy and machinery of government changes
- announcements regarding remote communities
- the introduction and impact of paperless arrest powers in the Northern Territory
- progress towards achieving constitutional recognition.

I am particularly concerned about the continued lack of meaningful engagement with Aboriginal and Torres Strait Islander peoples across these key policy areas.

I also report on a number of other developments that have occurred during the reporting period, namely:

- Close the Gap
- Indigenous participation at international fora (see Appendix 2)
- complaints received by the Australian Human Rights Commission from Aboriginal and Torres Strait Islander peoples during the last year (see Appendix 3).

Chapter 2: Welfare

In this chapter, I explore a number of developments that have taken place during the last year in relation to Aboriginal and Torres Strait Islander peoples and welfare.

Most notably these include:

- announcements made regarding the *Forrest Review: Creating Parity* report (the Forrest Review) in relation to a trial of the Healthy Welfare Card and the introduction of the Work for the Dole scheme in remote areas
- announcements made by the Australian Government to boost Indigenous employment such as through the Australian Public Service, the Indigenous Procurement Policy and the Employment Parity Initiative.

I welcome the Australian Government's commitment to addressing the disparity in employment outcomes between Indigenous and non-Indigenous Australians. However, from a human rights perspective, I am concerned about the disproportionate impact that the Healthy Welfare Card and Work for the Dole scheme may have on Aboriginal and Torres Strait Islander peoples.

Both of these initiatives are in their early stages of implementation and have started without meaningful and comprehensive engagement with Aboriginal and Torres Strait Islander peoples. I hope that this situation changes as these schemes progress and that human rights considerations are appropriately taken into account.

Chapter 3: Native Title - Year in review

In this chapter, I provide a snapshot of the significant issues that have arisen in native title and consider the impact of these events on Aboriginal and Torres Strait Islander peoples.

There have been a number of important federal processes that have occurred during the last year in relation to native title, namely:

- the release of *Our North, Our Future: White Paper on Developing Northern Australia*
- the Council of Australian Governments Investigation into Indigenous land administration and use
- the Australian Law Reform Commission report *Connection to Country: Review of the Native Title Act 1993*.

These reviews have occurred amidst the backdrop of discussions held with Aboriginal and Torres Strait Islander peoples about the need for a 'new conversation' regarding how our rights are realised in relation to land and native title. This dialogue mainly occurred via the Broome Roundtable on Indigenous property rights, which explored various challenges, impediments and opportunities in relation to the Indigenous Estate.

I also report on other significant developments in this space over the past year, including:

- *Akiba v Commonwealth* [2013] HCA 33
- *Barkindji Traditional Owners v Attorney-General of New South Wales* [2015] FCA 604
- changes to cultural heritage laws in Western Australia
- the Coniston massacre

- the Noongar settlement
- statistics regarding native title determinations, agreements and ILUAs.

Chapter 4: Disability

This chapter looks at the extent to which Aboriginal and Torres Strait Islander people experience disability and how their human rights in relation to this important issue are affected.

I also explore the state of national disability policy and services in Australia, including the experience of our mob in relation to the:

- National Disability Strategy
- National Disability Insurance Scheme (NDIS)
- National Disability Insurance Agency (NDIA)
- NDIS trials.

Aboriginal and Torres Strait Islander people with disability often describe being ‘doubly disadvantaged’ and feeling invisible in existing support and service delivery systems.

This chapter aims to highlight the often overlooked nature of this area, the experience of Aboriginal and Torres Strait Islander people with disability and how existing structures are meeting the rights and needs of our communities.

Chapter 5: Caring for our children

This chapter looks at one of the most pressing human rights issues facing Aboriginal and Torres Strait Islander peoples today, the overrepresentation of our children and young people in the child protection system.

In this chapter I will explore:

- the main reasons for removal
- the continued importance of the *Bringing Them Home Report* recommendations
- the nature of existing policy frameworks
- the nature of investment in child welfare services
- the need for a healing and trauma informed approach.

Importantly, I have identified the need for a number of reforms to take place in this space, particularly around more meaningful engagement with Aboriginal and Torres Strait Islander agencies and the importance of long-term funding.

I also highlight the advantages posed by enhancing oversight structures in this area such as through the creation of child welfare targets, dedicated Aboriginal and Torres Strait Islander Children’s Commissioners and a National Institute of Excellence in Indigenous Child Welfare.

A renewed approach to addressing this challenge that is conducted in a meaningful way with our communities and has our culture at its heart is key to seeing change in this area.

Recommendations

Recommendation 1: The Australian Government should reconsider the requirement for Indigenous organisations receiving more than \$500,000 of Indigenous Advancement Strategy funding to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Recommendation 2: The Western Australian Government should not close any remote Aboriginal communities without a proper consultation process and the free, prior and informed consent of the communities concerned, as per articles 10, 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation 3: The Northern Territory Government should repeal section 133AB of the *Police Administration Act* (NT) and commission an expert inquiry into responses to alcohol misuse, as per the recommendations of Coroner Greg Cavanagh SM.

Recommendation 4: The Australian Government finalise the Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan in accordance with recommendation 9 of the Close the Gap Campaign Steering Committee's *Progress and priorities report 2015*.

Recommendation 5: The Australian Government should design the Healthy Welfare Card and the Work for the Dole scheme in remote communities as voluntary, opt-in schemes.

Recommendation 6: The Australian Government support and resource the Australian Human Rights Commission to undertake, with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, a process to identify options for leveraging Indigenous property rights for economic development purposes.

Recommendation 7: Existing and potential Prescribed Bodies Corporate be engaged to develop the administrative arrangements for the distribution of the \$20 million allocation to support native title holders to engage with investors.

Recommendation 8: Representatives of Aboriginal and Torres Strait Islander peoples in Northern Australia be appointed to the political and operational governance structures to oversee the next steps in implementing the White Paper on Developing Northern Australia.

Recommendation 9: The Australian Government recognise the level of research and consultation involved in the Australian Law Reform Commission's Inquiry into the *Native Title Act 1993* (Cth) and take action to implement its recommendations.

Recommendation 10: The Australian Government take action to synchronise the work of the:

- COAG Indigenous Expert Working Group
- COAG Investigation into Indigenous land use and administration
- White Paper on Developing Northern Australia
- Australian Law Reform Commission's Inquiry into the *Native Title Act 1993* (Cth)
- Broome Roundtable on Indigenous property rights

to avoid duplication and to maximise outcomes for Indigenous communities in relation to the land and native title into the future.

Recommendation 11: The full extent of disability within the Aboriginal and Torres Strait Islander community be ascertained based on the collection of comprehensive, disaggregated data.

Recommendation 12: The effectiveness of programs and policies in addressing the needs of Aboriginal and Torres Strait Islander people with disability be monitored through a continuous robust evaluation framework.

Recommendation 13: By 2016, the Closing the Gap agreements include a target for Aboriginal and Torres Strait Islander people with disability as an area for future action.

Recommendation 14: The Disability Support Organisations model is expanded across Australia to ensure culturally competent and appropriate engagement with Indigenous communities in the implementation of the NDIS, in order to ensure full access to disability services for Aboriginal and Torres Strait Islander peoples.

Recommendation 15: The NDIS rollout in rural and remote Australia should prioritise locally based services and employment in order to utilise Aboriginal and Torres Strait Islander expertise and experience already present in those areas.

Recommendation 16: The Australian Government should undertake an evaluation of the accessibility of the NDIS for Aboriginal and Torres Strait Islander people with disability 12 months after the national rollout in July 2019.

Recommendation 17: The Australian Government takes steps to include child welfare targets as a part of the Closing the Gap, to promote community safety and wellbeing and reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples within the child protection system.

Recommendation 18: State and territory governments take steps to establish Aboriginal and Torres Strait Islander Children's Commissioners in their jurisdictions.

Recommendation 19: Australian, state and territory governments should collaborate to support greater investment in research and the quality of information relating to child protection through greater funding and the establishment of a National Institute of Indigenous Excellence in Child Wellbeing.

Recommendation 20: The Australian Government recognises the crucial link between child wellbeing, and early childhood education and care services, and supports greater investment in early childhood services for Aboriginal and Torres Strait Islander children including through renewed funding for Aboriginal Children and Family Centres.

Recommendation 21: The Australian Government supports long-term investment in healing initiatives including services, research and evaluation.

Chapter 1:

The need for better engagement - Year in review

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1.1 Introduction

In last year's *Social Justice and Native Title Report*, I raised concerns about the changes resulting from the 2014-15 Budget and the restructure to Indigenous Affairs through the Indigenous Advancement Strategy (IAS).

Despite initial concerns about how these changes would impact our communities, I indicated that the streamlining of programs and the move away from a 'one size fits all' mentality had the potential to offer great benefit and flexibility for Aboriginal and Torres Strait Islander peoples.

Unfortunately, the high hopes with which the announcements were made have not yet materialised. Instead, what we have seen are deep cuts, confusion and anxiety for Aboriginal and Torres Strait Islander peoples.

In the background to this major reform, there have been a number of additional major developments that have added to the stress and uncertainty already felt by our people.

The announcement of community closures in Western Australia has been a particularly pertinent example of uncertainty and distress caused by decision making without adequate engagement with Aboriginal and Torres Strait Islander peoples.

This lack of engagement has extended to other areas, including the introduction of 'paperless arrest' laws in the Northern Territory and the process to recognise Aboriginal and Torres Strait Islander peoples in the Constitution.

Overall, this chapter will explore the combined effect of all of these changes on our communities and consider what meaningful engagement looks like.

I will also reflect on progress at the national and international level, including developments regarding the Close the Gap campaign, the Stolen Generations and Australia's participation in United Nations mechanisms (at Appendix 2) during the past year.

In Appendix 3, I report on complaints of discrimination received by the Australian Human Rights Commission from Aboriginal and Torres Strait Islander peoples over 2014-15.

1.2 Indigenous Advancement Strategy

(a) Background

Following the September 2013 election, the Department of the Prime Minister and Cabinet (PM&C) assumed responsibility for most federal Indigenous specific programs and policies.

In 2014, the Australian Government announced its intention to introduce the Indigenous Advancement Strategy (IAS), rationalising 150 Indigenous specific programs and activities into five main streams:

- **Jobs, Land and Economy**, aimed at increasing Indigenous employment, business and economic development.
- **Children and Schooling**, aimed at increasing Indigenous school attendance, improving educational outcomes and improving transitions to further education and work.
- **Safety and Wellbeing**, aimed at increasing levels of community safety and wellbeing.
- **Culture and Capability**, aimed at achieving progress towards a referendum on constitutional recognition and improving participation in society and organisational capacity.
- **Remote Australia Strategies**, aimed at improving infrastructure, housing, local engagement, community safety, and educational and employment outcomes in remote Australia.¹

The Australian Government committed \$4.9 billion over four years to the IAS,² in addition to \$3.7 billion allocated through the National Partnership Agreements, Special Accounts and Special Appropriations to Indigenous specific funds.³

In last year's report, I welcomed this rationalisation of programs and activities. I believed, and still hope, it can provide greater flexibility, allowing more scope for on the ground responses to issues that confront our communities.

I also wrote that, if done properly, this restructure had the potential to achieve the Australian Government's stated aims of 'reducing red tape' for Aboriginal and Torres Strait Islander people and organisations and 'cutting wasteful spending' on bureaucracy. This in turn could translate to a greater share of funds being provided on the ground.

Finally, I warned of the challenges likely to be faced during the implementation of these changes and I made the following comments and suggestions to the Australian Government:

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.

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.

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.⁴

It is disappointing that the Australian Government did not take note of these concerns and those expressed by others regarding the challenges of attempting to do too much, too quickly. It has been frustrating to see many of the difficulties I anticipated unfold over the 2014-15 reporting period, creating significant confusion and stress in Aboriginal and Torres Strait Islander communities.

(b) Grants process

Funding from the IAS is available through the following mechanisms:

- **open competitive grants rounds** where applications are assessed against the criteria for the relevant outcome and prioritised against competing applications for available grant funding
- **targeted or restricted grant rounds** where PM&C invites targeted entities, selected on the basis of the specialised requirements of the outcome, to submit a proposal to deliver the outcome
- **direct grant allocation processes** where PM&C approaches a service provider to expand their existing services or deliver new services
- **a demand driven process** where applications are assessed on a value for money basis against the selection criteria
- **one-off or ad-hoc grants** that are designed to meet a specific, and often urgent, need.⁵

Approximately half of the \$4.9 billion allocated to the IAS was distributed through dedicated funding arrangements, including the Remote Jobs and Communities Programme and the Working on Country programs, leaving around \$2.3 billion to be allocated.⁶

(i) Application and assessment process

Applications for the first open competitive grants round opened on 8 September 2014 and closed on 17 October 2014. PM&C received 2,472 applications for 4,948 projects from 2,345 organisations.⁷

To assist applicants, PM&C produced an IAS Application Kit,⁸ with information for applicants and the application form, and a set of IAS Guidelines, which outline the terms and conditions for accessing IAS funding.

The application form for IAS funding required applicants to:

- detail the funding sought
- provide a project proposal
- describe the capacity of their organisation to deliver the proposed project
- detail the capability of their organisation
- describe their organisation's commitment to Indigenous participation
- provide supporting documentation.⁹

The information sought from applicants related to the general selection criteria for assessing applications, which were listed in the IAS Guidelines.¹⁰ There was no further guidance for applicants about what information they should include to adequately address the selection criteria.

Of the 2,472 applications, 1,233 applications were considered non-compliant.¹¹

Non-compliant applications included those applications that exceeded the page or electronic file size limits, were not signed, or did not include mandatory information. As this was the first IAS funding round, PM&C decided to include all non-compliant applications in the assessment process.¹²

The overwhelming number of applications resulted in the assessment process being extended. Organisations with service delivery contracts due to expire on 31 December 2014 were offered a six month funding extension.¹³

The IAS grants round introduced a shift to a competitive process that was markedly different from how Indigenous specific funding had previously been administered. Many organisations did not anticipate this new approach and were unprepared for this change of direction.

Applicants had six weeks to complete and submit their application and this presented a formidable task, particularly for organisations with little or no experience in such an application process.

A number of organisations had neither the capacity nor the resources to put together this kind of application. I am told that significant funds were spent hiring consultants to complete the application, but some were still unsuccessful. Others received assistance from PM&C, whilst some organisations decided not to apply, assuming that they did not fit the criteria.

The large number of non-compliant applications is one of the most damning indications of the confusion surrounding this application process. The consideration of non-compliant applications by PM&C does not assist those organisations that did not apply for IAS funding or who lacked the capacity to put together a competitive application.

PM&C, to their credit, have acknowledged they underestimated how difficult some organisations would find the application process.¹⁴

As part of the assessment process, PM&C developed a service footprint for each region, identifying its needs and funding gaps.¹⁵ Regional Assessment Teams considered and made recommendations about those applications concerning projects proposed for their region in the context of these service footprints.¹⁶

According to PM&C, these footprints included information about welfare reliance, employment, NAPLAN results, school attendance and community safety for Aboriginal and Torres Strait Islander peoples in each region.¹⁷

A broad overview of the stages of the assessment process was included in the IAS Application Kit. However, it was not clear from this information how the Assessment Panels planned to use the selection criteria to assess different applications against one another or the weight that would be given to factors like regional needs and available funding.

After the announcement of how the IAS process would proceed, I received many calls indicating widespread uncertainty and confusion amongst Aboriginal and Torres Strait Islander communities and organisations. These concerns included the lack of detail on how applications would be assessed, whether the outcomes of this process would contribute to the aims of the IAS more generally, and how its impact would be measured.

These concerns indicated a lack of confidence that this assessment process was the most appropriate method of achieving optimal outcomes for Aboriginal and Torres Strait Islander peoples.

As I said at the time, if the community is to have confidence in the outcome, they must have confidence in the processes that produced that outcome.

(ii) Funding decisions

On 4 March 2015, the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, announced that \$860 million was being offered to 964 organisations.¹⁸ This was increased to \$1 billion for 996 organisations and 1,350 projects in May 2015.¹⁹ This increase was to fill service delivery gaps resulting from the initial funding round and to extend the duration of some funding agreements.²⁰

PM&C used an internal probity adviser and then engaged an external probity adviser from Ernst & Young to advise their officers involved in the funding round.²¹ The Probity Plan outlined the requirements for the funding round, including the principles of:

- fairness and impartiality
- consistency and transparency of process
- security and confidentiality
- identification and resolution of conflicts of interest
- compliance with legislation and policies.²²

Whilst the probity oversight provides some comfort that the process is adhered to it does not necessarily ensure that the process itself is sound.

The establishment of these requirements and ensuring compliance with them does not address whether a competitive process is the best approach for funding culturally safe and appropriate services and programs for our peoples. This approach also did not address any of the weaknesses that resulted from the lack of engagement of the program designers with Aboriginal and Torres Strait Islander peoples.

As I said earlier, the outcomes of the funding round resulted in widespread stress and confusion amongst Aboriginal and Torres Strait Islander organisations and communities. In Chapter 5 of this report I also examine in more detail the negative impact of this process on Aboriginal and Islander Child Care Agencies.

After being notified that they would receive IAS funding, successful organisations then had to negotiate the detail of their funding agreements with PM&C,²³ resulting in a delay between the notification and the finalisation of the amount of funding organisations would receive. This then created confusion for some successful organisations when they discovered that they would not be receiving all of the funding they had applied for, prolonging uncertainty about whether or not they would be able to continue all their programs and retain all their staff.²⁴

Many Aboriginal and Torres Strait Islander peoples have expressed confusion at some of the funding decisions that have been made. Large corporations, government departments and sporting bodies all received grants through the IAS process and I am concerned that our organisations were disadvantaged by having to compete with such entities for funding.

PM&C estimates that 45 per cent of all recommended IAS applicants are Indigenous organisations.²⁵

The full extent of any gaps in service delivery arising from the IAS funding round are still not yet known, but the early signs are worrying. At the time of writing, concerns remained about the short length of some funding agreements and the proportion of funding that would reach frontline services.²⁶

Since the announcement of the first round funding results on 4 March 2015, I have been in ongoing discussions with PM&C about the IAS round, its results and process.

To date, there has been a lack of transparency and accountability in both the decision making process and its

outcomes. Aboriginal and Torres Strait Islander peoples are entitled to know where and for what purpose the funding that is supposed to assist our communities is being used and it is frustrating that clear answers have not been forthcoming.

I call on the Australian Government to be more responsive to the concerns of our communities and organisations outlined in this chapter. These concerns must be addressed if we are to have confidence in this process to deliver outcomes for our communities.

(iii) Communication with stakeholders

PM&C used a number of methods to provide information to stakeholders about the funding round, including:

- public information sessions in every location where PM&C has an on-ground presence
- emails and letters with information and updates to currently funded service providers and organisations that had registered an interest in receiving information
- advertising in national, regional and remote newspapers
- updates issued via media releases and PM&C's social media accounts
- an email inbox and a 1800 call line for fielding enquiries about the IAS.²⁷

Despite this multifaceted approach, confusion and misinformation characterised the process.

Many organisations reported having difficulty getting accurate information from PM&C about the funding round.²⁸ For example, the National Aboriginal and Torres Strait Islander Legal Services struggled to get clear advice about whether a 10 year funding agreement for their Stronger Futures program was secure or if they needed to apply for funding for this program through the IAS funding round.²⁹

In correspondence to me, PM&C acknowledged that more could have been done to consult with stakeholders prior to the opening of the funding round and noted that it is in the process of developing a stakeholder engagement strategy.³⁰

However, the failure at the core of many of the problems that emerged during the IAS funding round was the lack of engagement with Aboriginal and Torres Strait Islander peoples about the design and implementation of the IAS processes. Proper engagement may have pre-empted many of the issues that subsequently arose.

Information sharing is an important element of engaging with Aboriginal and Torres Strait Islander communities but it is not a substitute for a consultation process that gives our people the opportunity to have input into the policies that affect us.

(c) Incorporation requirements

Another issue of concern is the incorporation requirements for Indigenous organisations that applied for funding through the IAS. I have received many calls about the potentially discriminatory nature of these requirements.

These concerns were echoed by a number of submissions made to the Senate Finance and Public Administration References Committee inquiry into the IAS tendering process.³¹

The IAS Guidelines state that all organisations receiving grants of \$500,000 (GST exclusive) or more in a single financial year under the Indigenous Affairs portfolio are required to:

- incorporate under Commonwealth legislation. Indigenous organisations are required to incorporate

under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act). All other organisations must incorporate under the *Corporations Act 2001* (Cth) (Corporations Act), and

- continue to meet this requirement while receiving any amount of grant funding from the IAS.³²

For a long while there was uncertainty as to whether those Indigenous organisations currently incorporated under the Corporations Act would need to transfer their registration to the CATSI Act.

I welcome the clarification on PM&C's website that Indigenous organisations already incorporated under the Corporations Act are excluded from these requirements and do not have to change their incorporation status.³³ However, earlier advice of this nature would have made particularly good sense.

At the time of writing, the IAS Guidelines had not been amended to reflect this clarification and I hope that this is rectified soon.

It remains problematic that Indigenous organisations cannot choose to incorporate under State-based schemes or to register under the Corporations Act. Placing strict requirements on Aboriginal and Torres Strait Islander organisations that do not apply to non-Indigenous applicants raises immediate alarm bells for me and for many Indigenous organisations.

Sections 9(1) and 9(1A) of the *Racial Discrimination Act 1975* (Cth) (RDA) provide broad prohibitions against acts that are directly or indirectly discriminatory on the basis of race, colour, descent or national or ethnic origin.

Section 13 of the RDA provides that it is unlawful to discriminate in the delivery of services, including the provision of grants.³⁴ This means that a person who provides services to any section of the public cannot refuse or fail to supply those services (either at all or except on less favourable terms or conditions than they would otherwise supply the services by reason of race).

It is my belief that, unless further information about the effect of registration under the CATSI Act comes to light, it is likely that the requirement for some Indigenous organisations to register under the CATSI Act may be in breach of section 13 of the RDA.

The IAS incorporation requirements may also interfere with the right to self-determination³⁵ and could consequently breach section 9(1) or section 9(1A) of the RDA.

Given this, and the concern expressed by Aboriginal and Torres Strait Islander organisations about the incorporation requirement, I urge the Australian Government to reflect on this requirement in the context of the RDA.

(d) Inquiries into the IAS and related processes

At the time of writing this report, there were two ongoing inquiries into the IAS processes.

On 19 March 2015, the impact on service quality, efficiency and sustainability of the IAS tendering processes was referred to the Senate Finance and Public Administration References Committee (the Senate Committee) for inquiry and report. The Senate Committee is due to report on 26 November 2015.

I provided a submission to this inquiry on 23 April 2015³⁶ and also gave evidence to the Senate Committee on 29 June 2015.³⁷ In this submission and my subsequent appearance, I outlined many of the concerns I have expressed in this chapter.

PM&C have also initiated an internal review of the IAS Guidelines and funding process. Evidence given by PM&C officers to the Senate Committee advised that this review would look at the processes, administration

and communication of the funding round as well as the information included in the IAS Guidelines.³⁸

I hope that this review is conducted in genuine partnership and good faith with our people to produce a system that is going to deliver real benefits for Aboriginal and Torres Strait Islander communities.

I see these inquiries as an important mechanism through which to demystify elements of the IAS process that have been of great concern to Aboriginal and Torres Strait Islander communities. Together they have the potential to chart a way forward for the IAS and PM&C's engagement with Aboriginal and Torres Strait Islander peoples more broadly.

1.3 Remote Aboriginal communities in Western Australia

On 24 September 2014, Minister Scullion announced that the Commonwealth had reached agreements with the Queensland, Western Australian, Victorian and Tasmanian Governments that would see these states assume responsibility for municipal and essential services in remote Indigenous communities.³⁹

In November 2014, following this announcement, the Premier of Western Australia, the Hon Colin Barnett MLA, flagged that up to 150 remote Aboriginal communities in Western Australia may be closed.⁴⁰ Premier Barnett claimed that the social and health problems in many remote communities showed that the state could not provide them with essential services and the number of these communities should be reduced.⁴¹

Governments have an obligation to provide essential and municipal services to all of their citizens, including those in remote locations. It is concerning that the existence of remote Aboriginal communities has been called into question because of a dispute about which level of government should bear responsibility for providing these services.

It is hard to imagine any other group of people in Australia being forced through the indignity of having their futures trivialised and their culture dismissed as part of a political spectacle. I note that similar conversations about 'viability' are not taking place in relation to other rural and remote communities across the country.

This provides another example of how decision making without proper engagement with Aboriginal and Torres Strait Islander peoples can cause great anxiety and uncertainty for our peoples.

As article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) provides:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

As I have already indicated, the impact of the initial announcement created widespread uncertainty and enormous distress for all remote communities in Western Australia. Of more concern is the yet unknown impact of any changes to service provision and the resulting consequences for the health and wellbeing of Aboriginal and Torres Strait Islander people.

(a) Response to the announcement of potential closures

There are 274 remote communities in Western Australia with a total population of around 12,000 people.⁴²

Subsequent to the announcement, many justifications were put forward as to why the Western Australian Government should discontinue the funding of core services in many remote Aboriginal communities, including:

- the unviability of communities
- the cost per capita of service provision and the loss of federal funds
- child abuse
- family violence
- poor education outcomes
- the limited prospect of employment.⁴³

These justifications had the effect of painting all remote Aboriginal communities in Western Australia as

dysfunctional, compounding the distress and uncertainty created by the threat of community closures. This was further aggravated by Prime Minister, the Hon Tony Abbott MP, describing living in remote communities as a 'lifestyle choice'.⁴⁴ I cannot emphasise enough how insensitive this kind of commentary about our remote communities was to our people and culture.

Discussion about the proposed closure of remote Aboriginal communities continued in these terms over a number of months. Little evidence or policy detail was offered to justify this debate and there was no engagement with remote Aboriginal communities, even after it was clear that the prolonged speculation about their futures was fraught and causing considerable anxiety.

For all the discussion about the reasons why remote communities should be closed, there was little consideration of the consequences of forcing people to move, nor any mention of the devastation felt by the people forced to abandon their homes.

Questions like where people would go, what assistance they would receive, and whether the towns they would move to have the resources to support a larger population remain unanswered.

During this time Ms Kirstie Parker, Co-Chair of National Congress of Australia's First Peoples, and I wrote about the need for respectful engagement with the Aboriginal and Torres Strait Islander communities affected by these announcements:

This distressing situation - compounded by what is, at best, misjudged rhetoric and, at worst, failure to grasp or respect our people's connection with lands and territories - can only be addressed if governments work constructively with our people on long-term initiatives. Real and sustained engagement with our communities is one of the critical success factors.⁴⁵

(b) Benefits of remote communities

The Kimberley Land Council, which has many of the communities that may be subject to closure within its boundaries, has said that:

History demonstrates that Government policies removing people from their land has resulted in the gradual disintegration of cultural standards and governance; it has resulted in fringe communities in urban areas, in alcoholism and youth suicides, and in disempowerment. The proposed closure of remote communities in Western Australia is occurring:

- with complete discrimination – the Government is only proposing to remove services to Aboriginal communities, without regard to remote non-Aboriginal communities;
- without a long-term vision – no one has discussed what options or opportunities may be available to improve the economic sustainability of these communities;
- without properly establishing what will happen after communities are closed – there are many additional pressures that will be placed on larger regional communities, to the detriment of their current residents and those forced to move to them; and
- with complete disregard to the economic, social and cultural wellbeing of the Aboriginal people residing within them.⁴⁶

Whilst some remote Aboriginal communities face challenges it is unfair to suggest that all or even the majority of remote communities are dysfunctional.

Many of the remote communities in Western Australia are considered to be 'homeland' communities. In the

Social Justice Report 2009 my predecessor, Dr Tom Calma wrote:

Homelands provide social, spiritual, cultural, health and economic benefits to residents. They are a unique component of the Indigenous social and cultural landscape, enabling residents to live on their ancestral lands.⁴⁷

In that report, Dr Calma highlighted that the debate over the viability of these communities is not new and has been ongoing since key policy changes in the 1970s and 1980s resulted in increased homeland populations.

There is significant evidence of the health benefits of living in homeland communities, with residents often comparing positively in health indicators, including morbidity, diabetes and hypertension, than those living in regional centres.⁴⁸ Dr Calma reported that:

A large element of the health benefit is the social and emotional well being many homeland community members derive from living on country in smaller communities — removed from stressors such as community conflicts, alcohol and violence.⁴⁹

Living on country in remote communities is integral to the realisation of our right to culture in articles 11 and 12 of the Declaration. This is not just about preserving culture but fostering culture in a way that allows it to continue and evolve.⁵⁰

(c) Consultation process

It was not until 7 May 2015 that the Western Australian Government announced its ‘Regional Services Reform’ plan, which is proposed to address ‘the way services will be provided to Aboriginal communities to ensure better outcomes in health, education and job prospects, particularly for children’.⁵¹

Strategic Regional Advisory Councils have been established in the Kimberley and the Pilbara to advise the Western Australian Government on these reforms. Each Council consists of four Aboriginal leaders, four heads of relevant State Government agencies, a senior representative from the Australian Government and a representative from the community service sector.⁵²

The Western Australian Department of Aboriginal Affairs has announced a timeline for consultations on this process, which indicates that from July to December 2015, there will be regional and community engagement on:

- accountability and service delivery models
- improving service delivery
- supporting individuals and families to take up education and employment opportunities.⁵³

When this process was announced, I stressed that, ‘For this approach to be fair dinkum, it requires commitment, patience and time. It will mean challenging the status quo and making meaningful change in the relationship’.⁵⁴

I welcome the Western Australian Government’s commitment to a consultation process and the comment of Western Australia’s Aboriginal Affairs Minister, the Hon Peter Collier MLA, that ‘it is absolutely imperative that they [Aboriginal and Torres Strait Islander people living in remote communities] are a part of the decision making process’.⁵⁵

However, I am concerned about the lack of detail around the consultation process and its purpose. At the time of drafting, the full details of the methodology, timing and resources to be committed to this engagement were not yet clear. I will be watching carefully to see that this is conducted in line with the rights of Aboriginal and Torres Strait Islander people in remote communities.

I will talk more about what needs to be considered by the Western Australian Government to ensure that these consultations respect the rights of the individuals and communities involved later in this chapter.

1.4 Northern Territory paperless arrest powers

In December 2014, amendments to the *Police Administration Act* (NT) (the Act) commenced which provide for 'paperless arrest'.

Section 133AB of the Act allows the police, without a warrant, to detain a person in custody for up to four hours if they suspect that person has committed, or is about to commit, an 'infringement notice offence'. If the person is intoxicated, the police may detain that person for longer than four hours until they believe the person is no longer intoxicated.

At the end of that period, the police may:

- release the person unconditionally, or
- release the person and issue them with an infringement notice, or
- release the person on bail, or
- under section 137 of the Act, bring the person before a court for the infringement notice offence.⁵⁶

Infringement notice offences are prescribed by regulation and include offences that are not punishable by a term of imprisonment.⁵⁷

These powers are significantly broader than pre-existing powers to arrest a person without a warrant or take an intoxicated person into protective custody.

The key differences between the new paperless arrest powers and existing powers allowing police to arrest a person without a warrant are that:

- there is no requirement to bring the person before a court as soon as is practicable
- there is no requirement that the period of detention be a reasonable period for questioning the person in relation to a relevant offence
- the powers apply to minor offences which include some offences that are not punishable by a period of imprisonment.⁵⁸

Under existing protective custody provisions, police must have reasonable grounds to believe that the person is intoxicated, and in a public place or trespassing on private property, and because of their intoxication, the person:

- is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else, or
- may cause harm to himself or herself or someone else, or
- may intimidate, alarm or cause substantial annoyance to people, or
- is likely to commit an offence.⁵⁹

The person must only be held in custody for so long as it reasonably appears to the officer that the person remains intoxicated (or until 7.30am if they are in custody after midnight).⁶⁰

The Northern Territory Attorney-General and Minister for Justice, the Hon John Elferink MLA, described the purpose of the new powers as follows:

This alternative post-arrest option will provide further flexibility and efficiency in policing work. The option will enable police officers to return to their patrol in a more timely fashion, as opposed to being detained for

long periods preparing necessary paperwork for a court to consider the charges. An additional benefit to the community is intended by the use of such an option to de-escalate social disorder situations or potential situations of public disorder before they escalate into major incidents.⁶¹

I am extremely concerned that these powers are having a disproportionate impact on Aboriginal and Torres Strait Islander peoples in the Northern Territory, resulting in significantly more of our people spending time in custody for largely minor offending.

(a) Coronial inquest into the death of Kumanjayi Langdon

On 21 May 2015, Warlpiri man, Mr Kumanjayi Langdon, died in custody of heart failure, around three hours after being detained under the paperless arrest powers.

Kumanjayi Langdon was arrested after being seen drinking from a plastic bottle in a public park in the Darwin CBD.

The Coroner, Mr Greg Cavanagh SM, found that while Kumanjayi Langdon was lawfully arrested for drinking alcohol in a designated public area, he 'had done nothing to bring himself to the attention of police, beyond being with other Aboriginal people in a park in the Darwin CBD'.⁶² He cooperated with police and 'was not violent, was not uttering threats and not swearing or being offensive in any way'.⁶³

Drinking alcohol in a designated area is an offence under the *Liquor Act* (NT), carrying a maximum penalty of a \$74 fine. Following his arrest and prior to arriving at the Darwin Watch House, Kumanjayi Langdon was issued with an infringement notice, leading the Coroner to question the purpose of his subsequent detention.⁶⁴

While the Coroner noted that there were 'shortcomings' in the health check process undertaken for Kumanjayi Langdon, he was satisfied that he received adequate care and supervision during his period in custody.⁶⁵

However, the Coroner was highly critical of the paperless arrest powers, stating that the powers:

- have a disproportionate impact on Aboriginal and Torres Strait Islander peoples
- perpetuate and entrench the disadvantage experienced by Aboriginal and Torres Strait Islander peoples
- are irreconcilable with the recommendations of the Royal Commission into Aboriginal Deaths in Custody
- would likely result in more Aboriginal and Torres Strait Islander people dying in custody.⁶⁶

Consequently, the Coroner recommended the Northern Territory Government repeal section 133AB of the Act. He also recommended that the Northern Territory Government commission an expert inquiry into responses to alcohol misuse, which would form the basis of a plan to be developed by the Northern Territory Government working with stakeholders, including Aboriginal people, communities, and organisations to find solutions.⁶⁷

I am deeply disappointed that the Northern Territory Government has rejected these recommendations⁶⁸ and I call on the Northern Territory Government to better engage with Aboriginal communities to find strategies to deal with alcohol misuse that do not involve our people coming into contact with the criminal justice system.

(b) Disproportionate impact on Aboriginal and Torres Strait Islander peoples

The Coroner was also critical of the limited statistics available with which to assess the impact of these new powers, a consequence of the software used to collect this information.⁶⁹

Between 17 December 2014 and 17 July 2015, the option to release a person from custody and issue them with an infringement notice was used 1,807 times for 1,295 people, 901 of which were Aboriginal or Torres Strait Islander (around 70 per cent).⁷⁰

A further 512 people were released from custody with more than one infringement notice. The Coroner concluded, on the basis of evidence provided by the police that most, if not all, were Aboriginal or Torres Strait Islander, although the exact figure is unknown.⁷¹

This does not take into account those people detained using these powers who were released unconditionally, or released on bail, or who were brought before a court. However, there is currently no system for calculating what proportion of these groups were Aboriginal or Torres Strait Islander.⁷²

All of the available evidence strongly indicates that these powers are primarily affecting our people. However, as the Coroner noted, it is unacceptable that there is no way of evaluating the effectiveness or adverse impact of these powers in detail.⁷³

(c) Royal Commission into Aboriginal Deaths in Custody

Nearly 25 years since the Royal Commission into Aboriginal Deaths in Custody (the Royal Commission) published 339 recommendations for change, it is unacceptable that our people are still dying in custody after minor offending.

The Royal Commission highlighted that the high number of Aboriginal deaths in custody was related to the disproportionately high rates of detention experienced by our people. This was in part due to underlying social, cultural and legal factors, like the legacy of colonisation and socio-economic disadvantage, but also the processes of the criminal justice system.⁷⁴

Text Box 1.1:

Key recommendations of the Royal Commission into Aboriginal Deaths in Custody

Recommendation 82: governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences.⁷⁵

Recommendation 87: Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.⁷⁶

Recommendation 92: governments should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.⁷⁷

Recommendation 121: governments should ensure that sentences of imprisonment are not automatically imposed in default of payment of a fine.⁷⁸

Aboriginal and Torres Strait Islander peoples are already significantly overrepresented in the Northern Territory's criminal justice system. At 30 June 2014, around 85 per cent of prisoners in custody in adult

correctional centres in the Northern Territory were Indigenous.⁷⁹

The report from the coronial inquest into the death of Kumanjayi Langdon paints a disturbing picture of how the paperless arrest powers work in practice. Together with 'Operation Ascari II,' a police initiative that targets public drinkers, the paperless arrest powers are bringing more people, largely Aboriginal and Torres Strait Islander people, into contact with the criminal justice system.⁸⁰

Police officers who gave evidence at the coronial inquest described a dramatic increase in the numbers of people being detained at the Darwin Watch House without any corresponding increase in staff.⁸¹

This not only frustrates the aim of the powers to 'provide further flexibility and efficiency in policing work',⁸² but may seriously compromise the ability of the police to exercise their duty of care to people in custody.

Minimising the number of our people who die in custody requires a commitment in policy and practice to use arrest and imprisonment as a last resort.

At the heart of this is Kumanjayi Langdon and the grief of his family and friends, compounded unnecessarily by the circumstances of his death. The Coroner perhaps summed it up best when he wrote:

Kumanjayi Langdon, a sick middle aged Aboriginal man, was treated like a criminal and incarcerated like a criminal; he died in a police cell which was built to house criminals. He died in his sleep with strangers in this cold and concrete cell. He died of natural causes and was always likely to die suddenly due to chronic and serious heart disease, but he was entitled to die in peace, in the comfort of family and friends. In my view, he was entitled to die as a free man.⁸³

(d) High Court challenge

In March 2015, the North Australian Aboriginal Justice Agency (NAAJA) and Ms Miranda Bowden (the plaintiffs) commenced proceedings in the High Court to challenge the validity of the paperless arrest powers.

The plaintiffs challenged the laws on the basis that they involve a breach of the separation of powers. That is, they allow the executive to carry out a role that is reserved by the Constitution for the courts.

On 1 September 2015, the Australian Human Rights Commission (the Commission) was granted leave to intervene in these proceedings as *amicus curiae*, limited to the filing of written submissions.⁸⁴

The Commission has the statutory function of intervening in legal proceedings that involve human rights issues, where it is appropriate to do so and with the leave of the court hearing the proceeding, subject to any conditions imposed by the court.⁸⁵

At the time of writing this chapter, the High Court had reserved its decision.

1.5 Constitutional recognition

Over the past year, the process towards a referendum on constitutional recognition has been largely ad hoc, resulting in a mix of political drift, some positive engagement, and a failure to understand the importance of the voices of Aboriginal and Torres Strait Islander peoples in the constitutional recognition process.

Although there has been firm bipartisan support on the issue, this has resulted in few active steps to engage with Aboriginal and Torres Strait Islander peoples on the process moving forward and a lack of clarity of what that process will look like.

(a) Aboriginal and Torres Strait Islander Peoples Recognition Act

On 12 March 2013, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) was passed unopposed by both houses of Parliament. This Act recognises Aboriginal and Torres Strait Islander peoples as the first people of the land now known as Australia, their continuing relationship with land and waters, and their continuing cultures, languages and heritage.

The purpose of this Act was to build momentum for a referendum on constitutional recognition, and initially included a sunset clause of two years. On 20 March 2015, this Act was extended for a further three years by the *Aboriginal and Torres Strait Islander Peoples Recognition (Sunset Extension) Act 2015* (Cth) to 28 March 2018.

(b) Joint Select Committee on Constitutional Recognition final report

On 25 June 2015, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Joint Select Committee) tabled its final report.

The Joint Select Committee's recommendations were informed by 139 written submissions and evidence from witnesses who appeared at public hearings held around the country.⁸⁶

Recommendations in that report included that a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution and that this should take place at a time when it has the highest chance of success.⁸⁷

Other recommendations of the Joint Select Committee include:

- the repeal of section 25 of the Constitution⁸⁸
- the repeal of section 51(xxvi) and the retention of a persons power so that the Australian Government can legislate for Aboriginal and Torres Strait Islander peoples in accordance with the 1967 referendum result⁸⁹
- three proposed models that would retain a persons power, each with different constraints regarding discriminatory laws, be considered for referendum⁹⁰
- constitutional conventions to build support for a referendum, including conventions made up of Aboriginal and Torres Strait Islander delegates⁹¹
- each House of Parliament set aside a day of sitting to debate the Joint Select Committee's recommendations⁹²
- the establishment of a parliamentary process to oversee progress towards a referendum⁹³
- the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) be amended to include the Declaration.⁹⁴

(c) Bipartisan summit

On 6 July 2015, 40 Aboriginal and Torres Strait Islander leaders met with Prime Minister Abbott, and Opposition Leader, the Hon Bill Shorten MP, to determine the next steps towards holding a referendum.

Both Prime Minister Abbott and Mr Shorten agreed that a referendum could not be held before the next term of Parliament and they proposed three next steps:

- a series of community conferences across Australia
- the development of a discussion paper by the Joint Select Committee on issues regarding constitutional change in order to facilitate community discussion
- the establishment of a Referendum Council to progress matters including settling a referendum question, the timing of a referendum, and constitutional issues.⁹⁵

The Referendum Council would report to the Prime Minister and the Leader of the Opposition with recommendations to be considered in developing a proposal to put to Parliament.⁹⁶

Text Box 1.2:

Statement presented by Aboriginal and Torres Strait Islander attendees at a meeting held today with the Prime Minister and Opposition Leader on Constitutional Recognition, 6 July 2015

We welcome the willingness of the Prime Minister and Opposition Leader to meet with Aboriginal and Torres Strait Islander people to discuss next steps towards recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution.

We encourage the Government and the Parliament to identify a strong, multi-partisan consensus on the timing, content and wording of a referendum proposal, and acknowledge the stated commitment of all parties to this end.

We acknowledge the work to date by the Expert Panel (2012), Joint Select Committees on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (2013-15) and, prior to these, the Council for Aboriginal Reconciliation (1991-2000) in identifying options for recognition.

We note the guiding principles laid out by the Expert Panel that constitutional recognition must:

- Contribute to a more unified and reconciled nation;
- Be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples;
- Be capable of being supported by an overwhelming majority of Australians from across the political and social spectrum; and
- Be technically and legally sound.

Further, we agree with the Joint Select Committee (Interim Report, July 2014), that a successful referendum proposal must:

- Recognise Aboriginal and Torres Strait Islander peoples as the first peoples of Australia

- Preserve the Commonwealth’s power to make laws with respect to Aboriginal and Torres Strait Islander peoples; and
- In making laws under such a power, prevent the Commonwealth from discriminating against Aboriginal and Torres Strait Islander peoples.

On this basis, the meeting participants:

Emphasize the importance of leadership from the Prime Minister and Opposition Leader to ensure that:

- Constitutional recognition is progressed in a non-partisan manner; and
- that the debate shifts to discussion of concrete proposals for reform to avoid the process stalling.

Request that the Government and the Opposition identify the parameters of what they will support in relation to constitutional recognition, based on the issues identified by the various review processes to date, as well as their willingness to consider further measures to address the specific circumstances faced by Aboriginal and Torres Strait Islander peoples.

Process issues

Call for the following process moving forward:

- a) An ongoing dialogue between Aboriginal and Torres Strait Islander people (via a referendum council, steering committee or other mechanism) and the government and parliament, based on the significant work already completed, to negotiate on the content of the question to be put to referendum;
- b) Development of accessible and useful information for the Aboriginal and Torres Strait Islander community about the key issues to enable informed decision making;
- c) Engagement over the coming months with Aboriginal and Torres Strait Islander peoples about the acceptability of the proposed question for constitutional recognition; and
- d) Continuation of a parliamentary process to oversight the work towards a successful referendum.

Note the Joint Select Committee’s final report recommendations on engagement processes moving forward, including the role of National Congress, the ongoing public awareness and education role of Recognise, and the need to reform the referendum process. There is a need for ongoing resources to be allocated for these processes.

Substantive issues

Identify that any reform must involve substantive changes to the Australian Constitution. It must lay the foundation for the fair treatment of Aboriginal and Torres Strait Islander peoples into the future.

A minimalist approach, that provides preambular recognition, removes section 25 and moderates the races power [section 51(xxvi)], does not go far enough and would not be acceptable to Aboriginal and Torres Strait Islander peoples.

The recommendations of the Joint Select Committee were endorsed, noting that further engagement with Aboriginal and Torres Strait Islander peoples is required in relation to Recommendation 5 and in relation to a proposed Aboriginal and Torres Strait Islander advisory body and proposed Declaration.

To progress these matters, clarity from the Government and Opposition of their positions on two key

issues is critical: prevention of racially discriminatory laws and the proposed advisory body.

There was significant concern expressed that the Constitution as it stands enables current and future parliaments to enact discriminatory measures against Aboriginal and Torres Strait Islander peoples. Any reform option must address this concern.

At this stage, there are several proposals on the table that are aimed at addressing this issue ranging from: a stand alone prohibition of racial discrimination (proposed new section 116A); a new, contained power to make laws for Aboriginal and Torres Strait Islander peoples that does not extend to making adverse discriminatory laws; and a role for a new advisory body established under the Constitution.

It is recognized that Constitutional Recognition is only part of the solution to ensuring that Aboriginal and Torres Strait Islander peoples are treated equally in Australia, and that it must be accompanied by other measures to address the historic and ongoing disadvantage that has resulted from our past mistreatment.

(d) Process moving forward

Following the bipartisan summit, Professor Patrick Dodson, Mr Noel Pearson, Professor Megan Davis, and Ms Kirstie Parker wrote to Prime Minister Abbott outlining a proposal for Indigenous conferences through which our people could reach a consensus on a model for constitutional change before the community conferences take place.

At the time, Mr Pearson and Professor Dodson wrote that:

An independent process for indigenous people to reach a position is crucial to ensure indigenous support. Without such a process, a referendum council and community conferences will be unlikely to produce the necessary engagement, understanding and consensus among Indigenous Australians.⁹⁷

Prime Minister Abbott initially rejected this proposal on the basis that the community conferences would be sufficient and a separate process could result in 'something akin to a log of claims that is unlikely to achieve general support'.⁹⁸

Many in our communities, including myself, were extremely disappointed by Prime Minister Abbott's initial response to this proposal and I welcome his change of position.⁹⁹

At the time of writing, the detail of the Australian Government's support for Indigenous conferences is unclear. There is also little information around the composition and funding of the Referendum Council, and when and where the community conferences will be held.

1.6 Stolen Generations

Last year I reported on the case of the Collard family, who unsuccessfully sought compensation from the Western Australian Government for the removal of nine of their children by the Government in the late 1950s and early 1960s.

One of Donald and Sylvia Collard's children was placed into foster care when she was only six months old, 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 2013, the Supreme Court of Western Australia found against the Collard family.¹⁰⁰ Among other arguments, the Collards had alleged that the Western Australian Government had breached equitable fiduciary duties by removing their children and failing to act in their best interests with respect to their custody, maintenance and education.

In April 2014, the Supreme Court of Western Australia decided that because this matter was a 'test case', each party should bear their own costs.¹⁰¹

On 8 May 2015, the Court of Appeal (WA) overturned this decision and the Collard family were ordered to pay the State's costs.¹⁰²

At the time of writing, the Collard family was seeking leave to appeal this decision in the High Court.¹⁰³

Western Australia's costs are thought to be worth hundreds of thousands of dollars. At the time of the Western Australian Government's appeal, Western Australia's Attorney-General, the Hon Michael Mischin MLC, said that the state's costs were around \$400,000.¹⁰⁴

There is little prospect of the Western Australian Government recovering its costs from the Collard family.¹⁰⁵

I am disappointed for the Collard family that this matter continues to drag out because of the decision of the Western Australian Government to pursue costs. This family has already experienced considerable trauma and it is unfortunate that they now have to endure the stress and uncertainty of resolving court costs.

Again, I urge governments to prioritise effective reparations for the Stolen Generations and their families. Families like the Collards should not have to suffer through lengthy, expensive and traumatising litigation in an attempt to remedy past injustices.

1.7 Close the Gap

In my role as Co-Chair of the Close the Gap Campaign I continue to monitor progress on the national effort to close the unacceptable health and life expectancy gap between Aboriginal and Torres Strait Islander people and other Australians.

The most recent Australian Bureau of Statistics data estimating Aboriginal and Torres Strait Islander life expectancy indicates small increases over a five year period from 2005-07 to 2010-12.¹⁰⁶ As noted by the Close the Gap Campaign Steering Committee (Campaign Steering Committee):

the modesty of the gains, and the magnitude of the remaining life expectancy gap remind us why the Council of Australian Governments' (COAG) Closing the Gap Strategy and the target to close the life expectancy gap was needed. It remains necessary today.¹⁰⁷

Despite the slow progress in closing the gap, signs the task is possible are emerging from the available data. We are seeing reductions in smoking rates and improvements to maternal and child health outcomes.¹⁰⁸

In addition to these gains, new data has indicated high levels of Aboriginal and Torres Strait Islander people with undetected treatable and preventable chronic conditions.¹⁰⁹ The Campaign Steering Committee argues that this data demonstrates that relatively large health and life expectancy gains are possible in relatively short periods of time. These gains can be made as a result of a greater focus on increasing access to primary health care services that will enable these conditions to be detected, treated and managed.¹¹⁰

In July 2013, the former Australian Government launched the *National Aboriginal and Torres Strait Islander Health Plan* (Health Plan).¹¹¹ The Health Plan set out the policy directions required to close the gap, including tackling child and maternal health and addressing chronic disease. In order to drive outcomes the Health Plan requires a detailed implementation plan that sets specific actions, timeframes and targets.

In mid-2014, Assistant Minister for Health, Senator the Hon Fiona Nash, announced that the Australian Government would begin work on an implementation plan.¹¹² Since that time the Australian Government has been working in partnership with the National Health Leadership Forum (NHLF),¹¹³ comprised of national Aboriginal and Torres Strait Islander organisations whose core business is health, in this process. At the time of writing the implementation plan was close to being finalised.

I agree with the Campaign Steering Committee that an effective implementation plan for the Health Plan provides a significant opportunity for improving Aboriginal and Torres Strait Islander peoples' access to appropriate health care and could address many of the other challenges in closing the health and life expectancy gap.¹¹⁴ Text Box 1.3 contains the key features that an effective implementation plan would contain.

Text Box 1.3:

Recommendation 9 of the Close the Gap: Progress and priorities report 2015¹¹⁵

Recommendation 9: That the Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan include the following essential elements:

- Set targets to measure progress and outcomes;
- Develop a model of comprehensive core services across a person's whole of life;
- Develop workforce, infrastructure, information management and funding strategies based on the core services model;
- A mapping of regions with relatively poor health outcomes and inadequate services. This will enable the identification of services gaps and the development of capacity building plans;
- Identify and eradicate systemic racism within the health system and improve access to and outcomes across primary, secondary and tertiary health care;
- Ensure that culture is reflected in practical ways throughout Implementation Plan actions as it is central to the health and wellbeing of Aboriginal and Torres Strait Islander people;
- Include a comprehensive address of the social and cultural determinants of health; and
- Establish partnership arrangements between the Australian Government and state and territory governments and between Aboriginal Community Controlled Health Services and mainstream services providers at the regional level for the delivery of appropriate health services.

1.8 Where to from here?

The developments of the past year need to be viewed against the backdrop of Indigenous Affairs policy more broadly.

Aboriginal and Torres Strait Islander people are no strangers to the many transitions that occur in this space and have seen many changes to the administration of Indigenous Affairs over the past few decades. When I reflected on 20 years of the position of Social Justice Commissioner, I was reminded about how circular these changes can often be.¹¹⁶ Our communities have seen many administrations come and go, from:

- The Council for Aboriginal Affairs and Office of Aboriginal Affairs which were then followed by the Department of Aboriginal Affairs under the Whitlam government.
- The establishment of government sponsored representative bodies such as the National Aboriginal Conference, the National Aboriginal Consultative Committee and the Aboriginal and Torres Strait Islander Commission (ATSIC).
- The abolition of ATSIC in 2004 to the mainstreaming of Indigenous Affairs and the implementation of the Office of Indigenous Policy Coordination and the establishment of regional arrangements.
- The Department of Immigration and Multicultural and Indigenous Affairs during the Howard years, and then arrangements under the Department of Families, Housing, Community Services and Indigenous Affairs.
- The consolidation of Indigenous programming policies and service delivery from the eight federal government agencies prior to the 2013 election to a central agency in PM&C.

The cumulative effect of these changes over many years is significant. I think that positive changes in the social disadvantage experienced by Aboriginal and Torres Strait Islander peoples are difficult to come by when the policy framework we are presented with is so chaotic and inconsistent.

I would argue that many of these changes, and many of the events outlined earlier in this chapter, are symptomatic of government failures, both at a federal and state level, to adequately include Aboriginal and Torres Strait Islander people in decision making.

Inclusion in decision making on issues that affect us is a right of our people, clearly articulated in article 18 of the Declaration. Article 19 then places a duty on government to consult and cooperate in good faith with Indigenous peoples even if our rights have not been recognised in domestic law as part of our right to free, prior and informed consent.¹¹⁷

Article 18

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.

Article 19

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

In my view, the most effective initiatives to improve the lives of Aboriginal and Torres Strait Islander people are those that are managed or closely informed by the needs and aspirations identified by our communities.

The features of a meaningful and effective consultation process outlined in Text Box 1.4 were developed

from the foundation of the government's commitments to Aboriginal and Torres Strait Islander peoples in the Declaration. It then drew from:

- the work of international mechanisms such as the United Nations Permanent Forum on Indigenous Issues¹¹⁸
- the views and experiences of Australian Aboriginal and Torres Strait Islander organisations such as the Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Prescribed Bodies Corporate (PBCs).

These features are not designed as a checklist for consultations, for that is not the approach to consultations that is owed to our peoples. An inflexible, one-size-fits-all approach would not be conducive to relationship building or to effective outcomes for communities or governments.

Given the unproductiveness of a prescriptive, tick-a-box approach, the features of a meaningful and effective consultation process were prepared to guide the development of appropriate processes on a case-by-case basis.

Text Box 1.4:

Features of a meaningful and effective consultation process¹¹⁹

1. The objective of consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure

In all cases, States should engage in '[a] good faith effort towards consensual decision making'.¹²⁰ Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.¹²¹

2. Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on Indigenous peoples. A consultation process should itself be the product of consensus. This can help ensure that the process is effective.

3. Consultations should be in the nature of negotiations

Governments need to do more than provide information about measures developed on behalf of Aboriginal and Torres Strait Islander peoples, without their input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.

Governments need to be willing and flexible enough to accommodate the concerns of Aboriginal and Torres Strait Islander peoples, and work with them in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of Aboriginal and Torres Strait Islander peoples, and that the affected peoples do not agree to the measure.

4. Consultations need to begin early and should, where necessary, be ongoing

Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

5. Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

The capacity of Aboriginal and Torres Strait Islander communities to engage in consultative processes can be hindered by their lack of resources. Even the most well intentioned consultation procedure will fail if Aboriginal and Torres Strait Islander peoples are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot possibly be expected to consent to or comment on any proposal in a fully informed manner.

6. Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision

Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain consent.

In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes.

7. Adequate timeframes should be built into consultation processes

Consultation timeframes need to allow Aboriginal and Torres Strait Islander peoples time to engage in their decision making processes and cultural protocols.

Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner.

8. Consultation processes should be coordinated across government departments

Governments should adopt a 'whole of government' approach to law and policy reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies. This will assist to ease the burden upon Aboriginal and Torres Strait Islander peoples of responding to multiple discussion papers and reform proposals.

9. Consultation processes need to reach the affected communities

Government consultation processes need to directly reach people 'on the ground'. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them.

Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure.

10. Consultation processes need to respect representative and decision making structures

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision making mechanisms.

The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

11. Governments must provide all relevant information and do so in an accessible way

To ensure that Aboriginal and Torres Strait Islander peoples are able to exercise their rights to participate in decision making in a fully informed way, governments must provide full and accurate

information about the proposed measure and its potential impact.

This information needs to be clear, accessible and easy to understand. Information should be provided in plain English and, where necessary, in language.

1.9 Conclusion and recommendations

In last year's report I noted that 2013-14 was characterised by uncertainty and upheaval for Aboriginal and Torres Strait Islander peoples and I am disappointed to say that this has continued throughout the past year.

The need for better engagement with Aboriginal and Torres Strait Islander peoples has been starkly apparent across a range of areas and levels of government during this reporting period.

The features of a meaningful and effective consultation can provide guidance to governments about how to produce more positive outcomes over the year ahead.

In both the review of the IAS and its future administration, the Australian Government must ensure that the mistakes of the past year are not repeated. Information must be provided in a timely and clear manner with Aboriginal and Torres Strait Islander organisations included in any subsequent decision making about its direction and rationale.

Many of the criticisms by organisations, leaders and communities of the first funding round of the IAS, both in public commentary and through engagement with the Senate inquiry into the IAS tendering processes, would be addressed by the consideration and implementation of the features of a meaningful and effective consultation process.

The Western Australian Government has an opportunity to ensure that the mistakes made in the initial conversation about remote community closures are not repeated by considering how these features are incorporated in their forthcoming consultations and implementation process. A first step would be to reflect on the adequacy of the timeframes for consultation and decision making.

Similarly, the Northern Territory Government needs to better engage with our communities to develop strategies for reducing the numbers of Aboriginal and Torres Strait Islander peoples in custody and for better dealing with alcohol misuse. It is only through this engagement that we will be able to develop solutions that address the complexities underlying these problems.

Consideration of these features is also an important part of in the next steps of the constitutional recognition process. This will help ensure that our people understand and have confidence in the process, providing us with the best opportunity to effect meaningful change.

All governments in Australia should take heed of the features of a meaningful and effective consultation process and use them to inform their approach to consultation and engagement with Aboriginal and Torres Strait Islander peoples in all areas that affect us. Such an approach has the potential to improve outcomes for our peoples and improve policy at its earliest stages.

Recommendations

Recommendation 1: The Australian Government should reconsider the requirement for Indigenous organisations receiving more than \$500,000 of Indigenous Advancement Strategy funding to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

Recommendation 2: The Western Australian Government should not close any remote Aboriginal communities without a proper consultation process and the free, prior and informed consent of the communities concerned, as per articles 10, 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples.

Recommendation 3: The Northern Territory Government should repeal section 133AB of the *Police*

Administration Act (NT) and commission an expert inquiry into responses to alcohol misuse, as per the recommendations of Coroner Greg Cavanagh SM.

Recommendation 4: The Australian Government finalise the Implementation Plan for the National Aboriginal and Torres Strait Islander Health Plan in accordance with recommendation 9 of the Close the Gap Campaign Steering Committee's *Progress and priorities report 2015*.

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2.1 Introduction

In last year's *Social Justice and Native Title Report*, I made some brief comments on the review of employment and training for Aboriginal and Torres Strait Islander peoples conducted by Mr Andrew Forrest, *The Forrest Review: Creating Parity* (Forrest Review).¹ This chapter will consider the Australian Government's response to the Forrest Review in more detail.

In March 2015, the Australian Government announced several initiatives stemming from the Forrest Review to boost employment opportunities for Aboriginal and Torres Strait Islander peoples:

- A workforce participation target aiming to increase the proportion of Indigenous employees in the Australian Public Service to 3 per cent by 2018.²
- The Indigenous Procurement Policy, which seeks to increase the Australian Government's procurement from Indigenous businesses from around 1 per cent of contracts to 3 per cent of contracts by 2020.³
- The Employment Parity Initiative, in which the Australian Government will partner with businesses, including the Accor Hotel Group and Compass Group Australia, to create an additional 20,000 jobs for Indigenous peoples by 2020.⁴

I welcome these policies and the Australian Government's commitment to addressing the disparity in employment outcomes between Indigenous and non-Indigenous Australians.

In this chapter, I will focus on two specific aspects of the Australian Government's response to the Forrest Review that give rise to human rights concerns:

- the trial of the Healthy Welfare Card
- the introduction of the Work for the Dole scheme in remote communities.

These reforms will significantly impact on Aboriginal and Torres Strait Islander peoples because of our over-representation in the welfare system.

As outlined in Chapter 1, the Australian Government must properly consult with Aboriginal and Torres Strait Islander peoples on policy and legislation that affect us.

Given these policies are at the early stages of implementation, it is the appropriate time to consider how a human rights-based approach applies to welfare initiatives so that we can ensure our rights are properly incorporated into these schemes.

2.2 A human rights-based approach

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide the international law obligations through which we can assess the compliance of welfare reforms with human rights standards.

Details of a human rights-based approach will vary depending on the nature of the organisation concerned and the issues it deals with. Common principles, however, have been identified as the PANEL principles:

- **Participation:** everyone has the right to participate in decisions which affect their human rights. Participation must be active, free and meaningful, and give attention to issues of accessibility, including access to information in a form and a language which can be understood.
- **Accountability:** accountability requires effective monitoring of compliance with human rights standards and achievement of human rights goals, as well as effective remedies for human rights breaches. For accountability to be effective, there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights. This also requires the development and use of appropriate human rights indicators.
- **Non-discrimination and equality:** a human rights-based approach means that all forms of discrimination in the realisation of rights must be prohibited, prevented and eliminated. It also means that priority should be given to people in the most marginalised or vulnerable situations who face the biggest barriers to realising their rights.
- **Empowerment:** everyone is entitled to claim and exercise their rights and freedoms. Individuals and communities need to be able to understand their rights, and to participate fully in the development of policy and practices which affect their lives.
- **Legality:** a human rights-based approach requires that the law recognises human rights and freedoms as legally enforceable entitlements, and the law itself is consistent with human rights principles.⁵

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) articulates how the human rights principles in these treaties apply to Indigenous peoples, in particular the principles of:

- self-determination
- free, prior and informed consent
- non-discrimination and equality.

To be consistent with these principles, laws and policies should be non-discriminatory and promote the ability of Aboriginal and Torres Strait Islander peoples to exercise choice, participation and control.

(a) Compliance with the Racial Discrimination Act

The *Racial Discrimination Act 1975* (Cth) (RDA) is based on Australia's international legal obligations under ICERD. There are three key questions that need to be asked to assess whether welfare initiatives comply with the RDA:

- i. Where the measure is established by legislation, does it guarantee equality before the law?
- ii. Is the measure implemented in such a way that avoids both direct and indirect discrimination?
- iii. Is the measure exempt as a special measure?⁶

(i) Equality before the law

Section 10 of the RDA provides for a right to equality before the law. This right is relevant to an allegation that a law is discriminatory on the basis of race, colour, or national or ethnic origin in its terms or practical effect.

Determining whether a law breaches section 10 of the RDA involves examining the following questions:

- Is a relevant right affected by the law in question?
- Does the law prevent or limit the enjoyment of that right for persons of a particular race relative to others?
- Is the limitation legitimate because it is intended to achieve a valid, non-discriminatory purpose?⁷

The assessment of the legitimacy of a limitation on a right is objective. A lack of discriminatory intent is not sufficient to validate a limitation. The limitation will not be legitimate if its impact is disproportionate to the purpose or benefit claimed.⁸

(ii) No direct or indirect discrimination

Section 9 of the RDA provides broad prohibitions on acts of racial discrimination. This section is relevant to allegations that an act or behaviour of a person is discriminatory. It does not apply to allegedly discriminatory laws or policies, but it does apply to actions taken when implementing those laws or policies.⁹

Section 9(1) concerns direct discrimination, where an act involves a distinction, exclusion, restriction or preference based on race. An act will be based on race where there is a sufficient connection between the act and the race of the person or group to which the act applies.¹⁰

Section 9(1A) concerns what is known as indirect discrimination, where a term, condition or requirement is imposed generally but is unreasonable under the circumstances and has a disparate impact on people of a particular race. It is necessary to ask:

- Are there any terms, conditions or requirements that are unreasonable either in what they require or how they are applied?
- Are there people of a particular race who are unable to comply with the term, condition or requirement?¹¹

When assessing if an act is directly or indirectly discriminatory, we must ask if the act has a negative impact on the equal enjoyment of rights in public life by people of a particular race. If the practical effect of the act is to limit the enjoyment of a human right, then it is discriminatory.¹²

(iii) Special measures exemption

Special measures are positive actions taken to rectify disadvantage and ensure the 'full and equal enjoyment of human rights and fundamental freedoms' of a particular racial group.¹³ Section 8 of the RDA provides an exception to sections 9 and 10 for special measures.

A special measure should include the following elements:

- conferral of a benefit on some or all members of a particular class
- membership of this class must be based on race, colour, descent, or national or ethnic origin

- the sole purpose of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights equally with others
- the measure must not have already achieved its objectives.¹⁴

(b) Ensuring the right to social security

ICESCR provides a right to social security.¹⁵ ICESCR requires that the rights which it enunciates are to be enjoyed without discrimination of any kind, and equally between men and women.¹⁶ ICERD also provides that the right to social security is to be enjoyed without distinction as to race, colour, or national or ethnic origin.¹⁷

The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has commented that the form in which social security payments are provided must respect the principles of human dignity and non-discrimination.¹⁸

The Committee has interpreted the accessibility element of the right to social security as requiring:

- eligibility conditions that are ‘reasonable, proportionate and transparent’
- that the withdrawal, reduction or suspension of benefits are circumscribed, based on grounds that are reasonable and proportionate, and provided for by law
- the participation of social security recipients in the administration of the social security system.¹⁹

The Committee also commented with respect to Indigenous peoples:

States parties should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.²⁰

2.3 The importance of consultation and free, prior and informed consent

Articles 18 and 19 of the Declaration provide for the inclusion of Indigenous peoples in decision making processes. Governments must consult and cooperate with Indigenous peoples to give effect to our right to free, prior and informed consent.

The ongoing legacy of colonisation has left many Aboriginal and Torres Strait Islander peoples wary of government interventions in their daily lives. As I have said before in regards to the Northern Territory Emergency Response (the NT Intervention) and the subsequent Stronger Futures income management legislation, when imposing a scheme that restricts individual rights and choices, it is essential that decisions are made openly, fairly and competently.²¹

Following the release of the Forrest Review, the Australian Government undertook a six week consultation period to obtain feedback on the Forrest Review's recommendations.²²

Consultations were held around the country, with over 300 people attending 18 meetings.²³

Over 220 written submissions were received from individuals and organisations.²⁴ Written submissions received during and after the review were limited to two pages,²⁵ although some did not comply with this limitation. The limitation was apparently imposed at the discretion of Mr Forrest.²⁶

I am concerned about the adequacy of the consultation process, particularly given the length of the report and the significance of its recommendations. The large number of submissions and meeting attendees demonstrates the very high level of interest and concern around the Forrest Review recommendations.

Meaningful engagement with Aboriginal and Torres Strait Islander peoples is not just a step in the policy implementation process but an opportunity for our people to participate in decisions that will impact on our communities. Detailed input should be encouraged by allowing sufficient freedom and timeframes for thorough contributions.

In the coming months, the Australian Government must meaningfully engage with our people about the design and implementation of the Healthy Welfare Card and the Work for the Dole program in remote communities. If our people are to have confidence in policies that affect us, we must be able to understand and be involved in the process.²⁷

2.4 The Healthy Welfare Card

(a) The Forrest Review proposal

The objective of the Healthy Welfare Card proposal is to establish a cashless welfare system.

The reasoning behind this approach is that a cashless welfare system would prevent people spending 'untied welfare cash' on drugs, alcohol, and other damaging behaviours, and would encourage financial stability and responsible spending.²⁸

The Forrest Review argues a cashless welfare system would result in reduced rates of substance abuse and gambling, and enable people to focus on education, employment and family responsibilities.²⁹

Under the Forrest Review proposal, the Healthy Welfare Card will be issued through the recipient's financial institution in the form of a MasterCard or Visa debit card.³⁰

Recipients would be blocked from making cash withdrawals and from purchasing 'alcohol, gambling and illicit services and gift cards at the point of sale'.³¹

The Forrest Review recommendation suggested the Healthy Welfare Card should be used by all welfare recipients, except those receiving the age and veteran pensions.³²

In last year's report I described the Healthy Welfare Card proposal as 'one of the most radical welfare reforms ever proposed in Australia'.³³

(b) Healthy Welfare Card trial

In August 2015, the Australian Government announced that community leaders in Ceduna, South Australia had agreed to be the first trial site for the Healthy Welfare Card.³⁴

The Australian Government has also held discussions with leaders from Kununurra and Halls Creek in Western Australia, and Moree in New South Wales about hosting a trial.³⁵ In July 2015, Moree Council voted unanimously against becoming a trial site, reportedly due to concerns that exempt groups would be harassed for cash.³⁶ At the time of writing this report, consultations were ongoing with community leaders in Halls Creek and Kununurra.³⁷

The Social Security Legislation Amendment (Debit Card Trial) Bill 2015 (Cth) (the Debit Card Trial Bill) was introduced to the House of Representatives on 19 August 2015.

The Explanatory Memorandum of the Debit Card Trial Bill states:

The trial will test whether significantly reducing access to discretionary cash, by placing a significant proportion of a person's welfare payments into a restricted bank account, can reduce the habitual use and associated harm resulting from alcohol, gambling and illegal drugs. It will also test whether cashless welfare arrangements are more effective when community bodies are involved.³⁸

The Debit Card Trial Bill allows for debit card trials at up to three locations, to take place between 1 February 2016 and 30 June 2018. The trials can be of no more than 12 months duration and can include no more than 10,000 participants.³⁹

For people in a trial area, up to 80 per cent of particular social security payments (trigger payments) will be held in a restricted bank account that does not allow cash withdrawals. The debit card, which would be linked to the restricted bank account, will not be able to be used to purchase alcohol or gambling products or services. The remaining unrestricted amount (20 per cent if the full 80 per cent is quarantined) will be available in cash.⁴⁰

Certain authorised community bodies will be allowed, with the agreement of the trial participant, to issue written directions reducing the restricted proportion of a person's welfare payment. At least 50 per cent of a person's total payment must be restricted.⁴¹

The Debit Card Bill also provides that, despite any law in place in a State or Territory, an officer or employee of a financial institution, or a member, officer or employee of a community body may disclose information about a trial participant to the Secretary. If such information is disclosed, the Secretary may disclose information about the trial participant to:

- an officer or employee of a financial institution for 'the purposes of the performance of the duties, or the exercise of the powers, of the officer or employee'
- a member, officer or employee of a community body for 'the purposes of the performance of the functions and duties, or the exercise of the powers, of the member, officer or employee'.⁴²

These disclosure provisions raise significant concerns about the right to privacy in article 17 of the ICCPR.

The Parliamentary Joint Committee on Human Rights (PJC) has provided its initial assessment of the Debit Card Trial Bill and has requested further information from the relevant Minister on the existence of a rational connection between the objective of the Debit Card Trial Bill and the limitations it places on the rights to equality and non-discrimination, privacy, and social security.⁴³

In particular, the PJC is concerned about whether there is evidence indicating that restricting social security payments will reduce hardship, deprivation, violence and harm, and encourage socially responsible behaviour. The PJC has also sought advice on whether the limitations are reasonable and proportionate to achieve that objective, including safeguards such as monitoring and access to review.⁴⁴

The Debit Card Trial Bill was referred to the Senate Community Affairs Legislation Committee on 20 August 2015. The Senate Committee's reporting date is 12 October 2015.⁴⁵

(c) The experience of income management

Our communities have seen this kind of reform before. The Healthy Welfare Card resembles the BasicsCard, one of the most controversial elements of the NT Intervention.

Unlike income management, the Healthy Welfare Card does not quarantine a proportion of payments explicitly for priority items. It is however directed toward a similar objective of ensuring welfare payments are spent responsibly by restricting how people are permitted to use their income. In this sense, we can look to the experience of people under income management for guidance about the effectiveness of this proposal in practice.

Introduced in 2007, the original NT Intervention income management measures applied to most welfare payment recipients in 'prescribed areas' in the Northern Territory.⁴⁶ At the time, the Australian Human Rights Commission (the Commission) expressed concern the income management measure was racially discriminatory and breached the right to social security and procedural fairness.⁴⁷

In 2010, the NT Intervention was redesigned and the application of income management measures was broadened to disengaged youth, long-term welfare recipients and persons assessed as vulnerable,⁴⁸ removing direct reference to race and introducing voluntary opt-in programs.⁴⁹ The Commission welcomed most of the changes, yet remained concerned about issues of indirect discrimination due to the disproportionate impact on Aboriginal and Torres Strait Islander peoples.⁵⁰

The 2012 Stronger Futures legislation retained the 2010 NT Intervention measures and made changes to how authorities refer people to income management.⁵¹ The Commission submitted its concerns about these reforms, namely the limited consultation process, the restrictive grounds for administrative review and the broad powers of state and territory authorities to refer people to income management.⁵²

The PJC examined the *Stronger Futures in the Northern Territory Act 2012* (Cth) in 2013.⁵³ It considered the overwhelming application of income management to Indigenous Australians meant the scheme had the effect of limiting the rights of a person of a particular race or ethnic origin within the meaning of article 1 of ICERD. It was the PJC's view that there was insufficient evidence that income management is a reasonable and proportionate measure to achieve its legitimate objectives.⁵⁴

Several evaluations of income management, some of which are ongoing, have reported a mix of positive and negative impacts for income support recipients and communities.⁵⁵ There is some evidence to suggest that income management holds potential benefits for people with demonstrated financial management and substance abuse problems.⁵⁶ Income management may also assist people who experience financial harassment from family or friends, known as humbugging.⁵⁷ For others, however, it may lead to increased harassment for money and food due to reduced levels of cash in the community.⁵⁸

Where people have experienced benefits as a result of income management, they are modest when compared to its stated objectives⁵⁹ and need to be weighed against its significant drawbacks.

For many, income management results in few or no benefits and 'a sense of loss of control, shame and unfairness'.⁶⁰ Feedback from stakeholders has included concerns that people on income management find it disempowering⁶¹ and have difficulty managing their own income if they move from welfare to paid employment.⁶²

One evaluation concluded that income management:

seldom in itself motivates people to develop the skills to manage their finances (where these are lacking), obtain paid employment or parent more adequately. There is little evidence that it is bringing about the behavioural change necessary to generate the intended long-term effects.⁶³

Voluntariness appears to be a significant factor. Income management was introduced in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) at the request of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPY Women's Council) and is generally viewed positively.⁶⁴ The positive community response has been attributed to community consultation and people engaging in income management voluntarily.⁶⁵

Another evaluation found that, in the short-term, people on voluntary income management experienced significant reductions in tobacco and alcohol consumption and improved financial management. In contrast, those placed on income management generally did not show positive improvements in these areas.⁶⁶

The Commission has previously stated and confirms that its preferred features of an income management measure are:

- an approach that enables participants to voluntarily opt-in, rather than an automatic quarantining model (which then relies upon individual applications for exemptions)
- an approach that utilises income management as a 'last resort' for targeted risk areas such as child protection (that is supported by case management and support services), similar to the Family Responsibilities Commission model in Queensland

measures that are applied for a defined period and in a manner proportionate to the context.⁶⁷

An income management measure with these features can be justified as consistent with international human rights standards.

(d) Concerns about the Healthy Welfare Card

There has been significant discussion about the Healthy Welfare Card in the media and much of this has focused on Aboriginal and Torres Strait Islander communities.⁶⁸ Welfare dependence and substance abuse are not unique to Aboriginal and Torres Strait Islander communities and discussions about the Healthy Welfare Card should avoid stigmatising our communities.

Despite the proliferation of electronic payment methods, cash transactions are still widespread, particularly for small purchases. Technology can, and frequently does, fail. The restriction of 80 per cent of a person's welfare payment could create significant practical difficulties.

It is unclear how the Healthy Welfare Card will interact with existing income management arrangements. People who have opted to use income management should not be forced to use the Healthy Welfare Card.

The experience of income management demonstrates the limited value of restricting how welfare recipients spend their income to address entrenched social disadvantage.

Assuming the Healthy Welfare Card's restriction of the availability of cash will stop drinking, gambling and drug use, the people concerned and their families and communities will need an enormous amount of support. The challenges should not be underestimated.

If the Healthy Welfare Card does very little to bring about behavioural change, the personal freedom of welfare recipients who do not have drug, alcohol or gambling problems will be significantly restricted for no overall benefit.

Alcoholism, drug use and gambling problems are not caused by people having unrestricted access to cash. Limiting people's ability to access their welfare payments in cash does not address the reasons for this harmful behaviour, including poverty, trauma, and lack of education.⁶⁹

2.5 Work for the Dole in remote communities

The Work for the Dole scheme is being introduced in remote communities as part of reforms to the Remote Jobs and Communities Programme (RJCP), now known as the Community Development Programme.⁷⁰ The RJCP aims to help unemployed people in remote Australia build skills and job readiness.

(a) The Forrest Review recommendations

The reform of the RJCP reflects recommendations made in the Forrest Review, which called for the end of 'passive welfare' which enables people to receive income support for long periods without providing opportunities for education and skills development.⁷¹

The Forrest Review recommended the Australian Government use Job Centres to replace and consolidate services provided under the RJCP and related programmes that provide unemployed people with support and training. The introduction of mandatory Work for the Dole in RJCP geographic areas was among the steps suggested to implement this recommendation.⁷²

The Forrest Review also recommended transferring recipients of wages through the Community Development and Employment Project (CDEP) to Newstart Allowance and into the RJCP.

The CDEP offered communities and Aboriginal and Torres Strait Islander organisations the option of pooling welfare payments into direct wages, allowing people to opt-in to local employment as an alternative to individualised benefits.⁷³

From July 2009, the CDEP scheme was discontinued in non-remote locations. Participants in remote locations who joined the scheme prior to July 2009 were to continue receiving wages until June 2017 under the RJCP.⁷⁴

(b) The Community Development Programme

The rollout of the Work for the Dole scheme in RJCP geographic areas seeks to offer new pathways to employment to ensure all Australians are meaningfully involved in the community.⁷⁵

People capable of work aged 18 to 49 years who are not engaged in work or study, are required to undertake work-like activities for up to 25 hours a week, depending on their assessed work capacity.⁷⁶

According to the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, the activities involved will be flexible and tailored to the needs of job seekers and their communities. The activities could include attending parents groups, taking children to school, or caring for elderly parents.⁷⁷

Job seekers in remote areas will be required to undertake Work for the Dole activities five days a week throughout the year. The scheme allows for reasonable periods of leave, including cultural and sick leave and time off for caring responsibilities, public holidays, and during school holidays or standard business shut-down periods.⁷⁸ Participants will be paid 52 weeks a year.⁷⁹

In contrast, job seekers in other parts of Australia who have received income support for six months or more and have registered with a Jobactive employment services provider are required to undertake Work for the Dole or another approved activity for six months a year. Job seekers aged under 30 years must undertake activities for 25 hours per week and those aged 30 to 49 years must undertake activities for 15 hours per week.⁸⁰

The Community Development Programme will also involve the creation of a Job Plan for every job seeker, which will identify the supports they need to move into the workforce.⁸¹ The CDEP has wound down and as of

1 July 2015 all job seekers in remote areas became part of the same system.⁸²

Senator Scullion has announced these changes will be accompanied by a \$25 million investment in local small-businesses, such as butchers and hairdressers.⁸³

(c) Concerns about Work for the Dole in remote communities

I commend the Australian Government for prioritising policies relating to jobs in remote Aboriginal and Torres Strait Islander communities. These reforms come at a time when unemployment is still on the rise in Aboriginal and Torres Strait Islander communities.⁸⁴ In addition to the financial benefits, employment can also improve health and wellbeing, increase school attendance and reduce incarceration rates.⁸⁵

I have spoken before about the advantages of a coordinated, networked approach to employment and welfare, across sectors.⁸⁶ Promoting the employment of our people in local services and institutions could provide long-term benefits, creating more sustainable remote communities and establishing important role models for the younger generation.

Although I welcome this focus on employment and training in Aboriginal and Torres Strait Islander communities, I am concerned about the tougher conditions placed on Work for the Dole participants in remote areas.

It is not clear to me what benefit there is in job seekers in remote communities undertaking Work for the Dole for a longer period each year or for those aged 30 to 49 years in undertaking an additional 10 hours of work per week.

I am particularly concerned about comments made by Parliamentary Secretary to the Prime Minister, the Hon Alan Tudge MP, that a 'no-show, no-pay' penalty of up to 20 per cent of a person's weekly income will apply for each day they fail to show up.⁸⁷ In August 2015, it was reported that new penalties would be implemented to deduct a day's worth of a person's welfare payment for each day they fail to show up.⁸⁸

The penalty that applies to job seekers generally for similar failures is calculated by a formula that takes into account the amount of their income support payment and the length of the relevant period.⁸⁹ Penalties have the potential to cause considerable hardship and there is no clear rationale for applying a different penalty to job seekers in different locations.

This approach is questionable given broader concerns that Work for the Dole and similar jobs programs do not help job seekers secure employment.⁹⁰

Minister Scullion has commented that there will be high levels of engagement with Aboriginal and Torres Strait Islander communities as Work for the Dole is implemented gradually over the next 12 months.⁹¹

Some service providers have expressed concern that there are not enough activities or resources in remote communities to meet the 25 hour per week requirement.⁹² There were also concerns about the lack of information available just before the new measures commenced on 1 July 2015.⁹³

Aboriginal and Torres Strait Islander peoples require support from government to live in remote communities, and as I have said elsewhere in this report, this requires a broader discussion about how to foster sustainability in these communities. Our people should not be penalised for a lack of employment opportunities or for being unable to participate in work-like activities.

By undertaking further engagement with Aboriginal and Torres Strait Islander peoples, I hope the Australian Government will listen to our concerns and come to recognise the plurality of local economies operating in our remote communities.

2.6 Conclusion and recommendations

Although neither the Healthy Welfare Card nor the Community Development Programme are explicitly directed towards Aboriginal and Torres Strait Islander peoples, both are likely to have a disproportionate impact on our communities.

All of the communities considered for trialling the Healthy Welfare Card have large Aboriginal and Torres Strait Islander populations. In the Australian Bureau of Statistics 2011 Census, 28.3 per cent of the Ceduna population identified as Aboriginal and Torres Strait Islander,⁹⁴ in Kununurra the percentage was 34.8 per cent,⁹⁵ and 78.3 per cent in Halls Creek.⁹⁶

Around 37,000 people receive employment services from RJCP service providers. Of these, around 31,000 (84 per cent) are Indigenous.⁹⁷

The community-wide application of these measures means they may not be reasonable or proportionate in some cases.

Consequently, I am concerned the Healthy Welfare Card trial and the implementation of Work for the Dole in remote communities may give rise to indirect discrimination and have a negative impact on the ability of Aboriginal and Torres Strait Islander peoples to enjoy their rights, particularly the right to social security.

Income is fundamental to wellbeing and the ability of people to realise other economic, social and cultural rights. The recognition of social security as a human right acknowledges the particular vulnerability and insecure circumstances of people who are unable to obtain paid employment.

A human rights-based approach to policy is essential to addressing disadvantage in Aboriginal and Torres Strait Islander communities. I strongly urge the Australian Government to commit to this approach, particularly the rights contained in the Declaration.

As the Commission has recommended previously in relation to the Stronger Futures policy, a human rights-based approach would recognise welfare quarantining as a last resort and enable participants to voluntarily opt-in to income management measures for a defined period.⁹⁸

The causes of social disadvantage are complex and policies intended to help people require a multidimensional approach in collaboration with the people affected. It is important for the Australian Government to develop opt-in approaches that Aboriginal and Torres Strait Islander peoples who are struggling to manage their lives can use to improve their circumstances.

Recommendation

Recommendation 5: The Australian Government should design the Healthy Welfare Card and the Work for the Dole scheme in remote communities as voluntary, opt-in schemes.

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Chapter 3:

Native title - Year in review

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native title **75**
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3.1 Introduction

Each year as Aboriginal and Torres Strait Islander Social Justice Commissioner, I am required to report on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples in accordance with section 209 of the *Native Title Act 1993* (Cth) (Native Title Act).

The rights of Aboriginal and Torres Strait Islander peoples to access and enjoy our land, waters and resources is fundamental to not only our identity as Indigenous people, but increasingly to our economic and social development. Accessing these rights is essential to practicing our culture and to sustaining our communities for generations to come.

This chapter will explore the significant events that have taken place in native title during the reporting period from 1 July 2014 to 30 June 2015.

The stress and upheaval caused by the Indigenous Advancement Strategy (IAS) has been a major theme in Indigenous Affairs, as reflected in last year's *Social Justice and Native Title Report* and in Chapter 1 of this report. Whilst native title has largely been immune from these fluctuations, there have been a number of reviews and other processes that will spell change for native title in the future.

I will also reflect on the need for a new conversation surrounding the land and native title space. This theme of a 'new conversation' has emerged as a key priority from Aboriginal and Torres Strait Islander communities during this past year and I hope that this will shape the path forward into the future.

3.2 The need for a new conversation

During the reporting period, significant discussions took place with Aboriginal and Torres Strait Islander peoples about the enjoyment of our rights and interests in relation to land, waters and resources. Native title plays an integral role in realising these rights.

Overwhelmingly, these discussions revealed that Aboriginal and Torres Strait Islander peoples are not satisfied with what the native title system has delivered for our communities thus far, and there is a need for a new dialogue with governments to better realise our inherent rights to land, water and resources through native title.

In particular, there are still enormous challenges facing our communities in relation to our ability to benefit from this form of land tenure, despite Aboriginal and Torres Strait Islander peoples now owning or having an interest in nearly a third of the Australian land mass.¹

I have heard from many Aboriginal and Torres Strait Islander communities and Traditional Owners about the numerous barriers they face in realising their rights and benefits under land rights and native title. These barriers range from various legal duties through to the administrative red tape imposed once a native title determination has been made, including:

- various tax and regulatory standards placed on Aboriginal and Torres Strait Islander communities in the post determination phase
- conflicts between individual and communal property interests
- issues arising from the conversion of title.

These barriers conspire against us from using our land to enter the economy from which our peoples and communities can thrive.

This is compounded by the ‘next generation’ of native title issues such as litigation in relation to Indigenous Land Use Agreements (ILUAs), variations to determinations and compensation proceedings.

It is clear that Aboriginal and Torres Strait Islander peoples are now facing the challenge of how to make the most of the Indigenous Estate, that is, all rights to and interest in land and native title for our prosperity and sustainability.

As Noel Pearson succinctly put it:

We’re moving from a land rights claim phase to a land rights use phase where people are grappling with how we make our land contribute to our development.²

This section will explore this need for a new conversation about the Indigenous Estate, and outline how this may be achieved between both the Australian Government and Aboriginal and Torres Strait Islander peoples.

(a) Broome Roundtable on Indigenous property rights

In May 2015, together with my colleague and Human Rights Commissioner, Tim Wilson, I co-convened a Roundtable on Indigenous property rights on Yawuru country in Broome, Western Australia. The Roundtable included a diverse range of nearly 50 Aboriginal and Torres Strait Islander people, from as far and wide as the Torres Strait, the Gulf of Carpentaria, Cape York, Sydney, the Kimberley and Darwin.

The Roundtable was held after significant interest on this issue became apparent when Commissioner Wilson and I undertook consultations on property rights in the Kimberley in late 2014.

Overwhelmingly, what participants told us at the Roundtable was that whilst there has been an expansion of the Indigenous Estate since the commencement of the Native Title Act, it has not delivered sustainable outcomes for Aboriginal and Torres Strait Islander peoples. In some cases, participants identified that native title had actually become a burden that drowned them in a sea of regulation, red tape and process without the necessary support.

As Attorney-General, Senator the Hon George Brandis QC, said at the Broome meeting:

Property is not just the thing that is owned, it also includes a bundle of rights that come along with ownership. Those rights are as important as the actual property itself. Without them, we'd just have something that we couldn't do anything with.³

A number of key challenges that face Aboriginal and Torres Strait Islander peoples were explored, particularly when it comes to the full realisation of sustainable benefit that can be reaped from the Indigenous Estate.

The key themes emerging from the Roundtable were:

- fungibility and native title
- financing economic development within the Indigenous Estate
- governance, business development support and succession planning
- compensation
- promoting Indigenous peoples right to development.

(i) Fungibility and native title

The issue of fungibility and native title considers how Aboriginal and Torres Strait Islander peoples can build on the underlying communal title they have in order to create options for their economic development.

Fungibility is the transfer, usability and conversion of title, which was raised as a key challenge for communities who are trying to retain their underlying customary title but still want to make it usable in the modern economic sense. This often presents claim groups and Traditional Owners with internal issues around how decisions are made, how benefits are distributed and how responsibilities are exercised.

A common theme was that many applicable state and local government land rates and taxes present additional issues for Aboriginal and Torres Strait Islander communities once conversion has taken place. Unfortunately, these are often imposed immediately upon a determination and can hamper the economic aspirations of our communities so far as their native title is concerned.

(ii) Financing economic development within the Indigenous Estate

The Roundtable raised a second key issue around the financing of economic development within the Indigenous Estate. This is an area, which can often constrain the goals we have in relation to our land, as Professor Patrick Dodson, Yawuru Native Title Holder Chair has previously explained:

The difficulty with Indigenous groups is that they do not have access to the capital in the main, so we have to find a way to make capital available without placing at risk the nature of the tenure in order to get enterprises up and running.⁴

Participants identified these frustrations, as well as the need to start thinking creatively about finance, including the potential role that the financial services industry can play.

It was suggested at the Roundtable that organisations such as Indigenous Business Australia and the Indigenous Land Corporation could assist with insurance, underwriting costs, risk management and helping to explore options for Indigenous specific loans.

More than this however, a key part of this strategy will need to get both financial institutions and Aboriginal and Torres Strait Islander peoples to appreciate that there is a legitimate business case for this kind of model which can be mutually beneficial to both groups.

(iii) Governance, business development support and succession planning

Another key challenge to emerge out of the Roundtable is the need to improve the advocacy, governance and risk management skills necessary for Aboriginal and Torres Strait Islander peoples to successfully engage with business. These skills would enhance the ability of our communities to secure the best possible outcomes in relation to our land. Regrettably, participants identified that a lack of governance skills and experience means that our peoples are often ill equipped to successfully engage in business and development to manage their part of the Indigenous Estate.

On top of this, a lack of planning and support were also viewed as major failings of the current native title system.

Whilst governance has always been at the core of Aboriginal and Torres Strait Islander communities, contemporary demands mean that we must now adjust to meet the expectations and regulations of non-Indigenous laws and institutions. These adjustments are important if we are to translate our inherent legal rights under native title into sustainable opportunities for our peoples.

This means that we will need to work alongside government and business to turn our economic and commercial aspirations into reality. Being equipped with these skills will enable our communities to make better informed decisions for the maximum benefit of our peoples.

Beyond these goals though, effective governance is critical to ensuring that our organisations are both transparent and accountable to the communities they serve. A significant part of realising our rights as Aboriginal and Torres Strait Islander peoples in relation to the Indigenous Estate and its benefits is ensuring that our organisations have adequate administrative and governance systems in place.

We must rise to the challenge of contemporary Indigenous governance.

(iv) Compensation

Without doubt, compensation was one of the most fundamental issues to come out of the Broome Roundtable. This is an issue that I have previously advocated for in relation to realising our rights under native title.

Compensation for dispossession was raised as a key item of 'unfinished business' that remains unresolved for Aboriginal and Torres Strait Islander peoples. It was also identified as a way that our communities might be able to leverage finances in order to support economic development opportunities.

I wrote in last year's *Social Justice and Native Title Report* about the decision in the *De Rose Hill* case, which was the first case since the commencement of the Native Title Act to make a determination in relation to compensation for the extinguishment of native title.⁵

This case demonstrates that the hopes, or fears, that Aboriginal and Torres Strait Islander peoples would be compensated for dispossession through native title were baseless, as no compensation materialised over the 20 years prior to this decision in 2013. This was a key frustration of Roundtable participants and their communities.

The issue of compensation goes to the core of the initial intent of addressing the historical dispossession of Aboriginal and Torres Strait Islander peoples from their lands and waters. There were three key components to this:

- the enactment of the Native Title Act
- the commitment to a land fund
- the creation of a Social Justice Package.

The first two of these three components have been implemented, with varying degrees of success and impact on our communities. However, the Social Justice Package, which was meant to address compensation for the dispossession of land and the dispersal of the Indigenous population, remains unfulfilled.⁶

In 2008, my predecessor, Dr Tom Calma, explained the impact of never implementing a Social Justice Package:

This abyss is one of the underlying reasons why the native title system is under the strain it is under today.⁷

I believe that this issue remains one of the key unresolved concerns facing Aboriginal and Torres Strait Islander peoples and is fundamental in our quest for our ongoing economic development.

(v) Promoting Indigenous peoples right to development

Another significant item raised at the Roundtable was the rights of Aboriginal and Torres Strait Islander peoples to development. Most past discussion on this issue has concerned protecting our communities *from* development, rather than how to realise our rights *to* development, and its associated benefits.

Beyond the framework provided by the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), another key instrument that recognises our rights in relation to land is the United Nations Declaration on the Right to Development (the Development Declaration).

The Development Declaration was adopted by the United Nations General Assembly in 1986 and contains just 10 articles on what the instrument describes as an:

inalienable right, by which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.⁸

Some key principles underpinning this right are:

- active, free and meaningful participation in development
- equality and non-discrimination
- fair distribution of benefits
- self-determination and full sovereignty over natural wealth and resources.⁹

The Development Declaration centralises the role of both the individual and government in the development process, identifying the need for States to create national policies to properly ensure the development of all its citizens. For Indigenous peoples around the world, it has been a tool through which they can free themselves from the 'shackles of colonialism' and share equitably in the benefits of development.¹⁰

Realising our rights under the Development Declaration could translate into greater Indigenous control over our lands and resources and decrease the burden placed on Indigenous landholders by government and other industries.

Whilst these hopes certainly align with what Aboriginal and Torres Strait Islander peoples have been seeking in relation to our economic freedom, away from government models of dependence, they also have implications for our broader health and wellbeing.

Beyond material and economic wealth, the Development Declaration is also fundamental to our rights to self-determination and control over our natural wealth and resources. However, more importantly, development is also a process through which other human rights can be realised and our wellbeing alongside all other populations can be maximised.

As it stands, Aboriginal and Torres Strait Islander peoples do not share the same social advantages as other Australians. This is despite scales such as the United Nations Human Development Index,¹¹ which ranked Australia second after Norway in 2014, a position that would seem to indicate that we all enjoy a quality of life superior to most others in the world.

The fact that our people live shorter, poorer lives than non-Indigenous Australians is further evidence of the urgent need to adopt a development approach. Unfortunately, Aboriginal and Torres Strait Islander peoples are not currently sharing in the developmental prosperity for which Australia is known and this needs to change.

(b) Moving forward

As I have already articulated above, Aboriginal and Torres Strait Islander people identified a need to undertake a new dialogue and process with government in relation to the Indigenous Estate at the Broome Roundtable earlier this year.

Participants expressed a desire for the Australian Human Rights Commission (the Commission), guided by Commissioner Wilson and myself, to lead this process with Aboriginal and Torres Strait Islander peoples, government and other stakeholders to identify options for leveraging our property rights for economic development purposes.

The Commission proposes that this process involve:

- **The formation of three expert working groups** bringing together experts and relevant stakeholders to outline current knowledge and gaps in the research on the five key themes outlined above through literature reviews, and identify key factors in enabling economic development. The working groups would focus on governance, finance and risk, and land title and tenure.
- **Issue specific discussion papers** to underpin consultations and engagement.
- **Roundtables** to develop the agenda for a new dialogue between Aboriginal and Torres Strait Islander peoples and government about property rights and economic development. This would involve:
 - **roundtables in different regions** to consider the research and progress dialogues with government
 - **specific identified sector roundtables**, eg with the banking and finance sector, other stakeholders (the mining sector and pastoralists), and business development specialists
 - **a national roundtable of experts** on land use and tenure arrangements in Australia and in comparable situations internationally
 - **tripartite dialogues** with state and territory and federal government representatives to address state and territory specific issues.

This process would be led by an Indigenous Steering Committee facilitated by the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Human Rights Commissioner.

At the time of writing, the Commission was awaiting the Australian Government's response to this proposal.

3.3 Federal processes relating to land and native title

A number of federal processes took place during the reporting period that have implications for the rights and enjoyment of the rights of Aboriginal and Torres Strait Islander peoples in relation to their land and native title.

These include the Australian Government's White Paper on Developing Northern Australia, the work of the Council of Australian Governments (COAG) Investigation into Indigenous land administration and use and the long anticipated completion of the Australian Law Reform Commission's (ALRC) Native Title Inquiry.

(a) White Paper on Developing Northern Australia

Late in the reporting period, I welcomed the release of the Australian Government's *Our North, Our Future: White Paper on Developing Northern Australia* (the White Paper), which came out on 19 June 2015.

The White Paper outlines a long-term vision for unlocking the 'untapped potential'¹² of the North by 2035, aided by a \$1.2 billion investment on top of that already provided by the Australian Government.¹³

At the outset, the White Paper outlined a number of key issues that appeared to coincide with the aspirations of Aboriginal and Torres Strait Islander peoples discussed at the Broome Roundtable.

The focus on creating opportunities through education, job creation and economic development in 'full partnership' with our communities is what we have been calling for in relation to realising our rights when it comes to land and economic development.

However, the White Paper also raises other important opportunities, which go beyond the ideas articulated by the Roundtable. The White Paper proposes to look at six broad areas, including:

- simpler land arrangements to support investment
- developing the North's water resources
- growing the North as a business, trade and investment gateway
- investing in infrastructure to lower business and household costs
- reducing barriers to employing people
- improving governance.¹⁴

(i) Simpler land arrangements to support investment

This section of the White Paper is perhaps one of the most significant for our communities in the North, outlining a number of reforms regarding land tenure and economic opportunities for Aboriginal and Torres Strait Islander land holders.

The parallels with the outcomes from the Broome Roundtable were clearly evident throughout this section of the White Paper. I particularly agree with statements put forward in the paper that our communities do not currently 'have the same opportunities as other Australians to leverage their land assets to generate wealth'.¹⁵

In order to address this, the White Paper sets out a number key areas of reform which appear below at Text Box 3.1.

Text Box 3.1:

Key areas for reform

- \$20.4 million to support the engagement of native title holders with investors.
- \$10.6 million to support pilot reforms to broaden economic activity on land.
- Providing around \$110 million a year over the next four years with a view to finalising all existing native title claims within a decade.
- \$17 million to support 99 year freehold lease options for willing Aboriginal and Torres Strait Islander communities.
- Exploring new models to manage native title development funds.
- The provision of business friendly information on the variety of land tenure arrangements in the North.
- Exploring options to use exclusive native title rights for commercial purposes such as through the COAG Indigenous land review.
- Creating greater opportunities for native title holders and certainty for investors through more efficient native title processes.¹⁶

The communal and non-transferable nature of native title presents some barriers for Aboriginal and Torres Strait peoples in the pursuit of economic opportunities. The White Paper outlines a number of options to support the use of land for commercial interests, without extinguishing native title.¹⁷ These include opportunities for home ownership and leasing arrangements, particularly in the Northern Territory as well as other options that may be identified by the COAG Investigation into Indigenous land administration and use.

As I indicated in last year's *Social Justice and Native Title Report*, whilst I welcome the creation of freehold title options and their associated benefits for our communities, these changes:

- should not occur without compensation for the surrender of native title
- should not occur without requirements to adequately consult with native title owners to obtain their free, prior and informed consent
- might have implications for breaking up Aboriginal and Torres Strait Islander communities and diminishing their land ownership.¹⁸

The announcement of \$17 million to support land administration and town leases in the Northern Territory is intended to create greater certainty for potential investors and security of tenure for communities.¹⁹ I am open to these options if they are negotiated with the aim of obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander communities who are willing to participate.

The White Paper suggests a degree of flexibility about how these leases will be assigned. Whilst this is to be welcomed, I also share concerns about the bulk of these arrangements being vested in the Executive Director of Township Leasing rather than a representative community entity.²⁰

The additional funding injection of just over \$20 million to support native titleholder engagement with investors was made by the Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, at the Native Title Conference in June 2015.²¹

The funding is a much needed investment that will extend to Prescribed Bodies Corporate (PBCs) and will be available in the 2015-16 financial year. The approach adopted by the Australian Government to the administration of these funds must be done in conjunction with the groups intended to benefit, particularly existing and potential PBCs.

A number of suggestions were also made via the White Paper to make the native title system faster and more efficient. These included proposals to:

- delegate certain Land Council functions to Aboriginal Corporations
- finalise claims within a decade
- demystify complex land arrangements for potential investors via a ‘single point of entry’ office in Darwin.²²

Organisations such as the Northern Land Council are already in the process of making arrangements to delegate some of their functions to the executive branch of their organisation. However, I would be cautious about any steps to delegate authority away from Land Councils that diminishes the communal decision making and rights of titleholders.²³

Plans to expedite the native title claim process with a view to finalising all claims in a decade presents an opportunity to ameliorate what is often a long and protracted experience for our communities. These proposals are welcome, so long as they do not translate into Aboriginal and Torres Strait Islander people being forced into decision making processes that are contrary to their legitimate claim interests. I look forward to the findings of COAG in its work with Traditional Owners about how a more efficient native title system can be achieved,²⁴ without compromising our rights to our land, waters and resources.

Steps to simplify the complex nature of land arrangements in the North for business and investors, which is currently governed by 13 different laws,²⁵ will be an important part of maximising potential benefits for Indigenous communities.

However, more often than not, the effort to ‘simplify’ land arrangements has resulted in the diminution of our rights. I will be extremely vigilant in making sure any simplification of these tenures work for our benefit.

(ii) Water and cultural heritage

The paper also outlines a number of reforms in the area of water and cultural heritage.

Of particular relevance to Aboriginal and Torres Strait Islander peoples:

- \$200 million to support northern water infrastructure
- possible amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) to simplify cultural heritage regulation.²⁶

Greater investment in the understanding, management, planning and financing of water systems is vital to the economic development of our communities in the North.

Aboriginal and Torres Strait Islander peoples have unique rights in relation to land and waters, so any steps taken to improve investment into the water infrastructure of Northern Australia must do so in a way that does not infringe on these rights.

It is also important that steps are taken to identify existing water infrastructure sites to allow for low cost measures where possible for our communities, over large scale high cost measures. This will maximise the

likelihood that smaller scale projects will be able to be taken up by local labour forces, for the benefit of Aboriginal and Torres Strait Islander peoples.²⁷

However, our peoples are also well placed to make significant contributions to the expansion of water infrastructure given our extensive knowledge of water flows having lived off the land over tens of thousands of years.²⁸ The development of this infrastructure must lead to opportunities for Aboriginal and Torres Strait Islander peoples to benefit.

The Australian Government has also proposed to simplify existing cultural heritage regulation in Australia, which it suggests is a key barrier to economic development in the North, particularly for opportunities that have the support of Traditional Owners. Any approach that aims to reduce the cost and red tape that prevent communities from maximising their opportunities must not reduce the protection of our cultural heritage.

I will closely monitor the proposed state and territory accreditation scheme to ensure Aboriginal and Torres Strait Islander peoples are engaged in the process during the next two years.²⁹

(iii) Business, trade and investment

The White Paper anticipates significant growth in business, trade and investment, particularly in relation to neighbouring regional markets in Asia. However, in order to capitalise on these potential opportunities, the White Paper outlines a number of proposals that require significant investment in the North.

Chief among these are:

- a major investment forum in Darwin in 2015 to attract investment opportunities in the North
- \$2.5 million to foster business links with Indonesia, Papua New Guinea and Timor Leste
- \$12.4 million to enhance Indigenous Ranger groups in Northern Australia.³⁰

Aboriginal and Torres Strait Islander communities in the North have been trading with Indonesian fishermen and islands off the Torres Strait for generations. However, the Northern Land Council points out that, as Free Trade Agreements and greater investment take place with these markets, our people 'want to share the advantage that flows from that proximity, and from the opportunities that will flow from the agreement with China'.³¹

(iv) Infrastructure and employment

The remaining key issues outlined by the White Paper relate to improving infrastructure, particularly roads and enhancing the workforce of Northern Australia.

The dedication of more resources to transport infrastructure and the sealing and upgrade of roads and highways will make Aboriginal and Torres Strait Islander communities more accessible, particularly those in remote locations. This will have positive implications for everyday needs but particularly in relation to land, agriculture, tourism and other economic ventures.

As KRED Enterprises outlined in their submission to the White Paper:

There are significant opportunities for partnerships between native title groups and the private sector in relation to infrastructure developments to support the resources sector and such partnerships should be encouraged and supported by the Australian Government.³²

The \$208.4 million package provided to the Cape York Region is also a key part of the infrastructure reform outlined by the White Paper. The package will deliver reforms that support local industry such as hospitality,

mining, transport and tourism, as well as social projects relating to health, education and community services.³³ Importantly, it is proposed that the funds will be spent in consultation with Aboriginal and Torres Strait Islander communities.³⁴

These strategies create the basis for providing benefits for our communities in the North. However, the infrastructure needs of Aboriginal and Torres Strait Islander communities and other parts of the country should not be ignored as a part of this process.

Employment is another issue that is integral to the strategy outlined in the White Paper.

Unfortunately, weak labour markets in remote communities mean that Aboriginal and Torres Strait Islander peoples of working age are more than three times as likely to be on welfare and do not share in the employment benefits enjoyed by 85 per cent of people in Northern towns and cities.³⁵

The White Paper indicates that reform to the Remote Jobs and Communities Programme (RJCP), which I look at in Chapter 2, will enhance the participation of our communities in local job opportunities.³⁶ I welcome the incentives provided to business to support the RJCP as well as the creation of employment targets,³⁷ so long as these translate to real, long-term employment for Aboriginal and Torres Strait Islander peoples.

However, unless real investments into training and education are made, the untapped potential of Aboriginal and Torres Strait Islander people may never be realised.

As KRED Enterprises again argued in their White Paper submission:

The Indigenous workforce represents a significant and largely untapped economic asset and there needs to be a renewed focus on improving education, training and employment outcomes for indigenous people to realise this asset.³⁸

(v) Governance

As outlined in the report and outcomes of the Broome Roundtable, the issue of Indigenous governance is central to the ability of Aboriginal and Torres Strait Islander peoples to take advantage of the development opportunities that will arise from the Indigenous Estate.

The White Paper includes a section on Good Governance for Northern Australia which explores both political and operational modes of governance.

At the operational level the White Paper outlines the structures that are basically driven from a non-government perspective.

These include:

- the Northern Australia Alliance
- Empowered Communities
- Northern Regional Development Australia Alliance
- the Greater Northern Australia Regional Training Network
- the National Critical Care and Trauma Response Centre.

At the political level the White Paper talks about the Northern Australian Strategic Partnership which supports coordination across government and includes the Prime Minister, Deputy Prime Minister, Premiers of Queensland and Western Australia and the Chief Minister of the Northern Territory.

The White Paper also outlines that the Indigenous Advisory Council (IAC) will 'continue to advise the Prime Minister in their area of expertise with respect to the north'.³⁹

It is interesting that the two Indigenous structures mentioned are Empowered Communities, which is still in its formative stages and the IAC, that was formed immediately upon the election of the Coalition Government in 2013.

The IAC includes an impressive array of talent but it is also in its formative stages and has never made any claims to provide a representative voice for Aboriginal and Torres Strait Islander peoples anywhere in Australia, let alone in the North.

Meanwhile there are organisations such as the Kimberley, Northern and Cape York Land Councils operating across the breadth of Northern Australia that have for many years advocated for the issues mentioned earlier in this chapter.

If Aboriginal and Torres Strait Islander peoples and their interest in land matters are to be central to the success of the outcomes articulated in the White Paper, we need to have a representative voice from the North in both the operational and political governance structures that oversee the implementation of this strategy.

Overall, whilst the White Paper sets some ambitious goals for the development of Northern Australia over the next 20 years,⁴⁰ the real test will be the agreement on a framework that fully engages with Aboriginal and Torres Strait Islander peoples so that we can enjoy the benefits from the Indigenous Estate and contribute to the economic prosperity of Australia.

Given the alignment with the priorities already articulated by the Broome Roundtable, Commissioner Wilson and I look forward to an opportunity to progress the objectives of the White Paper with the Australian Government.

The prospect of coordinating the various processes concerning the rights and opportunities of Aboriginal and Torres Strait Islander peoples in relation to land will no doubt present many challenges, however, if done in concert with Aboriginal and Torres Strait Islander communities, they also provide a potential platform for better outcomes for our communities in a way that extends to Northern Australia and beyond.

(b) COAG Investigation into Indigenous land administration and use

On 10 October 2014, COAG announced that it would conduct an urgent investigation into Indigenous land administration and use.⁴¹ The aim of this investigation is to explore ways that Aboriginal and Torres Strait Islander people may attract private sector investment and finance to create jobs and provide room for economic advancement.⁴² According to the Australian Government, this process represents an opportunity to focus the attention of all governments on how our rights to land can be supported and leveraged for economic benefit.⁴³

On 20 February 2015, Minister Scullion announced the appointment of the Working Groups and the terms of reference for the investigation.⁴⁴ The COAG investigation will be conducted by a Senior Officers Working Group (SOWG), alongside an Expert Indigenous Working Group,⁴⁵ that includes Mr Wayne Bergmann (Chair), Mr Brian Wyatt (Deputy Chair), Mr Djawa Yunupingu, Ms Shirley McPherson, Dr Valerie Cooms, Mr Craig Cromelin and Mr Murradoo Yanner.⁴⁶

The Working Groups will investigate 'Indigenous land legislative, regulatory, administrative and operational systems and processes'.⁴⁷ This will involve consulting with key stakeholder groups such as land councils, native title organisations, among others, to identify issues and develop options for COAG's consideration.⁴⁸

Both Working Groups are due to report to COAG in late 2015.⁴⁹

The SOWG have indicated to my office that their focus will be:

- improving efficiencies in native title claims and settlements
- exploring long-term tradeable tenure
- reducing transaction costs in native title agreements
- increasing efficiencies in agreement making
- improving planning and land administration
- ensuring the sustainability of PBCs
- maximising the benefits of Indigenous land use (looking at topics such as township leasing).⁵⁰

The SOWG have also indicated that my office will have an opportunity to feed into this process.⁵¹ The SOWG will be holding consultations from April 2015, with a view to finalising their report in October 2015.⁵²

It was important that many representatives from the Expert Indigenous Working Group also participated in the Broome Roundtable.

These are timely issues that require national solutions, and have the potential to greatly assist Aboriginal and Torres Strait Islander peoples with getting the most out of their land. It is therefore essential that meaningful engagement with our communities, land councils and organisations representing Aboriginal and Torres Strait Islander peoples occur, so that the views of our people are heard in this investigation.

Whilst the extensive intergovernmental and national nature of the SOWG is to be commended, I am disappointed to learn that the Western Australian Government has not participated in this process since February 2015.⁵³

(c) Australian Law Reform Commission Inquiry

In last year's *Social Justice and Native Title Report* I wrote about a number of reviews that were taking place in relation to native title, including one conducted by the Australian Law Reform Commission (ALRC).

The ALRC released its long-awaited review of the Native Title Act on 4 June 2015.⁵⁴ Professor Lee Godden led the ALRC Inquiry, conducting 162 consultations and receiving 70 submissions from Aboriginal and Torres Strait Islander and non-Indigenous peoples, organisations and stakeholders from around Australia.⁵⁵ The Final Report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*,⁵⁶ makes 30 recommendations for reform. These recommendations relate to two broad areas:

- connection requirements
- any barriers imposed by the Native Title Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.⁵⁷

(i) Connection requirements

Under section 223 of the Native Title Act, Aboriginal and Torres Strait Islander peoples are required to prove that they have a connection with land or waters in order for native title to be determined.

As I have said previously, the current legislative framework sets up onerous standards of physical, continuous

connection to country.⁵⁸ I have long advocated for reforms to these provisions to properly recognise the impact of dispossession and colonisation on Aboriginal and Torres Strait Islander peoples and to give effect to the original purpose of the Native Title Act.⁵⁹

In many ways, the ALRC's recommendations align with what our communities have been waiting for – greater flexibility in determining 'connection', to facilitate a more efficient claims system.⁶⁰

The ALRC recommended that section 223 should be amended to provide that traditional laws and customs can adapt, evolve or otherwise develop⁶¹ and that it is not necessary to establish that the observance of traditional laws and customs have been 'substantially uninterrupted'.⁶²

The ALRC also recommended that it should not be necessary to prove that 'traditional laws and customs have been acknowledged and observed by each generation since sovereignty'.⁶³

In my view, these recommendations accurately reflect the concerns of Aboriginal and Torres Strait Islander peoples about the realisation of our full rights under native title. As I have previously advocated, the law should provide some flexibility when determining connection to accommodate the many ways that Aboriginal and Torres Strait Islander cultures have evolved and adapted since colonisation.⁶⁴ Importantly, relaxing these requirements will also have the effect of expediting what can often be a long and stressful claims process.

I urge the Australian Government to seriously consider making the necessary legislative amendments in order to implement these reforms.

(ii) Physical connection

The ALRC also considered the law governing 'how connection to land and waters is proved, and whether evidence of physical occupation or continued or recent use is required'.⁶⁵

The ALRC recommended repealing sections 62(1)(c) and 190B(7) of the Native Title Act, which outline that a claimant's application and the registration test for native title must establish a 'traditional physical connection' with land or waters.⁶⁶ This reflects the ruling in the case of *De Rose v South Australia (No 2)*, where the court rejected the need for claimants to prove an ongoing physical connection with the land.⁶⁷

Whilst the ALRC recommended the repeal of these sections, it did not go as far as to recommend amending the Native Title Act in accordance with the judgment in *De Rose v South Australia (No 2)*. Instead, the ALRC considered that 'the law is already clear in this regard'⁶⁸ and wanted to avoid risking 'disturbing the settled law, causing uncertainty and unnecessary litigation'.⁶⁹

The recommended changes may bring important clarity to sections of the Native Title Act that were in conflict with the substantive law in *De Rose v South Australia (No 2)*. However, I am disappointed that the ALRC did not go as far as to recommend amending this point of the law. I believe that this would have brought greater certainty to Aboriginal and Torres Strait Islander communities and eased the barriers still faced by our people in satisfying connection requirements when negotiating with State parties and others in consent determinations.⁷⁰

(iii) Presumption of continuity

The ALRC considered that it was not necessary to introduce a 'presumption of continuity' in relation to proof of native title⁷¹ given its proposed changes to the definition of native title in section 223 and Recommendation 7-1.⁷²

Recommendation 7-1 provides:

The *Native Title Act 1993* (Cth) should provide guidance regarding when inferences may be drawn in the proof of native title rights and interests. The Act should provide that the Court may draw inferences from contemporary evidence that the claimed rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the native title claim group.⁷³

Unlike the mandatory nature of a legal presumption, the discretionary guidance for inferences means that the court is not required to draw a particular conclusion based on the existence of particular facts.⁷⁴

This is one of the most disappointing aspects of the ALRC Report. Many stakeholders, including the Commission, support the introduction of a presumption to ease the evidentiary burden placed on Aboriginal and Torres Strait Islander applicants in proving native title.⁷⁵ As the ALRC acknowledges:

The time elapsed between the assertion of sovereignty, and the Australian legal system's recognition of native title in 1992, means that evidencing the survival of those rights over 200 years presents significant challenges of evidence.⁷⁶

I maintain that the Native Title Act needs to be amended to establish a presumption of continuous connection once the requirements of the registration test set by section 190A have been met. This would shift the onus of proof on to respondents to demonstrate evidence of 'substantial interruption' and away from claimants having to prove 'continuity'.⁷⁷

Whilst I do not feel that the proposed changes to section 223 and Recommendation 7-1 would offer the same protection as an express presumption of continuity, it is at least a step in the right direction. However, our communities remain in an uncertain position where the onerous burden of providing evidence to prove a traditional connection to native title will still be required.

(iv) The nature and content of native title

I welcome Recommendation 8-1, which recognises the broad purposes for which native title rights may be exercised and gives legislative effect to the principles emerging from the cases of *Akiba v Commonwealth*⁷⁸ (*Akiba*) and *Western Australia v Brown*.⁷⁹ I will discuss the implications of the decision in *Akiba*, which was handed down whilst the ALRC Inquiry was underway, later in this chapter.

The proposed amendments provide that native title rights and interests may be exercised for any purpose including commercial and non-commercial purposes, as well as trading rights and interests.⁸⁰ Aligning the Native Title Act with the decision in *Akiba* will extend and provide certainty in relation to section 223(2) of the Native Title Act, which currently provides that native title rights and interests include but are not limited to hunting, gathering, or fishing rights or interests.

It is encouraging to see that this recommendation reflects the principles of self-determination enshrined in article 3 of the Declaration.⁸¹ By virtue of that right, Aboriginal and Torres Strait Islander peoples should be able to 'freely pursue their economic, social and cultural development'.⁸²

This recommendation has, if implemented, the potential to improve the economic circumstances of Aboriginal and Torres Strait Islander peoples in exercising property rights. As stated in the ALRC Report, it:

provides a platform to start to align the native title system more closely with the increasingly widely adopted policy position that native title should be a component in supporting long term sustainable futures for Aboriginal and Torres Strait Islander peoples.⁸³

I also welcome the need to conduct a review into the consideration of cultural and traditional knowledge as another potential source of native title rights and interests as identified by the ALRC.⁸⁴

(v) Authorisation

The concept of ‘authorisation’ refers to the person or applicant who is authorised to make a native title claim on behalf of the claim group.⁸⁵ This was introduced as part of the 1998 amendments to the Native Title Act in order to minimise conflicts and the number of overlapping claims.⁸⁶

These changes were perhaps amongst the most favourable to Aboriginal and Torres Strait Islander peoples of the 1998 amendments. As the National Native Title Council submitted to the ALRC Inquiry, authorisation is ‘fundamentally important to the legitimacy of native title applications’⁸⁷ and ensures that claims are lodged with the consent of Traditional Owners.

The ALRC makes numerous recommendations to strengthen the authorisation process so as to ‘reduce costs, streamline the procedures, and support robust decision making structures’ within Aboriginal and Torres Strait Islander communities.⁸⁸ Specifically, I support the proposals which seek to recognise the diverse decision making processes used by Aboriginal and Torres Strait Islander peoples and respects our rights to use traditional or other mechanisms in the claims process.⁸⁹ This is self-determination in action.

I welcome these proposed amendments, particularly those that aim to offer claim groups greater flexibility in authorising applicants,⁹⁰ negotiating ILUAs⁹¹ and consenting to native title decisions.⁹² I am particularly pleased that these changes seek to:

- strengthen the authority of the claim group in defining the role of the applicant
- ensure that any monetary benefits are directed to the claim group and not the applicant
- where there is doubt, require an applicant to act by a majority of the claim group.⁹³

In my time as the Aboriginal and Torres Strait Islander Social Justice Commissioner, I have written extensively about how current native title processes cause considerable stress and can contribute to ‘lateral violence’ within Aboriginal and Torres Strait Islander communities.⁹⁴ These recommendations can be a positive step towards empowering our communities in these very important decision making processes.

(vi) Promoting claims resolution

Unfortunately, the proposed claims resolution reforms set out in Recommendations 12-1 to 12-5 of the ALRC Report, do not make significant headway in making the native title system faster, cheaper or more effective. Limited by the terms of reference, the ALRC ‘did not undertake a comprehensive review of the claims resolution process’⁹⁵ and did not focus on reform possibilities for creating an alternate settlement system in accordance with initial plans for a statutory compensation fund.⁹⁶

Given the often protracted nature of native title proceedings, a process that aims to expedite claims is welcome. However, a balance must be struck to avoid Aboriginal and Torres Strait Islander people being unnecessarily forced into finalising matters.

(vii) Implementing reform

I call on the Australian Government to recognise the level of research and consultation involved in the ALRC’s Inquiry into the Native Title Act and to act on their recommendations.

Since the introduction of the Native Title Act, our communities have been let down by the technicality, inefficiency and increasing restrictiveness of the native title regime. The proposed reforms, although not perfect, will go a long way in improving the current system.

If enacted, these amendments might finally begin 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.⁹⁷

I remain committed to the need for native title reform to address the requirements and burdens imposed on our communities through proving connection as well as the presumption of continuity.

The reforms alone covered in the ALRC Report, whilst necessary, are not sufficient in and of themselves to address the many inadequacies with the native title system.

(d) Case law

(i) *Akiba v Commonwealth* (2013) 250 CLR 209

Akiba remains a highly significant judgment in native title. In that case, Mr Leo Akiba lodged a claim on behalf of the Torres Strait Regional Seas Claims Group seeking a determination of native title over an area of the Torres Strait and its waters on behalf of 13 communities in the Torres Strait. The Federal Court made a determination to this effect in 2010.⁹⁸

The native title rights and interests held by each of the communities was determined by the court to include the right to access the native title areas and take resources for any purpose, for example by fishing. This fishing could, however, only take place after any necessary statutory licences were obtained. Mr Akiba also sought to claim that certain reciprocal rights which arose out of personal relationships in Torres Strait Islander society, were rights in relation to land or waters and were thereby native title rights. This claim was rejected by the Federal Court.⁹⁹

The Commonwealth and Queensland Governments appealed the decision to the Full Court of the Federal Court in relation to the right to access and take resources.¹⁰⁰ Collectively, the Commonwealth and Queensland Governments argued that the relevant statutory regimes prohibited taking fish for commercial purposes without a permit and effectively extinguished native title in these circumstances.¹⁰¹ These arguments were upheld by a majority of the Full Federal Court on 14 March 2012, before being appealed by Mr Akiba, who sought special leave to appeal to the High Court.

The High Court held that the legislation in question, which prohibited fishing for commercial purposes without a licence, was not incompatible with the native title right to access the native title areas and take resources for any purpose.¹⁰² Importantly, this meant that native title rights to access and take resources are not extinguished by the requirement to hold a fishing license. The reciprocal rights, however, were held to be rights of a personal character and were not rights in relation to the waters which were the subject of the native title determination.

This decision is significant because it is the first time since the operation of the Native Title Act that commercial native title interests have been formally recognised in the context of litigation. This moves beyond the consent determinations that have previously recognised the rights of Aboriginal and Torres Strait Islander peoples to trade in accordance with their own laws and customs in relation to certain areas.¹⁰³

This decision finally recognises our commercial rights in relation to our lands, waters and resources, and signals the way for our economic participation in this area. However, questions still remain about how this will work in practice. As I will reflect on later in this chapter, economic development remains a key challenge in this area, in relation to the realisation of the rights of Aboriginal and Torres Strait Islander peoples.

I understand that these commercial rights will still be exercised within a context of regulation provided by Commonwealth and state fisheries legislation. This means that Aboriginal and Torres Strait Islander peoples still need to comply with section 211 of the Native Title Act which requires them to obtain the appropriate license or permit.¹⁰⁴

It must be acknowledged that the *Akiba* decision may lead to greater inclusion of Torres Strait Islander native title holders in fisheries management, but it is not as broad as a previous decision of the High Court in *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 (*Blue Mud Bay*).

Blue Mud Bay confirmed the existence of rights in respect of 'Aboriginal land' under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which extended to certain areas of sea and intertidal areas. The High Court found that the *Fisheries Act* (NT) did not confer power to grant a licence to enter and take fish or other aquatic life from areas within the boundaries of Aboriginal land.

(ii) Barkandji Traditional Owners v Attorney-General of New South Wales [2015] FCA 604

In what has been lauded as the largest native title determination in New South Wales history,¹⁰⁵ the Federal Court handed down its decision in the case of *Barkandji Traditional Owners v Attorney-General of New South Wales*¹⁰⁶ on 16 June 2015.

The native title determination covers over 128,000 square kilometres of western New South Wales, stretching between the Murray River on the Victorian border and up towards the Queensland border at Wanaaring, including Broken Hill, Menindee and Wilcannia.¹⁰⁷ The court recognised that the Barkandji Traditional Owners have, and always have had, native title rights and interests in land within the area.¹⁰⁸

This victory for the Barkindiji and Malyangapa peoples of western New South Wales comes 18 years after they first lodged their claim for native title.¹⁰⁹

Since 1997, the Barkandji Traditional Owners have been negotiating with the New South Wales Attorney-General and 27 other parties with an interest in the area. The Federal Court made orders by consent under sections 87A and 94A of the Native Title Act, acknowledging that parties had reached an agreement as to the terms of a determination of native title.¹¹⁰

Despite last minute setbacks, the court congratulated all of the parties for their resolution of this claim without requiring a costly, time consuming and stressful hearing.¹¹¹ Days before the court was set to make its orders, the Wentworth Shire Council expressed it felt 'undue pressure' to make a decision.¹¹² In the end, the Council consented to the determination, but parcels of land within the Shire were excluded.¹¹³

This case can serve as an important reminder that we must work harder and smarter in resolving these types of claims.¹¹⁴ As outlined in the judgment:

[N]o one in Australia should have to wait for 18 years to have their claim resolved. Timeliness, efficiency and proportionality are part and parcel of just outcomes. When justice is delayed, it is also denied.¹¹⁵

(e) Legislation

(i) Cultural heritage laws in Western Australia

The cultural heritage of Aboriginal and Torres Strait Islander peoples is of great importance to our communities because it provides us with links to who we are as peoples. This is particularly the case given the nature of colonisation and the dispossession that Aboriginal and Torres Strait Islander peoples have endured. However, our heritage is also an important part of Australian heritage.

Cultural heritage is a matter of continuing significance, particularly in the realm of native title as it is the means through which we continue to maintain our connections to culture and to our land.

In accordance with article 31 of the Declaration, Aboriginal and Torres Strait Islander peoples have the right to 'maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions'.¹¹⁶ This also extends to the right to maintain, control, protect and develop our intellectual property over such heritage.

Importantly, the Declaration imposes a duty on all governments to take 'effective measures to recognise and protect the exercise of these rights' and this generally takes place via state or territory legislation.¹¹⁷ However, where state governments do not adequately protect sacred sites, Commonwealth legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), the *Protection of Movable Cultural Heritage Act 1986* (Cth) and the Native Title Act can offer protection that overrides state laws.

There have been a number of reforms in relation to the area of cultural heritage over the reporting period in Queensland, Victoria and Western Australia.

However, the significant nature of the proposed changes to the *Aboriginal Heritage Act 1972* (WA) have been a recurring theme during the past year and so will be the focus of this section.

(ii) Aboriginal Heritage Amendment Bill 2014

The *Aboriginal Heritage Act 1972* (WA), (Heritage Act), seeks to protect and preserve important cultural heritage sites and objects for Aboriginal and Torres Strait Islander peoples in Western Australia.¹¹⁸ However, the Aboriginal Heritage Amendment Bill 2014 (WA), (the Bill), makes a range of amendments to this legislation, aiming to improve enforcement and compliance, streamline processes and establish a more complete register.

A draft of the Bill was released for consultation in June 2014. There were many submissions from organisations representing the views of Aboriginal communities, who opposed the Bill for a number of reasons. This was followed by a coalition of Aboriginal people who joined together at the Western Australian Parliament to oppose the proposed amendments and present a petition to that effect in November 2014.

The Bill was read a second time in late November 2014 and appeared not to take into account the various concerns of Aboriginal people in Western Australia.

Concerns about the Bill included:

- that it did not address the inequities of the Heritage Act, particularly around the lack of Aboriginal involvement in decision making
- the lack of appeal rights for Aboriginal custodians of the land.¹¹⁹

The most significant area of change relates to the way in which landowners can apply to use land, and this may impact traditional sites and objects.

Sections 17 and 18 of the Heritage Act are proposed to be replaced by new provisions, transferring many of the functions and responsibilities from the Aboriginal Cultural Material Committee (ACMC) to the CEO of the Department of Aboriginal Affairs, who will be responsible for handling applications for permits from landowners.

Once the CEO receives an application, they may issue a declaration that they are of the opinion that there is no Aboriginal site on the land, issue a permit or *may* choose to refer the application to the ACMC.¹²⁰

The CEO may issue a declaration that there is no Aboriginal site on the land in response to an application, or on his or her own initiative.¹²¹

Under the Bill, an Aboriginal site may be declared a protected area following the recommendation of the CEO, rather than the ACMC.¹²²

An issue of significant concern is that, whilst rights of appeal to the State Administrative Tribunal are afforded to applicants, the Bill affords no option of appeal to Aboriginal and Torres Strait Islander peoples whose cultural heritage may be adversely affected.¹²³

I have a number of concerns in relation to the passage of this Bill into law. There appears to be a reduction of the protection provided to Aboriginal sacred sites through these amendments, as is evidenced through the lack of appeal rights and lack of Aboriginal participation in the decision making process regarding site determinations. I am concerned that the Bill seeks to delegate too much power to the CEO at the expense of the ACMC as the voice for affected Traditional Owner groups.

In particular, the Bill appears to further weaken the protections afforded to Aboriginal people under the Heritage Act and is seemingly contrary to the stated objectives of the amendments and the Declaration.

(f) News stories

(i) The Coniston massacre and return of native title

In 1928, many Aboriginal people, including children, were massacred on land known as Yurrkuru or Brookes Soak in the Northern Territory.¹²⁴ The murder of a white man, Fred Brooks, on the Coniston Station sparked the retaliation killings of up to 100 people across the region over several months.¹²⁵ Hundreds more Aboriginal people were displaced from the area, traumatised by the violence. Constable George Murray, a white policeman, led the reprisals, but no one was ever convicted for the crimes. An investigative Board of Inquiry set up by the Australian Government in 1929 decided Constable Murray had acted in self-defence.¹²⁶ The incidents are remembered as the Coniston Massacre.

The land on which the massacre took place holds deep historical significance for our peoples. Although a claim for land rights of Yurrkuru was lodged in 1985 and the Aboriginal Lands Commission recommended in 1992 that the land should be returned, this was met with resistance from the Mount Denison pastoralists.¹²⁷

It was not until 8 October 2014 that the land was handed back to the Yurrkuru Aboriginal Land Trust and Willowra Elder, Teddy Long, on behalf of the Traditional Owners.¹²⁸

The Yurrkuru Aboriginal Land Trust was given rights to the square mile of former Crown land bordered by the Mount Denison pastoral lease, including the sacred site where Fred Brooks was killed.¹²⁹ The Minister for Indigenous Affairs, the Aboriginal Land Commissioner, Mount Denison pastoralists and approximately 80 Traditional Owners were invited to the ceremony at Yurrkuru to hand back the title.¹³⁰

Francis Kelly, Warlpiri Elder, *Coniston* documentary maker and Chair of the Central Land Council (CLC),

described the ceremony:

They formed a corroboree there, on that Country, on their own land and they said to Nigel Scullion, [Northern Territory Senator] ‘this is where the massacre happened in this area, in our Country, Yurkurru. And from there they said nobody talked about our land... but we are happy that we got em back to occupy [by] our people, put something for the tourists to recognise it when they come along, history about Yurkurru, talk about where the massacre happens and from there, everybody can move back to that place where they got taken away from them.’¹³¹

The granting of native title gives Traditional Owners the right to use and make decisions relating to traditional lands, upholding various provisions of the Declaration.¹³² In particular, article 8(2) affirms that States shall provide effective mechanisms for the prevention of, and redress for actions which deprive Aboriginal and Torres Strait Islander peoples of their integrity, lands, territories or resources.¹³³

Article 25 of the Declaration affirms the right of Aboriginal and Torres Strait Islander peoples to maintain and strengthen our distinctive spiritual connection with traditionally owned lands for past, present and future generations.¹³⁴

I commend the Minister for Indigenous Affairs for working with the Anmatyerre and Warlpiri peoples and the CLC in handing title back to the Traditional Custodians of the land. The CLC has acknowledged the importance of returning this title after the Traditional Owner’s 22 year quest for justice, explaining that teaching visitors of its history will help the community ‘make peace with our shared past’.¹³⁵

This event will have a significant impact on the healing of the community and marks a historic step towards reconciliation.

(ii) Noongar settlement

The Commission has been monitoring the negotiations for a settlement between the Western Australian Government and the Noongar peoples for many years.

The settlement process arose out of the *Bennell v Western Australia*¹³⁶ litigation, which commenced in the Federal Court in 2003 on behalf of over 400 Noongar families (80 applicants), over land covering the south-west of Western Australia, including the whole of the Perth metropolitan region. The trial was split up by assessing only the claims to land in and around Perth, known as the ‘Combined Metro Claim’.¹³⁷ My predecessor, Dr Tom Calma, monitored this case and its appeal¹³⁸ and reported on its progress in the 2007 and 2008 *Native Title Reports*.¹³⁹

In *Bennell v Western Australia*, Justice Wilcox found that a single Noongar society had existed since 1829, and that contemporary Noongar communities continued to observe traditional laws and customs, and had a connection with the whole claim area.¹⁴⁰ The court found that, except where it has been extinguished, native title exists for the whole Noongar community over the whole of the land and waters in the area covered by the Combined Metro Claim.¹⁴¹

This decision was overturned on appeal. In *Bodney v Bennell*, the Full Court of the Federal Court found that Justice Wilcox had failed to consider:

- whether there had been continuous acknowledgment and observance of traditional laws and customs from 1829 to present
- whether the Noongar peoples had proven a connection specifically with the Perth Metropolitan Area.¹⁴²

This outcome was disappointing for the Noongar peoples at this particular time. I agree with Dr Calma’s

observations in 2008 that the decision sets a worrying precedent about the ability of judges to take the impact of colonisation into account when assessing the 'continuity' elements of native title claims, and could encourage governments to deny the devastating impact of colonisation on these communities.¹⁴³

For over four years, the South West Aboriginal Land and Sea Council (SWALSC) and the Noongar Negotiation Team have been negotiating with the Western Australian Government to settle Noongar native title claims.¹⁴⁴ The six principle Noongar native title claim groups are Yued, Gnaala Karla Boodja, South West Boojarah, Wagyl Kaip, Ballardong and Whadjuk, and their lands are indicated by the figure below.¹⁴⁵

Figure 3.1: Areas of proposed settlement and tribal lands¹⁴⁶



In the primary judgment, Justice Wilcox urged the parties to consider settling the matter outside of court, due to its historical significance and its importance for reconciliation in Western Australia.¹⁴⁷ Negotiations were initiated by the Western Australian Government with SWALSC in 2010.¹⁴⁸ This was followed by an in-principle offer by the Western Australian Government in 2011 and by further negotiations.¹⁴⁹

The Western Australian Government made its final settlement offer in July 2013, described in Text Box 3.2, which exchanges Noongar native title rights over 200,000 square kilometres of land for assets and benefits to the value of \$1.3 billion.¹⁵⁰

Text Box 3.2:

Terms of proposed settlement package from Western Australian Government to Noongar peoples¹⁵¹

- **Recognition through an Act of Parliament** recognising the Noongar people as the Traditional Owners of the South West through the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill.
- **Noongar Boodja Trust (NBT):** the establishment of a perpetual trust into which the Western Australian Government would make funding instalments of \$50 million yearly for 12 years. A professional Trustee will be appointed and will manage the Government's financial contribution and the Noongar Land Estate.
- **Noongar Regional Corporations:** the establishment of six Noongar Regional Corporations and one Central Services Corporation, with funding support of \$10 million yearly for 12 years. The Regional Corporations are established and maintained principally for the purposes of benefiting, advancing and promoting the Agreement Groups and their communities within the Region and managing and caring for the Cultural Land in the Region.
- **Noongar Land Estate:** the creation of a Noongar Land Estate through the transfer of a maximum of 320,000 hectares of Crown land into the Noongar Boodja Trust over five years (a maximum of 300,000 hectares as reserve land and a maximum of 20,000 hectares as freehold title). All transfers, coordinated by the Department of Lands, are subject to statutory clearances and consultation with any affected Western Australian Government or local government interest.
- **Joint Management of the South West Conservation Estate:** the establishment of joint management arrangements across the State's South West Conservation Estate between the Department of Parks and Wildlife and the Noongar community. Joint management plans will be initially developed for select parks with an option for joint management to extend to other areas of the Conservation Estate.
- **Land and Water Access:** Regional Corporation Land Access Licence allowing access to Crown land for customary purposes and inclusions in the Metropolitan Water Supply Sewerage and Drainage Amendments By-Laws 2014, and the Country Areas Water Supply Amendments By-Laws 2014 regarding Noongar customary activities in public drinking water source areas.
- **Noongar Standard Heritage Agreement:** improved processes for the preservation of heritage and a standard Noongar heritage agreement applying to land development and related activities.

- **Noongar Heritage Partnership Agreement** which provides a framework through which the Department of Aboriginal Affairs and the Regional Corporation can work in partnership in the areas of identifying, recording, protecting and managing Noongar Heritage values and sites within the agreement area.
- **Noongar Housing Program:** the transfer and refurbishment of 121 properties to the Noongar Boodja Trust by the Department of Housing.
- **Noongar Economic Participation Framework:** a Noongar Economic Participation Steering Group will be established with the goal to improve economic participation outcomes for Noongar people in the South West. An agreed key deliverable is intensive capacity building in year one of the implementation of the Settlement, and ongoing support thereafter, in government tendering and contracting policies as well as the development and submission of tender documentation.
- **Community Development Framework:** with the establishment of six Noongar Regional Corporations in different parts of the South West, one key objective is to provide Western Australian Government human service agencies with greater scope for direct communication with the Noongar community. Initially the main interface will be via the Regional Managers Forums which already involve the Departments of Health, Education, Child Support and Family Support, local and regional government representatives, and other government and non-government interest holders. A number of priorities have been identified, with improved Noongar health and youth outcomes being one of those priorities.
- **Capital Works Program**
 - **Office Accommodation:** the State has committed \$6.5 million indexed for 2 years to establish offices for the Central Services Corporation and six Regional Corporations. This commitment will extend to fitting out or leasing of existing buildings for the administrative purposes of each corporation across the South West including two properties in the Metropolitan Area.
 - **Noongar Cultural Centre:** the Settlement includes \$5 million indexed for two years to support the development and construction of a Noongar Cultural Centre. This funding is contingent on the Noongar community obtaining the remaining funding from other sources (i.e. Commonwealth and private sector), as well as demonstration of a financially viable Cultural Centre management plan. Up to two hectares of Crown land is also to be provided in the Metropolitan Area as part of the Western Australian Government's offer.
- **Land Fund:** a Western Australian Government managed Land Fund will be established to achieve objectives related to land management, Noongar land ownership and Aboriginal heritage protection. The Fund will resource programs facilitated by partnerships between State land agencies including the Department of Regional Development, the Department of Environment and Conservation, the Department of Aboriginal Affairs, and the Department of Agriculture and Food Western Australia and the Regional Noongar Corporations but which are beyond the existing remit of mainstream services. These programs will include enhancing Noongar land capacity, Noongar heritage site protection programs, targeted conservation programs, and remediation of certain Crown land parcels included in the land transfer process. The partnerships will also encourage Noongar employment and economic participation within the State's land agencies.

SWALSC gave in-principle agreement to the ILUAs in October 2014.¹⁵² There were numerous opportunities to participate in this process, with the offer going to a vote at authorisation meetings, and endorsed by all six Noongar native title claim groups.¹⁵³ The Western Australian Government executed the ILUAs in June 2015 and filed them with the National Native Title Tribunal.¹⁵⁴ Objections can be lodged for three months after the notification of the ILUAs pursuant to sections 24CH and 24CI of the Native Title Act. Western Australian Premier, the Hon Colin Barnett MLA, anticipates that the agreements will be in force by mid-2016.¹⁵⁵

As part of the settlement package, the government released the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2014 on 26 February 2014 for public comment and consultation.¹⁵⁶

Following this, on 6 November 2014 the Constitution Amendment (Recognition of Aboriginal People) Bill 2014 was introduced by the Hon Josie Farrer MLA.¹⁵⁷ The Western Australian Parliament then referred the question of constitutional recognition to the Joint Select Committee on Aboriginal Constitutional Recognition.¹⁵⁸ The Committee released their *Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* on 26 March 2015.¹⁵⁹

The Western Australian Government has committed to introducing and sponsoring the Noongar Recognition Bill, which will be drafted based on the recommendations of the Committee, as soon as possible following the execution of the ILUAs.¹⁶⁰

Premier Barnett has indicated that the Australian Government will contribute \$10 million to the \$1.3 billion settlement.¹⁶¹ Premier Barnett is disappointed in this outcome, referencing the commitment of former Prime Minister Paul Keating that the Australian Government should fund 75 per cent of native title settlements.¹⁶² The Premier is of the view that the Australian Government should meet half the cost of the settlement.¹⁶³

I applaud the Noongar peoples and the Western Australian Government for heeding the advice of Justice Wilcox to enter into negotiations. It takes courage to enter such negotiations, and to conduct and continue these conversations respectfully over many years, especially in light of the sensitivity of the subject matter.

This has been a process that has empowered Aboriginal people, by ensuring their participation in this decision, and so aligns with the obligations of governments in article 18 of the Declaration.

(g) Snapshot of native title determinations

During the reporting period from 1 July 2014 to 30 June 2015 there were:

- 21 native title consent determinations
- 3 litigated native title determinations
- 24 native title claims referred to mediation.¹⁶⁴

(h) Trends in native title during the past five years

The Federal Court has noted a number of trends in the resolution of native title claims over the past five years.

In particular, the Federal Court notes that there has been a general decline in the number of new applications filed, with an increase in the number of non-claimant applications made in the last financial year compared to claimant applications.¹⁶⁵

In total there were 52 new applications filed (up from 40 last year), with 30 of these being claimant applications, 21 non-claimant applications and one compensation application.

There has also been an increase in the overall number of matters resolved by consent, with 21 matters finalised this financial year, compared to just 8 matters resolved five years ago.¹⁶⁶

The number of proceedings referred to mediation increased slightly, with a large number of matters continuing to be referred to case management. This is consistent with the overall trend of a decrease in the number of matters going to mediation and an increase in the number of matters being referred to case management.

As at 30 June 2015:

- 43 matters were referred to mediation (up from 28 matters last year)
- 207 matters were referred to case management.¹⁶⁷

3.4 Conclusion and recommendations

The overwhelming sentiment in native title this year was that Aboriginal and Torres Strait Islander people are frustrated with what native title has delivered for our communities.

It is clear that with an increase in Indigenous land ownership and interest that we are now moving to the next phase of challenges in relation to our land and the benefits that should come with this unique form of title.

Our people are presented with many hurdles in relation to the use of their land such as legal and administrative obstacles, which present major barriers to economic development.

Many of these barriers were captured by major processes occurring in this space, including the work of the COAG Indigenous Expert Working Group, the White Paper on Developing Northern Australia and the Broome Roundtable.

There is an opportunity to synchronise these processes in order to avoid duplication and maximise outcomes for our communities in relation to land and native title in the future.

Whilst there are still many challenges that our communities face in relation to native title, I welcome the findings of the ALRC Inquiry and the break through cases during the reporting period such as the *Akiba*, *Barkindji* and the *Noongar* settlement decisions.

It is clear that our rights in this space are starting to evolve and that we have come a long way since the *Mabo (No 2)*¹⁶⁸ decision was first handed down 23 years ago.

However, these advancements present Aboriginal and Torres Strait Islander peoples with new challenges about how to maximise the opportunities and manage the risk associated with using the Indigenous Estate as leverage to enter the economy. Whether this is in the form of negotiating royalties, lease arrangements or agreements with business, our communities still need to work out how to ensure that they have the necessary administrative and governance structures in place to take on new opportunities and the consensus/mandate to do so.

Recommendations

Recommendation 6: The Australian Government support and resource the Australian Human Rights Commission to undertake, with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, a process to identify options for leveraging Indigenous property rights for economic development purposes.

Recommendation 7: Existing and potential Prescribed Bodies Corporate be engaged to develop the administrative arrangements for the distribution of the \$20 million allocation to support native title holders to engage with investors.

Recommendation 8: Representatives of Aboriginal and Torres Strait Islander peoples in Northern Australia be appointed to the political and operational governance structures to oversee the next steps in implementing the White Paper on Developing Northern Australia.

Recommendation 9: The Australian Government recognise the level of research and consultation involved in the Australian Law Reform Commission's Inquiry into the *Native Title Act 1993* (Cth) and take action to implement its recommendations.

Recommendation 10: The Australian Government take action to synchronise the work of the:

- COAG Indigenous Expert Working Group
- COAG Investigation into Indigenous land use and administration
- White Paper on Developing Northern Australia
- Australian Law Reform Commission's Inquiry into the *Native Title Act 1993* (Cth)
- Broome Roundtable on Indigenous property rights

to avoid duplication and to maximise outcomes for Indigenous communities in relation to the land and native title into the future.

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 - 3 Senator the Hon George Brandis QC, Attorney-General, 'Remarks at the Australian Human Rights Commission Indigenous Leaders Roundtable on Property Rights' (Speech delivered at Broome, 20 May 2015) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2015/SecondQuarter/20-May-2015-Remarks-at-the-Australian-Human-Rights-Commission-Indigenous-Leaders-Roundtable-on-Property-Rights.aspx>>.
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Chapter 4:

Disability

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4.1 Introduction

For too long, Aboriginal and Torres Strait Islander people with disability have been overlooked in a policy, program and advocacy context.

Disability, along with ageing issues, particularly dementia and Alzheimer's disease, have 'fallen through the cracks' of the Aboriginal and Torres Strait Islander landscape.

Advocacy in these areas is crucial and without a dedicated group of committed advocates who work tirelessly, these areas would be almost invisible. Advocates have been determined that the issues confronting our people with disability will not be unheard.

Much needed advocacy has been provided by the First Peoples Disability Network (FPDN), the national organisation for, and governed by, Aboriginal and Torres Strait Islander people with disability. Damian Griffis, Lester Bostock and Gayle Rankine fought hard for many years to establish the FPDN. The Australian Government finally funded FPDN in 2013. A brief history of the FPDN is provided in Appendix 4.

Together with state-based networks like the Aboriginal Disability Network NSW, the FPDN has been working hard to raise awareness of the unmet needs of our people with disability.

Their advocacy has never been more important and more required than at the present time with the piloting and impending rollout of the National Disability Insurance Scheme (NDIS) across Australia.

Given that Aboriginal and Torres Strait Islander people experience disability at approximately twice the rate of non-Indigenous people, it is essential that our issues are represented in the formative stages of the NDIS.

This high rate of disability is driven by socio-economic disadvantage, trauma, and exposure to risk factors including smoking, obesity, physical inactivity, and substance abuse.¹ Disability and the socio-economic disadvantage experienced by Aboriginal and Torres Strait Islander peoples have a circular relationship.² Socio-economic disadvantage is associated with risk factors that increase the likelihood of acquiring a disability, while living with a disability further entrenches socio-economic disadvantage.³

Acknowledging the complexity of the underlying social factors, the Council of Australian Governments (COAG) states:

The high prevalence of disability—approximately twice that of the non-Indigenous population—occurs in Aboriginal and Torres Strait Islander communities for a range of social reasons, including poor health care, poor nutrition, exposure to violence and psychological trauma (e.g. arising from removal from family and community) and substance abuse, as well as the breakdown of traditional community structures in some areas.⁴

The 'double disadvantage' of being an Aboriginal and Torres Strait Islander person and having a disability manifests itself in different ways. In my 2012 report, I discussed the alarmingly high number of Aboriginal and Torres Strait Islander people with a cognitive impairment indefinitely detained in custody without conviction because they are found unfit to plead.⁵

There have been major developments in disability policy in Australia over recent years that have the capacity to make an enormous difference to the lives of our people with disability, empowering them to participate in our communities and enjoy their human rights without discrimination. I provide an outline of disability policy in Australia in section 4.5 of this chapter.

This year I will explore some of the broader issues facing Aboriginal and Torres Strait Islander people with disability, and how their particular needs are reflected in the overarching policy framework of the National Disability Strategy and addressed in the implementation of the NDIS.

4.2 International human rights framework

The United Nations Convention on the Rights of Persons with Disabilities (the Convention) details the rights of persons with disability and the measures States must implement to give effect to those rights.

The Convention adopts a social model of disability that recognises the interaction between impairment and the societal barriers that hinder the participation of people with disability in their communities.

It does not define 'disability' but describes it as an 'evolving concept'⁶ and it identifies persons with disability as including those with:

long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.⁷

Article 4 of the Convention requires State parties, including Australia, to adopt appropriate legislative, administrative and other measures to realise the rights recognised in the Convention and to abolish laws, regulations, customs and practices that constitute discrimination against persons with disability. State parties are obligated to ensure people with disability:

- have equal recognition before the law⁸
- have equal access to the physical environment and public services⁹
- are free from exploitation, violence and abuse.¹⁰

State parties are also required to take measures to facilitate the personal mobility,¹¹ independence,¹² and inclusion in the community of persons with disability.¹³

In the Convention's preamble, the State parties express concern for the difficult conditions experienced by people with disability who are subject to 'multiple or aggravated discrimination' on the basis of their Indigenous status or other characteristics.¹⁴

The importance of looking after our people with disability is highlighted by the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). Article 21(2) of the Declaration requires States to take all necessary steps to ensure the social and economic improvement of Indigenous peoples, with a particular focus on people with disability.¹⁵

Article 22 then places an obligation on States to focus on the rights and special needs of Indigenous peoples with disability and guarantees protection against all forms of violence and discrimination.¹⁶

Australia's obligations to persons with disability were scrutinised by the United Nations Committee on the Rights of Persons with Disabilities (the Committee) in 2013. The Committee welcomed the development of the National Disability Strategy and the NDIS. Of particular relevance to Aboriginal and Torres Strait Islander peoples, the Committee recommended:

- remedying the inadequate funding that is currently provided to organisations representing Aboriginal and Torres Strait Islander people with disability¹⁷
- strengthening anti-discrimination laws to address intersectional discrimination¹⁸
- developing nationally consistent measures for collecting and publishing data disaggregated by age, gender, type of disability, place of residence and cultural background.¹⁹

The Committee noted a particular lack of data regarding Aboriginal and Torres Strait Islander women and girls with disability.²⁰

Other United Nations mechanisms have also addressed the issue of disability within Indigenous communities.

In 2013, the United Nations Permanent Forum on Indigenous Issues (UNPFII) released a study on Indigenous persons with disability. This study highlighted the complex issues facing Indigenous persons with disability, including:

- the vulnerability of Indigenous women with disability to sexual violence in the home, schools, residential institutions and in disability services²¹
- the importance of culturally competent training for disability service providers, especially those in residential settings owned by government²²
- the need for rights awareness among Indigenous peoples with disability to gain a better understanding of their human rights under the Declaration and the Convention.²³

Then in 2014, the World Conference on Indigenous Peoples reached consensus on an outcome document adopted by the United Nations General Assembly. It includes commitments by Member States to:

- promote and protect the rights Indigenous peoples with disabilities by ensuring they are involved in the development of measures to achieve the ends of the Declaration²⁴
- promote and protect the rights of Indigenous peoples with disabilities by ensuring they are included in legislative, policy and institutional structures concerning Indigenous peoples²⁵
- disaggregate data, conduct surveys and use well-being indicators in efforts to address the needs of Indigenous peoples, particularly those from vulnerable groups including persons with disabilities²⁶
- intensify efforts to eliminate all forms of violence and discrimination against Indigenous peoples, particularly those from vulnerable groups including persons with disabilities.²⁷

4.3 Disability prevalence for Aboriginal and Torres Strait Islander peoples

Both the Committee and the World Conference on Indigenous Peoples have emphasised the responsibility of States to collect comprehensive, disaggregated data about Indigenous peoples with disability.²⁸ Without this data, it is difficult to develop a detailed understanding of the experiences of Indigenous peoples with disability and the effectiveness of programs and policies in addressing their needs.

However, collecting accurate data on disability within Aboriginal and Torres Strait Islander communities can be challenging.

The Australian Institute of Health and Welfare has highlighted that key issues for statistical collections with respect to Aboriginal and Torres Strait Islander peoples are:

- under identification due to not asking people about their Indigenous status, inconsistent approaches to this question, or inaccurate recording
- lack of full coverage of the Indigenous population in some data collections resulting in undercounting and a degree of inaccuracy
- gaps in the available data.²⁹

The Productivity Commission has suggested that the data largely understates the extent of disability prevalence in Aboriginal and Torres Strait Islander communities. This is due to high rates of non-response to surveys, and a lack of understanding of the concept of disability in Aboriginal and Torres Strait Islander communities.³⁰

The most recent data collections used to estimate disability prevalence amongst Aboriginal and Torres Strait Islander peoples have some limitations.

The Australian Bureau of Statistics estimates that the 2011 Census net undercount for Indigenous people was 17 per cent compared to 6 per cent for non-Indigenous people. Data collected in the 2012 Survey of Disability, Ageing and Carers excluded people living in *Very remote areas* and in *Indigenous Community Frame Collection Districts*, which is around 15 per cent of the Indigenous population.³¹

Despite these limitations, the available data demonstrates the significance of disability for Aboriginal and Torres Strait Islander peoples, in terms of both prevalence and outcomes.

Statistical snapshot

- In 2008, approximately 50 per cent of Indigenous people aged 15 years and over reported a disability or a long-term health condition.³²
- In 2012, the overall rate of disability among Aboriginal and Torres Strait Islander Australians was 23.4 per cent, a small increase from 21.1 per cent in 2009.³³
- In 2009 and 2012, after adjusting for differences in population age structures, the rate of disability for Aboriginal and Torres Strait Islander Australians was 1.7 times the rate for non-Indigenous Australians.³⁴
- In 2011-13, the most common types of disability experienced by Aboriginal and Torres Strait Islander adults living in non-remote areas were 'physical' (31.8 per cent) and 'sight, hearing, speech' (19.6 per cent).³⁵
- In 2012-13, 5.8 per cent of disability support service users were Aboriginal and Torres Strait Islander Australians, up from 4.8 per cent in 2008-09.³⁶
- In 2012, the proportion of Aboriginal and Torres Strait Islander Australians with a profound or severe core activity limitation was 1.7 times greater than the proportion of non-Indigenous Australians.³⁷ (Core activities are tasks involving mobility, communication and self-care. A measure of profound or severe encompasses people who are unable to do, or who require assistance with, a core activity.³⁸)
- In 2012-13, 45.8 per cent of Aboriginal and Torres Strait Islander Australians aged 15 years and over who had a profound or severe core activity restriction left school at year 9 or below, compared to 20.7 per cent of Aboriginal and Torres Strait Islander Australians without a disability.³⁹
- In 2012-13, Aboriginal and Torres Strait Islander Australians aged 15 to 64 years with a profound or severe core activity restriction had significantly lower labour force participation and employment rates (28.2 per cent and 20.9 per cent) than Aboriginal and Torres Strait Islander Australians without a disability (68.8 per cent and 55.3 per cent).⁴⁰

4.4 Challenges faced by Aboriginal and Torres Strait Islander peoples when accessing disability services

In addition to an underreported rate of disability in our communities, a number of Aboriginal and Torres Strait Islander people with disability are currently outside the disability support system.⁴¹

(a) Perceptions of disability

There is no equivalent word for ‘disability’ in many Aboriginal and Torres Strait Islander languages. Among the Indigenous communities in the Northern Territory’s Barkly Shire, where a trial of the NDIS is underway, there are 14 different languages, none of which include the word ‘disability’.⁴² Consequently, some Aboriginal and Torres Strait Islander communities may not have a general concept of disability, resulting in underreporting of disability and underutilisation of disability services.⁴³

The higher rate of disability among Aboriginal and Torres Strait Islander peoples may have the effect of ‘normalising’ perceptions of disability.⁴⁴ For example, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council (NPY Women’s Council) has highlighted that in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY Lands) the range of symptoms associated with fetal alcohol syndrome or brain injury have, to an extent, become normalised because these conditions are relatively common in this area.⁴⁵

(b) Mistrust of authority

Many Aboriginal and Torres Strait Islander people with disability are reluctant to seek support because of negative experiences with government agencies and service providers. Past individual experiences and the legacy of historical mistreatment of Aboriginal and Torres Strait Islander peoples has led to ongoing mistrust of government involvement in our communities.⁴⁶

The consequences of intergenerational trauma, such as feeling shamed, judged or misunderstood, can be a strong deterrent for Aboriginal and Torres Strait Islander people with disability, and their families and carers, seeking support. Some may feel that they are a burden to their families and communities.⁴⁷ Others may worry that service providers will judge them and be critical of the cleanliness of their home or the standard of care they provide.⁴⁸

Text Box 4.1:

Rhys

Rhys has bipolar disorder and *cerebella ataxia*, a condition that affects Rhys’ coordination and balance and causes him to shake. One evening, as the shaking got worse, he began to panic. He called an ambulance and was taken to hospital. He was admitted to the mental health unit, where he was diagnosed with bipolar disorder.

The process I was put through, I just felt like an animal. Nobody asked if I was Aboriginal or tried to connect with me ... The way I was treated, it was as if I was drunk.

I’ve been picked up by the police because they think I’m drunk. I’ve been singled-out at airports by security because they think I’m drunk. Friends end up having to speak for me because people don’t listen to me when I try to explain that I’m not drunk, I have a disability.

(c) High level of disadvantage

Aboriginal and Torres Strait Islander peoples experience acute disadvantage across a range of indicators, including life expectancy, health, education and employment.

Socio-economic disadvantage creates risk factors, which compound on each of these indicators resulting in a higher rate of disability in Aboriginal and Torres Strait Islander communities. In turn, disability heightens socio-economic disadvantage.⁴⁹ For example, Aboriginal and Torres Strait Islander children are more susceptible to hearing loss, which leads to poorer education outcomes, and consequently, fewer opportunities for employment.⁵⁰ Lower levels of education and difficulties with reading, writing and numeracy make obtaining information about disability and accessing disability services a daunting experience, further entrenching this cycle.

This high level of disadvantage can influence how we understand and prioritise disability. The significance of issues such as poor health, unemployment, discrimination, and poverty means that disability is rarely viewed as a priority.⁵¹ The degree of acute, chronic and co-occurring illnesses experienced by many of our people can impact on whether they self-identify as having a disability, and subsequently whether they consider the NDIS and other disability services to be relevant to their needs.⁵²

The discrimination faced by Aboriginal and Torres Strait Islander peoples may contribute to a reluctance to self-identify as having a disability and adopt the additional stigma of being an Aboriginal or Torres Strait Islander person with disability.⁵³

(d) Remoteness and lack of services

There are profound challenges to delivering and accessing disability support services in remote and rural Australia. Transport is scarce, roads and infrastructure are poor, and the distances between communities are vast. Remoteness effectively reduces the scope of services that can be provided and considerably increases the costs of service delivery.⁵⁴

A significant proportion of Aboriginal and Torres Strait Islander peoples live in remote and regional Australia and failures in service delivery have a disproportionate impact on our communities.

In 2011 around:

- 35 per cent of Aboriginal and Torres Strait Islander peoples lived in Major City Areas
- 21 per cent of Aboriginal and Torres Strait Islander peoples lived in Remote or Very Remote Australia
- 44 per cent lived in Inner or Outer Regional Areas.⁵⁵

(e) Lack of cultural competence in service delivery

Policy makers and service providers need to understand the relationship between Aboriginal and Torres Strait Islander peoples and our traditional lands, languages, and culture if they are going to engage constructively with Aboriginal and Torres Strait Islander people with disability, particularly in remote areas.

The significance of living on country, and among family and community to our people must be understood and respected. For many, relocation to an area with more services would result in a considerable sense of loss. As the Centre for Aboriginal Economic Policy Research writes:

A unifying theme in much of the research into disability in the Indigenous community is the importance of caring for people with impairments within the family and wider community.⁵⁶

Cultural considerations around kinship systems, communication styles and values also need to be understood when delivering disability services in Aboriginal and Torres Strait Islander communities. For example, Anangu peoples focus on the present and feel uncomfortable in terms of planning for the future and answering personal questions.⁵⁷

Hayley's experience, described in Text Box 4.2, demonstrates how a lack of culturally appropriate disability services can effectively exclude Aboriginal and Torres Strait Islander people with disability.

Text Box 4.2:

Hayley

I grew up without being accepted. I had to choose between my identity as deaf or Aboriginal. I went to a deaf school and I didn't have the same opportunities as my brother and sister to celebrate being Aboriginal. I'm hoping to set up a group where people like me can be proud to be both deaf and Aboriginal without feeling forced to pick one.

At TAFE they have opportunities for Aboriginal students but I wasn't able to participate because I'm deaf. A lot of Aboriginal organisations aren't set up to communicate with deaf people and the Deaf Society doesn't understand my culture. I'm just tired of being left out.

4.5 Disability policy in Australia

(a) National Disability Agreement

COAG's National Disability Agreement provides for the administrative and funding responsibilities of the Australian, state and territory governments in the delivery of disability services. It specifies that the Australian Government delivers income support and employment services to people with disability and that the state and territory governments supply disability services.

The National Disability Agreement commenced on 1 January 2009 and was revised in December 2012. The responsibilities it sets out will remain in place until the full rollout of the NDIS by July 2019⁵⁸ when it is expected that many people using services provided under the Agreement will transition to the NDIS as the scheme is rolled out nationwide.⁵⁹

It is anticipated that people with disability who are not eligible for the NDIS will continue to receive their existing support or support consistent with their current arrangements.⁶⁰

(b) National Disability Strategy 2010-2020

The National Disability Strategy is a 10 year national policy framework that articulates long-term goals in policy areas affecting people with disability.⁶¹

It is a COAG initiative that aims to improve the performance of mainstream services, including housing and education, and involve people with disability in the associated policy development and implementation process.⁶²

The National Disability Strategy adopts the principles set out in article 3 of the Convention⁶³ and seeks to help ensure that the Convention's principles are incorporated into initiatives affecting people with disability.⁶⁴

The National Disability Strategy has six outcome areas:

1. **Inclusive and accessible communities**—the physical environment including public transport; parks, buildings and housing; digital information and communications technologies; civic life including social, sporting, recreational and cultural life.
2. **Rights protection, justice and legislation**—statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, the electoral and justice systems.
3. **Economic security**—jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing.
4. **Personal and community support**—inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services; informal care and support.
5. **Learning and skills**—early childhood education and care, schools, further education, vocational education; transitions from education to employment; life-long learning.
6. **Health and wellbeing**—health services, health promotion and the interaction between health and disability systems; wellbeing and enjoyment of life.⁶⁵

Underpinning these areas are policy directions, which describe what is required in order to achieve these outcomes. The policy directions contain 53 additional specific areas for future action.

The National Disability Strategy discusses the particular needs of Aboriginal and Torres Strait Islander people with disability and highlights the relationship between the Strategy and the COAG's Closing the Gap targets, captured in the National Indigenous Reform Agreement (Closing the Gap) and related COAG agreements.

The National Disability Strategy identifies the need for the Closing the Gap agreements to address the needs of Aboriginal and Torres Strait Islander people with disability as an area for future action.⁶⁶

In 2012, relevant Ministers from the Australian, state and territory governments reported to COAG with the first of three implementation plans for the National Disability Strategy.⁶⁷

The first implementation plan outlines the six main actions for achieving the objectives of the National Disability Strategy:

1. Periodic reviews of COAG's national agreements and partnerships.
2. The appointment of disability champion ministers who are responsible for driving the implementation of the National Disability Strategy.
3. Improving the evidence base by undertaking further research and enhancing data collection.
4. Developing, reviewing and implementing state and territory government disability plans.
5. Involving people with disability in the development and implementation of government policies and programs.
6. National cooperation through reporting implementation progress to COAG.⁶⁸

The Department of Social Services is developing an Aboriginal and Torres Strait Islander Action Plan, which will be one of the components of the second implementation plan for the National Disability Strategy, due to be released in late 2015.⁶⁹

This Action Plan will focus on practical actions for improving outcomes for Aboriginal and Torres Strait Islander people with disability across a range of government portfolios. These actions were developed following a roundtable with key Commonwealth agencies and external stakeholders with experience in disability and Aboriginal and Torres Strait Islander affairs.⁷⁰

The National Disability Strategy's progress will be detailed in two-yearly reports using national trend indicator data based on the six outcome areas.⁷¹ Where possible, indicators will be disaggregated by Indigenous status.⁷² The first report will be presented to COAG in 2015.⁷³

(c) National Disability Insurance Scheme

In August 2011, the Productivity Commission released its inquiry report, *Disability Care and Support*. The Productivity Commission found the current disability support system to be 'underfunded, unfair, fragmented, and inefficient'. It described a system struggling with increasing costs and demand that offered little choice or certainty to people with disability.⁷⁴ The Productivity Commission recommended major reform, proposing a national disability insurance scheme in which funding for disability services and support would be allocated to individuals rather than linked to service providers.⁷⁵

The framework for the NDIS was codified in the National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act), given assent on 28 March 2013.⁷⁶

The NDIS Act provides for a scheme that will:

- take an insurance approach that shares the costs of disability services and supports across the community;
- fund reasonable and necessary services and supports directly related to an eligible person's individual ongoing disability support needs; and
- enable people with disability to exercise more choice and control in their lives, through a person-centred, self-directed approach, with individualised funding.⁷⁷

One of the objects of the NDIS Act is to, in conjunction with other laws, give effect to Australia's obligations under the Convention.⁷⁸ It provides for regard to be given to the National Disability Strategy in giving effect to the objects of the Act.⁷⁹

The objects of the NDIS Act are to be achieved by adopting an insurance based approach.⁸⁰ Text Box 4.3 summarises the four key principles underlying this approach.

Text Box 4.3:

Principles of an insurance based approach⁸¹

1. An actuarial assessment of the reasonable and necessary supports of the target population will determine the total annual funding required for the scheme to operate. These cost estimates will be compared with actual experience and outcomes.
2. The NDIS will invest in early intervention and supports for the families and carers of NDIS participants. This will help maximise opportunities for people with disability to be independent and participate in social and economic life, minimise support costs over a person's lifetime and align the goals of NDIS participants, and their families and carers with the goals of the scheme.
3. The NDIS will invest in research and innovation, supporting the objective of maximising opportunities for independence and social and economic participation in the long-term.
4. The NDIS will invest in building community capability and social capital for people with disability. This will be particularly important for people with disability who are not eligible for the NDIS. This will help facilitate the full inclusion of people with disability in community life.

The NDIS Act sets out the access criteria for NDIS participants⁸² including the age, residence, disability, and early intervention requirements. These are detailed in Text Box 4.4.

Text Box 4.4:

NDIS access requirements

A person must satisfy both the age and residence requirements, and either the disability or early intervention requirements to become a NDIS participant.

Age requirements: the person must be aged under 65 years at the time he or she makes an access request to become a participant in the NDIS.⁸³ Additional age-related criteria may apply, depending on the trial site.

Residence requirements: the person must reside in Australia and be an Australian citizen, hold a permanent visa, or hold a special category visa.⁸⁴ Additional residence requirements apply in each trial site.

Disability requirements: the person will satisfy this requirement if he or she has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition.

The impairment or impairments must:

- be permanent, or likely to be permanent, and
- result in a substantially reduced functional capacity, or psychosocial functioning, and
- affect the person's capacity for social or economic participation.

It must also be likely that the person will require NDIS support throughout their lifetime.⁸⁵

Early intervention requirements: the person will satisfy this requirement if he or she:

- has one or more identified intellectual, cognitive, neurological, sensory or physical impairments that are, or are likely to be, permanent, or
- has one or more identified impairments that are attributable to a psychiatric condition and are, or are likely to be, permanent, or
- is a child with a developmental delay.

It needs to be likely that the provision of early intervention supports will reduce the person's future need for support in relation to their disability.

Early intervention support must also benefit the person by improving, mitigating, alleviating, or preventing further deterioration of his or her functional capacity or by making the informal supports available to the person more sustainable.⁸⁶

The NDIS Act also outlines the preparation and content of participant's support plans,⁸⁷ including what constitutes 'reasonable and necessary' support.⁸⁸

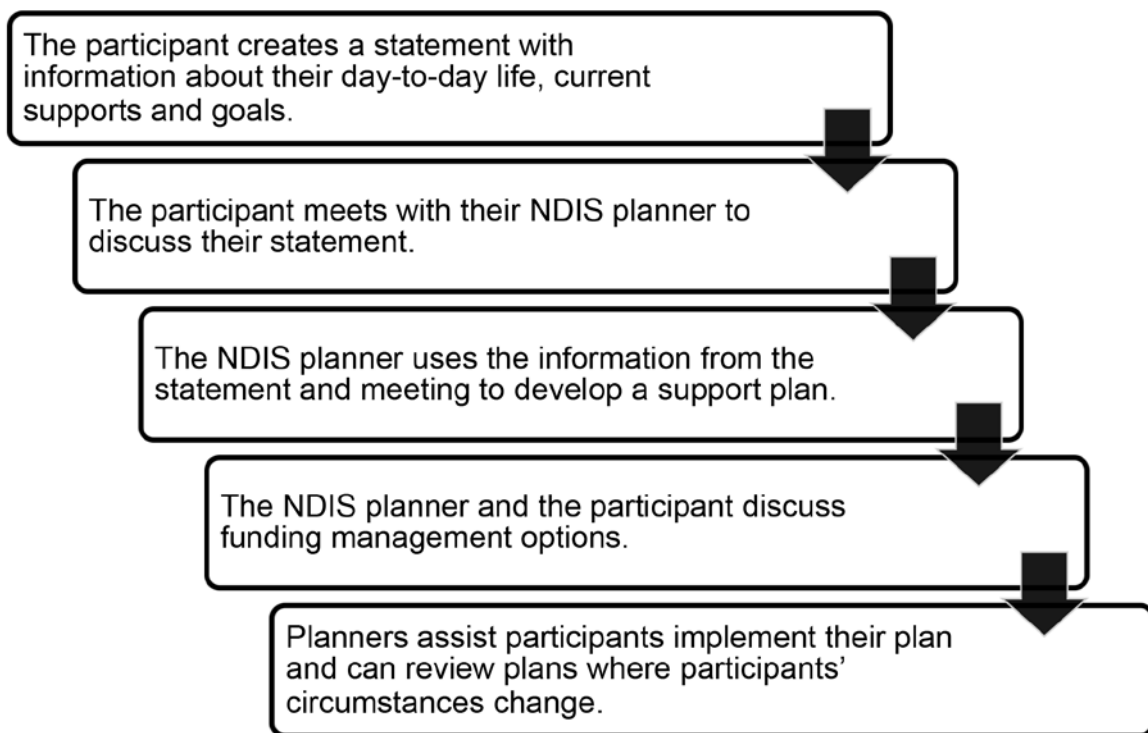
The NDIS Act authorises the creation of rules,⁸⁹ which provide further detail on the operation of the NDIS regarding matters including becoming a participant,⁹⁰ decision making for children,⁹¹ the appointment and duties of nominees,⁹² and plan management.⁹³

(d) National Disability Insurance Agency

The NDIS Act establishes the National Disability Insurance Agency (NDIA) to administer the NDIS.⁹⁴ The NDIA's governance and operations is based on the insurance principles outlined above.⁹⁵

The NDIA Board receives advice from an Independent Advisory Council, established under the NDIS Act.⁹⁶ The Advisory Council can provide advice to the Board on its own initiative, or at the request of the Board, about the way in which the NDIA implements the NDIS.⁹⁷

The NDIA helps develop individual support plans with people who satisfy the NDIS access criteria. This generally involves:



Another key function of the NDIA is to connect and provide information to all people with disability, and their families and carers. An Information, Linkages and Capacity Building (ILC) policy framework has been developed to support this part of the NDIA's work.⁹⁸

The ILC focuses on:

- Providing information, linkages and referrals to connect people with disability, and their families and carers, with appropriate supports.⁹⁹
- Building the capacity of mainstream (government funded) services to ensure they are accessible for people with disability, and their families and carers.¹⁰⁰

- Building community awareness and capacity to create opportunities for social and economic participation for people with disability, and their families and carers.¹⁰¹
- Building the capacity of people with disability, and their families and carers to exercise choice and control.¹⁰²
- Local area coordination to build relationships between people with disability, and their families and carers, the NDIS, and the local community.¹⁰³

The ILC works alongside other laws and policies, including the Convention, the *Disability Discrimination Act 1992* (Cth) and the National Disability Strategy to achieve these goals.¹⁰⁴

The story of Tania in Text Box 4.5 offers a sense of how planning and the ILC can help NDIS participants achieve their goals.

Text Box 4.5:

Tania – home with her family where she should be¹⁰⁵

Tania is a proud Awabakal woman who is passionate about assisting others find the strength and confidence to be more independent, especially young people residing in aged care similar to herself.

After having a stroke at 39, Tania lived in an aged care facility for three years where she was confined to her bed, away from her husband and daughter, who is now 16, and unable to access her community.

When she became a participant of the NDIS, Tania began to reclaim her independence and achieve her goals.

Through the NDIS Tania was provided with an electric wheelchair that gave her back her freedom and saw her achieve her first goal.

I was in bed all day every day. When I first had my stroke I couldn't talk, walk, move or see. And then I was given an electric wheelchair. I remember the first day I went outside it was just an amazing feeling, the sun and seeing the grass, the things you miss. Then I was given some travel allowance so that I could go home and see my daughter. Until then I could only see her once a week. She hated visiting the nursing home.

In Tania's second NDIS plan her goal was to move back home with her husband and daughter but in order to do so Tania needed an appropriate home in her community to move to. Through the support of Tania's NDIS planner and her Local Area Coordinator, Tania has been able to achieve this goal and now lives at home with her family with supports including an electric bed, an electric shower chair, physiotherapy and occupational therapy supports.

The NDIS is just fantastic I cannot thank them enough for what they have done. It has changed my life. It has given me my daughter back and everything back to me that I ever wanted.

Tania's next goal is to increase her social circle and her community engagement. She wants to be an ambassador and share her story in order to assist others to move out of aged care facilities, if that is their goal. Tania is also an active member of the NDIA Hunter Local Advisory Group.

The NDIA has developed Operational Guidelines based on the legislative framework that further describes its operation and decision making processes.¹⁰⁶

Where necessary, or at the request of a participant, the CEO of the NDIA may appoint a plan nominee or a correspondence nominee. Plan nominees may perform any act that may be done by a participant under, or for the purposes of, the NDIS Act that relates to the preparation, review or replacement of the participant's plan or the management of the participant's funding for supports.¹⁰⁷ Correspondence nominees may perform any other act that may be done by a participant under, or for the purposes of the NDIS Act.¹⁰⁸

(e) National Disability Insurance Scheme implementation process

The NDIS is being introduced in stages, with the full rollout of the scheme anticipated by July 2019 for all jurisdictions except Western Australia,¹⁰⁹ with trials currently in place in the following locations:

- Tasmania for youth aged 15 to 24 years
- South Australia for children aged 13 years and under
- the Barwon area of Victoria for people aged under 65 years
- the Hunter area of New South Wales for people aged under 65 years
- the Nepean Blue Mountains area of New South Wales for children aged 17 years and under
- Australian Capital Territory for people aged under 65 years
- the Barkly region of the Northern Territory for people aged under 65 years
- the Perth Hills area of Western Australia for people aged under 65 years.¹¹⁰

In September 2015, the New South Wales and Victorian Governments each signed Bilateral Agreements with the Australian Government for the rollout of the NDIS in those states from July 2016.¹¹¹

The Australian and Queensland Governments also announced in September 2015 an early transition to the NDIS for people aged under 18 years in Townsville and Charters Towers, and people aged under 65 years in Palm Island from July 2016.¹¹²

At a COAG meeting in April 2015, the Northern Territory and the Australian Governments agreed to discuss a second trial site in a remote Indigenous community.¹¹³

Western Australia is piloting a different NDIS service model called 'WA NDIS My Way'. This is currently being trialled in the Lower South West, Cockburn and Kwinana by the WA Disability Services Commission within Western Australia's current disability services model, the Local Area Coordination program.¹¹⁴

The key differences between the WA NDIS My Way model and the Australian Government's NDIS model are the ways in which service providers are funded and the pricing of those services.¹¹⁵ Unlike other states and territories, Western Australia, as yet has not made an agreement with the Australian Government to rollout the full scheme.¹¹⁶

The Department of Social Services is currently developing a national quality and safeguarding framework that will provide nationally consistent protections and aim to ensure high quality supports for NDIS participants. This will replace the different state-based arrangements that are currently in place. The five key elements of the proposed framework are:

- NDIA service provider registration
- complaints handling systems
- ensuring staff are safe to work with participants
- safeguards for participants who choose to manage their own plans
- reducing and eliminating restrictive practices in NDIS funded supports.¹¹⁷

The consultation period for the framework ended on 30 April 2015. The Australian, state and territory governments will develop a regulatory impact statement that draws on the outcomes of the consultation and a cost-benefit analysis.¹¹⁸

(f) Monitoring the effectiveness of the NDIS

The NDIA provides quarterly reports to COAG's Disability Reform Council outlining its operations. It also provides COAG's Disability Reform Council with yearly progress reports that measure the NDIS' progress against the goals and outcomes outlined in the NDIA's *Strategic Plan 2013-2016*.

(i) Outcomes framework and reference packages

The NDIA has developed an outcomes framework that will be used to measure the benefits of the NDIS for participants and their families. The framework has been developed in conjunction with the disability sector, including Aboriginal and Torres Strait Islander representatives,¹¹⁹ with outcomes for participants assessed across the following eight domains:

- exercising choice and control
- daily activities
- relationships
- home
- health and wellbeing
- lifelong learning
- work
- social, community and civic participation.¹²⁰

The framework will allow the NDIA to monitor the progress of the NDIS and benchmark against other OECD countries. The framework will also help the NDIA to:

- understand what types of supports produce good outcomes
- identify barriers preventing people from achieving their goals
- share this information with other participants and providers.¹²¹

Reference packages are also being developed which will allow the Scheme Actuary, who is responsible for assessing the financial sustainability of the NDIS, to monitor scheme performance and identify cost drivers. The aim is to provide an annual benchmark level of funding support for participants with similar characteristics and support needs.¹²²

(ii) Evaluation of the NDIS trials

Flinders University's National Institute of Labour Studies (NILS) has been commissioned by the Department of Social Services to lead an evaluation of the NDIS.¹²³ An overview of the evaluation process is outlined in the *Framework for the Evaluation of the Trial of the National Disability Insurance Scheme*.¹²⁴ A final draft of the evaluation is due by November 2016.¹²⁵

The evaluation will assess the impact of the NDIS on participants, their families and carers, both mainstream and disability-specific service providers, and the community.¹²⁶ The purpose of the evaluation is to identify the strengths and weaknesses of the NDIS, evaluate its effectiveness, and collate lessons for the full rollout of the scheme.

In 2014, NILS commenced a separate evaluation of the Barkly trial site in the Northern Territory, which will focus on the scheme's operation in rural and remote communities and the experience of Aboriginal and Torres Strait Islander peoples.¹²⁷

4.6 The NDIS: how will it work for our mob?

(a) Proposals for addressing the needs of Aboriginal and Torres Strait Islander people with disability

The Productivity Commission dedicated a chapter of *Disability Care and Support* to discussing Aboriginal and Torres Strait Islander issues.¹²⁸

It recognised that the mainstream NDIS framework would not be sufficient to address the needs of Aboriginal and Torres Strait Islander peoples but emphasised that measures to address this should not reduce the choice available to Aboriginal and Torres Strait Islander people with disability.¹²⁹

The Productivity Commission's recommendations for addressing the needs of Aboriginal and Torres Strait Islander people with disability are detailed in Text Box 4.6.

The First Peoples Disability Network (FPDN) has also considered the particular measures required to ensure that the NDIS is effective for Aboriginal and Torres Strait Islander people with disability. The FPDN's 10-point plan, detailed in Text Box 4.7, provides insight into both what is needed and what an effective implementation process would look like from the perspective of Aboriginal and Torres Strait Islander people with disability, and their families and carers.

Text Box 4.6:

Productivity Commission recommendation 11.2

The Australian Government and the state and territory governments should consider the feasibility of overcoming the barriers to service delivery for the NDIS for Indigenous people with disability by:

- block funding suitable providers where services would not otherwise exist or would be inadequate
- fostering smaller community-based operations that consult with local communities and engage local staff, with support from larger experienced service providers, in particular those with a high level of community ownership
- employing and developing Indigenous staff
- developing the cultural competency of non-Indigenous staff
- encouraging innovative, flexible and local problem solving, as well as conducting and publishing evaluations of trials in order to better understand what works and why
- developing an effective and cost-effective balance between bringing services to remote areas, and bringing people with a disability in remote areas to services
- working with state and territory governments, Indigenous advocacy groups and other community groups to develop and refine funding strategies, better understand local and systemic issues as well as successful (and unsuccessful) approaches and diffusing this knowledge to other service providers, researchers working in this field and the broader community.

In its initiatives for delivering disability services to Indigenous people, the NDIS should be mindful of the wider measures addressing Indigenous disadvantage being adopted throughout Australia.¹³⁰

Text Box 4.7:

First Peoples Disability Network 10-point plan for the implementation of the NDIS in Aboriginal communities¹³¹

1. **Recognise** that the starting point is the vast majority of Aboriginal people with disability do not self-identify as people with disability.
2. **Awareness raising via a concerted outreach approach** informing Aboriginal people with disabilities, their families and communities about their rights and entitlements.
3. **Establish a NDIS Expert Working Group on Aboriginal and Torres Strait Islander people with disability and the NDIS.**
4. **Build the capacity of the non-Indigenous disability service system** to meet the needs of Aboriginal people with disability in a culturally appropriate way.
5. **Research** including into the prevalence of disability and into a range of other relevant matters. Critically this work must be undertaken in partnership with Aboriginal and Torres Strait Islander peoples with disabilities to ensure a culturally appropriate methodology.
6. **Recognise** that there already exists a workforce in many Aboriginal communities that continues to do important work, often informally.
7. **Recognise** that it is not always about services. Many communities just need more resources so that they can continue to meet the needs of their own people with disabilities.
8. **Recruitment** of more Aboriginal people into the disability sector.
9. **Build the capacity of the social movement of Aboriginal and Torres Strait Islanders with disabilities** by supporting existing networks and building new ones in addition to fostering Aboriginal leaders with disabilities.
10. **Aboriginal 'Launch' sites** focused upon remote, very remote, regional and urban settings.

Both sets of recommendations highlight the importance of cultural competence and local knowledge in the delivery of disability services in Aboriginal and Torres Strait Islander communities. As I have said elsewhere in this report, our people must have a voice in the measures that affect us.

(b) Level of participation by Aboriginal and Torres Strait Islander peoples

In the trial sites that commenced on 1 July 2013 (New South Wales, Victoria, Tasmania and South Australia), the proportion of Aboriginal and Torres Strait Islander participants was lower than expected, except in Victoria.

The NDIA reports that the trial sites that commenced on 1 July 2013 are more affected by missing records.¹³²

In the trial sites that commenced on 1 July 2014 (Australian Capital Territory, Northern Territory and Western Australia), the proportion of Aboriginal and Torres Strait Islander participants was largely in line with expectations.¹³³

At 30 June 2015, 4 per cent of the 17,303 NDIS participants with approved plans identified as Aboriginal and/or Torres Strait Islander. Indigenous status was not stated in 16 per cent of records, compared to 38 per cent at the end of December 2014.¹³⁴

The NDIA reports that the number of Aboriginal and Torres Strait Islander participants increased across all trial sites in the June 2015 quarter, with the exception of the Australian Capital Territory. This increase is, in part, due to improved reporting of Indigenous status.¹³⁵

(c) Lessons from the NDIS trial sites

(i) Service delivery

The challenges of service delivery in remote areas mean that the market based service delivery system underpinning the NDIS could be ineffective for people with disability living in these areas.¹³⁶

The NDIS trial in the Barkly region of the Northern Territory was expressly undertaken to gain a better understanding of how the NDIS model should be adapted to be effective in remote areas.

On 21 July 2015, the Joint Standing Committee on the NDIS (Joint Standing Committee) conducted a public hearing in Darwin where the NDIS service providers and participants discussed their experiences of the Barkly trial.

Encouragingly, some reported an increase in services and service providers in the area.¹³⁷ However, there is still uncertainty about how NDIS funding will work in practice for service providers in remote areas and whether there will be sufficient services for people with disability in these areas to exercise meaningful choices about their supports.¹³⁸

The Joint Standing Committee has considered the challenges in implementing the NDIS in very remote Aboriginal and Torres Strait Islander communities. The Joint Standing Committee recommended that governments, in consultation with Aboriginal and Torres Strait Islander organisations, consider bringing all eligible people into the NDIS at the same time in each remote Aboriginal and Torres Strait Islander community, rather than by age cohort.¹³⁹ This was due to the small numbers involved and concerns about age-related cultural sensitivities.¹⁴⁰ The NDIA has accepted this recommendation.¹⁴¹

(ii) Fetal alcohol spectrum disorders

Concerns about how the NDIS will operate for people with fetal alcohol spectrum disorders (FASD) have emerged during the trials.¹⁴²

FASD is not confined to Aboriginal and Torres Strait Islander communities, however, the limited data suggests that Aboriginal and Torres Strait Islander people experience FASD at a higher rate than non-Indigenous Australians.¹⁴³

Obtaining a diagnosis of FASD is difficult due to the lack of a diagnostic tool (which is currently being developed), a lack of trained clinicians, and a lack of awareness within the health sector and the broader community.¹⁴⁴

The difficulty obtaining a diagnosis of FASD does not in itself preclude a person with FASD from receiving NDIS supports, as eligibility for the NDIS is determined using assessment tools that do not rely on a formal diagnosis.¹⁴⁵ However, the lack of diagnostic capacity makes it difficult to measure how many people have FASD, which restricts the development of expert and community understanding, as well as the ability of people with FASD and their families to seek assistance.

(iii) Mental illness

The operation of the NDIS for people with mental health problems has also emerged as an area of concern.

Again, this issue is not confined to Aboriginal and Torres Strait Islander communities. However, gaps in the NDIS for people with mental health problems will likely disproportionately affect Aboriginal and Torres Strait Islander peoples.

Between 2008 and 2012, the suicide rate for Indigenous Australians was almost twice the rate for non-Indigenous Australians. In 2012-13, the rate of hospitalisations for Indigenous Australians with mental health-related conditions was twice the rate than that of non-Indigenous Australians.¹⁴⁶

The episodic nature of mental illness has been identified as problematic in terms of the 'permanent impairment' requirement that is at the core of the NDIS and this episodic nature can make planning around future care extremely difficult.¹⁴⁷

There are also concerns around the level of support that will be available for those who are not eligible for NDIS support after the full rollout of the scheme.¹⁴⁸

(iv) Engagement issues

The Independent Advisory Council has been advised that the NDIA's engagement efforts with Indigenous peoples in the Barkly region of the Northern Territory about the NDIS have lacked cultural sensitivity, particularly in the early stages of the trial.¹⁴⁹

Language barriers are a significant consideration in remote Aboriginal and Torres Strait Islander communities. At 30 June 2015, of the 61 participants with approved plans in the Northern Territory trial, 58 identified as Aboriginal and/or Torres Strait Islander and 47 were classified as Culturally and Linguistically Diverse.¹⁵⁰ This suggests that a large number of the Aboriginal and Torres Strait Islander participants in this area do not primarily speak English at home.

The Independent Advisory Council has informed me that the NDIA's digital resources have not worked well for Aboriginal and Torres Strait Islander people with disability in remote and regional communities. This has been due to a lack of internet and computer access, low English literacy skills, and low awareness of disability.¹⁵¹

Some people 'want to learn about the NDIS from someone that they trust and that uses a common language'.¹⁵²

The NPY Women's Council has described how parents in the APY Lands are reluctant to 'sign up' to the NDIS to receive support for their children with disability. Reasons for this include shame, past negative experiences, fear of child removals, confusion about services, a lack of understanding about disability, and the reluctance of parents to acknowledge that their child may have a disability.¹⁵³

The NPY Women's Council were optimistic that this situation could improve with further meetings between staff and family members and carers, allowing them to become more familiar with the NDIS and develop trusting and supportive relationships with the staff involved.¹⁵⁴

The NPY Women's Council emphasised the importance of culturally appropriate engagement in this familiarisation process.¹⁵⁵

The story of Dion in Text Box 4.8 demonstrates the potential of the NDIS.

Text Box 4.8:

Dion – connecting with his community¹⁵⁶

Dion, 24, is a talented Tennant Creek artist. Recently Dion's artwork and children's book made its way to Buckingham Palace as part of a gift from the Northern Territory Government to welcome the arrival of Princess Charlotte.

According to Dion's guardian Joie, Dion is 'mad keen on drawing dogs', all of whom he has met while living in communities across the Northern Territory.

Dion has this amazing memory for detail and he has also launched into drawing aerial views of the communities that he has lived in over the years.

In 2013, Dion illustrated 'Too Many Cheeky Dogs,' a children's picture book, and is currently completing drawings for a second book which will hopefully be published next year.

Last year Dion became a NDIS participant.

Dion is profoundly deaf. He lost his hearing after contracting meningitis as a baby and he also has muscular dystrophy.

Joie says,

I met Dion when he was almost 12. He spent his earlier years drifting around the community of Barkly, he's done more travelling than you or I will ever do. Coming from an Aboriginal background he was not recognised as a person, everyone called him 'mad one' so my mission in life was to encourage people to use his name, which they do now and certainly through his art Dion has a wonderful reputation, but he was hidden for twelve years.

We still have miles to go in recognising people who are different.

When he came to town he was pretty uncooperative but drawing was the thing that connected him to others and so we could communicate that way.

I was very excited when the NDIS started because it is a needs based system which I thought could be perfectly targeted to Dion. Dion already had wheelchairs and ramps, so his basic needs had been met, but through the NDIS he has been able to access his community. He was desperate to go out into the communities he's lived in previously and check out what new houses had been built, who lived where and where the dogs were.

Often you presume you know what's best for people and it's really quite off the mark. What I thought was important for him at the time was that he communicated with others, but the beauty of the Scheme is that it makes you stop and think and consider the person and not what we presume they need.

He wanted to visit Lake Nash, so we used his funding to make this trip happen. We took his scooter and saw the dogs and visited his granny. His mother passed away last year so we visited her grave, which keeps him happy and contented and at one with the world. The ability to get him out and about with other likeminded groups is absolutely wonderful.

Dion is now passionate about his mobility.

We've got his scooter going. When that stops working his whole world falls apart so we've now put the maintenance of his scooter on his NDIS plan and because his plan is flexible we've changed it a couple of times and included repairs to the scooter.

We are self-managing so we've found someone in town who can fix the scooter and we can just go ahead and do that and really the paperwork is a breeze.

That funding enables him to keep moving and no doubt down the track things will change and his needs will change.

Joie says since the introduction of the NDIS in Tennant Creek access to specialist help such as physiotherapists and occupational therapists has been much more structured and organised with appointments booked in ahead of time for Dion.

Having the NDIS in Tennant Creek helps to inform the community about what resources and equipment are available and what we can access.

The services aren't like they are in a city but you can't expect that they ever will be because we don't live in the city. The NDIS has made remarkable inroads in the 12 months it's been here. As more people become aware of the scheme, more people get on board. I think a lot of people presumed services would pop up overnight, which of course will take time because we are so remote. There are not a lot of people who choose to come to Tennant Creek.

The staff at the NDIS have been absolutely wonderful and committed to the cause and bend over backwards to help Dion.

(d) Approaches to engaging with Aboriginal and Torres Strait Islander people with disability

The experiences of the Barkly region and APY Lands demonstrate the necessity of ongoing, thorough, face-to-face engagement with Aboriginal and Torres Strait Islander people with disability, and their families and communities.

The Independent Advisory Council has reported that the NDIA is responsive and willing to engage with Aboriginal and Torres Strait Islander peoples on these issues.¹⁵⁷ The FPDN has also reported feeling encouraged by the NDIA's attitude.¹⁵⁸

The lessons from delivering the NDIS in the Barkly and APY Lands have been used by the NDIA to develop a Rural and Remote Servicing Strategy that will be implemented in conjunction with an Aboriginal and Torres Strait Islander Engagement Plan.¹⁵⁹ I understand that this will be put into effect by the end of 2015.

The NDIA has also established an Aboriginal and Torres Strait Islander Working Group that provides advice about service delivery for Aboriginal and Torres Strait Islander peoples and a Rural and Remote Working Group.¹⁶⁰

In the Northern Territory, the NDIA has established a Local Advisory Group that includes local stakeholders, community controlled organisations and consumer representatives. This group provides the NDIA with cultural, local and consumer advice to assist the NDIS to be responsive to local conditions and requirements.¹⁶¹

In March 2015, community consultations and meetings were conducted with community members and local Aboriginal organisations, including Julalikari Council Aboriginal Corporation, Anyinginyi Health Aboriginal Corporation and Papulu Apparr-Kari Aboriginal Corporation.¹⁶²

The NDIA has also looked at different approaches to engaging Aboriginal communities in the Barkly region. It sponsored the 2015 Desert Harmony Festival in Tennant Creek, using the Festival as a platform for raising awareness about the NDIS and disability in Aboriginal and Torres Strait Islander communities.¹⁶³ The NDIA has also worked with Barkly Regional Arts to produce the 'story plates' ceramic art project to facilitate discussion about disability and the NDIS.¹⁶⁴

In the Hunter trial site in New South Wales, the NDIA participated in the 'Linked Up Aboriginal Aged & Disability Road Show Newcastle Hunter', engaging with Mindaribba Land Council, Awabakal Land Council and Biriaban Land Council.¹⁶⁵

In South Australia, the FPDN has been engaged by the NDIA to employ two Local Area Coordinators (LACs) to help Aboriginal and Torres Strait Islander people access the NDIA. The FPDN are also working with the NDIA to develop joint engagement activities in remote communities.¹⁶⁶

The NPY Women's Council has received funding from the Community Inclusion and Capacity Development fund to help build the capacity of Anangu to use the NDIS.¹⁶⁷

(e) Disability Support Organisation Capacity Building project

The NDIA has funded 18 community organisations, including the FPDN and the Aboriginal Disability Network NSW, to act as Disability Support Organisations (DSOs).¹⁶⁸

Each DSO operates up to 20 local support groups that assist NDIS participants, and their families and carers, engage with the scheme by providing information and support. The aim of these groups is to build the capacity of people with disability to exercise choice and control in their lives and participate in the community. Building capacity will also enable people with disability to engage with mainstream services.¹⁶⁹

In evidence given to the Joint Standing Committee, Independent Advisory Council member, Ms Jennifer Cullen, observed that DSOs resonate well across remote and regional Australia and in Aboriginal and Torres Strait Islander communities.¹⁷⁰

The Independent Advisory Council has reported that the operation of DSOs in the Barkly region has resulted in benefits including:

- increased connection to communities for people with disability
- increased engagement 'Proper Way'
- enhanced working relationships with local Elders and Traditional Owners regarding how to communicate about the NDIS using local languages and concepts of disability
- increased access to communities for DSOs and NDIA staff
- the identification of local leaders who can facilitate conversations about disability.¹⁷¹

It is the view of the Independent Advisory Council that locally run DSOs are best placed to do the early engagement work about the NDIS with communities. It recommends utilising the expertise of Aboriginal and Torres Strait Islander organisations in rural and remote Australia to engage Aboriginal and Torres Strait Islander communities in these areas. It also supports expanding the current DSO program across Australia.¹⁷²

The NDIA is supportive of the project and believes that the mid-term evaluation will provide a stronger indication of the impact of DSOs on people with disability and their family and carers.¹⁷³

(f) Building cultural competence across the NDIA

The nationwide rollout of the NDIS over the coming years presents a unique opportunity for starting conversations about disability in Aboriginal and Torres Strait Islander communities.

For many Aboriginal and Torres Strait Islander people, this will be the first conversation they have had about their disability and receiving disability support services, so it is critical that the NDIA engages with our people in a culturally appropriate way.

All trial site staff are required to complete the Aboriginal and Torres Strait Islander Cultural Awareness eLearning module, developed by the Department of Immigration and Border Protection and recognised as best practice by the Australian Institute of Training and Development.¹⁷⁴

The NDIA has indicated that it is developing a cultural awareness training program contextualised to the NDIA, which will be included in the training materials available to all staff members. It anticipates that the cultural awareness materials will be available by December 2015.¹⁷⁵

As at 31 March 2015, the NDIA had 11 (1.43 per cent) employees who identified as Aboriginal or Torres Strait Islander.¹⁷⁶ The NDIA is currently implementing its Indigenous Employment Plan. Initiatives in this plan include:

- recruiting Aboriginal and Torres Strait Islander graduates to participate in its graduate program (to commence in 2015-16)
- participating in the Indigenous Australian Government Development Program, with a focus on placements for Aboriginal and Torres Strait Islander employees with an interest in project management
- targeting recruitment in Tennant Creek to people with experience in Aboriginal and Torres Strait Islander issues.¹⁷⁷

The Barkly trial site currently employs nine staff, five of which are local to Tennant Creek and four of whom identify as Aboriginal.¹⁷⁸

The NDIA is also currently updating its Reconciliation Action Plan.¹⁷⁹

4.7 Conclusion and recommendations

The NDIS is one of the most significant public policy reforms to happen in Australia.

Its implementation provides an opportunity to start a conversation about how to best address disability in Aboriginal and Torres Strait Islander communities. Building meaningful and respectful relationships will facilitate the participation and involvement of Aboriginal and Torres Strait Islander peoples in the decisions that will affect us, and which will lead, I am sure, to the equity of access to services to which we are entitled.

As choice and control are at the core of the NDIS model it can, if done well, empower some of our most vulnerable people and assist them to realise their aspirations.

Kim Mahood writes in her 2012 essay on non-Indigenous workers in remote Aboriginal communities, ‘No matter how good the strategies and programs developed at the policy level, the delivery on the ground is where it counts, and where it consistently fails’.¹⁸⁰

The NDIS’s focus on capacity building and tackling the societal barriers impeding the full participation of people with disability in the community, together with the implementation of the National Disability Strategy to improve the accessibility of mainstream services for people with disability, will hopefully mean that this reform has positive effects for all Aboriginal and Torres Strait Islander people with disability.

Every community is different and will want and need different things. Therefore it is important for the NDIS to enable local decision making. Local community members should be in decision making roles and part of community service delivery.

Perhaps a ‘local first’ employment strategy should be a priority in the implementation of the NDIS, particularly in regional and remote Australia, where the local labour market should be exhausted before focusing on strategies for attracting people to relocate to those understaffed areas.

Ensuring the NDIS works in remote communities is going to require an investment in time, effort, engagement and innovation, and I welcome the NDIA’s commitment to do this.

Culturally competent people working in a culturally secure environment must underpin all NDIS services. Cultural competence therefore needs to be cultivated throughout the implementation of the NDIS and across the NDIA.

The focus on cultural competence seen in efforts currently underway in remote communities must extend to engagement with our people living in urban and regional areas. Proactive and sensitive engagement with Aboriginal and Torres Strait Islander people with disability needs to be a nationwide priority to ensure the NDIS realises its potential for our communities.

Recommendations

Recommendation 11: The full extent of disability within the Aboriginal and Torres Strait Islander community be ascertained based on the collection of comprehensive, disaggregated data.

Recommendation 12: The effectiveness of programs and policies in addressing the needs of Aboriginal and Torres Strait Islander people with disability be monitored through a continuous robust evaluation framework.

Recommendation 13: By 2016, the Closing the Gap agreements include a target for Aboriginal and Torres Strait Islander people with disability as an area for future action.

Recommendation 14: The Disability Support Organisations model is expanded across Australia to ensure culturally competent and appropriate engagement with Indigenous communities in the implementation of the NDIS, in order to ensure full access to disability services for Aboriginal and Torres Strait Islander peoples.

Recommendation 15: The NDIS rollout in rural and remote Australia should prioritise locally based services and employment in order to utilise Aboriginal and Torres Strait Islander expertise and experience already present in those areas.

Recommendation 16: The Australian Government should undertake an evaluation of the accessibility of the NDIS for Aboriginal and Torres Strait Islander people with disability 12 months after the national rollout in July 2019.

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Chapter 5:

Caring for our children

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5.1 Introduction

The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today.

Despite concerted efforts aimed at preventing Indigenous contact with child welfare agencies over the 18 years since the *Bringing them Home Report* (BTH report) was published in 1997, disparities between Aboriginal and Torres Strait Islander children and non-Indigenous children continue to grow.

Current statistics indicate that Aboriginal and Torres Strait Islander children are approximately nine times more likely to be in out-of-home care, compared to non-Indigenous children.¹

Unfortunately, the likelihood of Aboriginal and Torres Strait Islander children coming into contact with the child protection system and being removed from their families has increased since the BTH report.

Our children are our most precious resource and their innocence and their right to be safe, healthy and free from violence must be protected at all costs.

There are undoubtedly circumstances where children need to be removed from their families. However, greater efforts are required to empower and support Aboriginal and Torres Strait Islander peoples to break free from the cycle that brings them into contact with child protection authorities in the first place.

This includes improved efforts to ensure that the rights and voices of Aboriginal and Torres Strait Islander people are prioritised in existing systems.

We do not enjoy a level of meaningful participation in the decisions that affect our lives and those of our children.

It is also clear that more could be done to ensure the rights of Aboriginal and Torres Strait Islander children to their culture and identity. The importance of this cannot be understated given what we know about culture as a protective factor for our young people.²

However, these improvements are meaningless by themselves without an overarching system of accountability in place.

In this chapter, I will explore the need for a series of mechanisms that specifically monitor the safety and wellbeing of our children.³

In the wake of the National Apology, we are also learning more about the importance of healing given the impact of past policies of removal on our people and the intergenerational nature of that trauma that is passed onto our children.

This chapter will also examine the importance of a healing and trauma informed approach to addressing current challenges within the child protection system.

The rate at which our children enter this system has reached epidemic levels, so it is incumbent on all of us to explore what more can be done and to actually do it. This involves a more concentrated focus on healing, culture, self-determination, early intervention and family preservation.

I am confident that a more concerted effort by all of us as parents, families, communities, service providers, carers and government, will translate into better outcomes in the long-term for our children.

5.2 A human rights-based approach to child welfare

The United Nations Convention on the Rights of the Child (CRC), the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), together provide the basis for the human rights framework concerning vulnerable Aboriginal and Torres Strait Islander children.

Australia has legal obligations to uphold the rights contained in the CRC, which generally involve the principles of non-discrimination, the best interests of the child, the right to be heard, and the right to survival and development.

However, articles 19, 29 and 30 of the CRC also set out additional obligations to uphold the safety of all children from all forms of violence, abuse and neglect as well as their rights to culture and identity.⁴

Article 30 of the CRC is particularly significant because it is the only article in a United Nations human rights treaty that specifically refers to Indigenous peoples:

In those states in which ethnic, religious or linguistic minorities or persons of Indigenous origin exist, a child belonging to such a minority or who is Indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practise his or her own religion, or to use his or her own language.⁵

Governments have given various levels of effect to these obligations through a number of legal, administrative and policy initiatives. This is primarily achieved through their administration of child protection legislation, which is aimed at the protection of all children.

Maintaining links to culture and identity are especially important within the Indigenous child protection context. This is particularly the case given the impact of past policies of removal that resulted in the destruction of Aboriginal and Torres Strait Islander family, culture and identity.

In addition to the rights contained in the CRC, the rights of our communities to preserve our culture and identity are also set out in articles 11-13 of the Declaration.⁶ The right to determine our own systems of governance and cultural identity are also fundamental to our rights to self-determination as Aboriginal and Torres Strait Islander peoples.⁷

A number of steps have been taken in the child protection context to specifically progress the rights of Aboriginal and Torres Strait Islander children to their culture and identity. These have occurred through kinship placements, cultural care plans and increased participation of Indigenous child welfare agencies.

In 2012, the United Nations Committee on the Rights of the Child (the Committee) expressed a number of concerns in relation to the increasing number of Aboriginal and Torres Strait Islander children entering out-of-home care in Australia, including that:

- The child welfare system does not adequately promote their cultural or linguistic identity.
- Aboriginal and Torres Strait Islander peoples are not adequately involved in the design, delivery, decision making and implementation of child welfare policy.⁸

As a result, the Committee recommended that the Australian Government review its progress in relation to the implementation of the BTH report to ensure the full respect for our rights and the rights of our children to their identity, name, culture, language and family relationships.⁹

A lack of participation by Aboriginal and Torres Strait Islander peoples is contrary to article 18 of the Declaration, which provides for our right to participate in matters that affect us.

At the service delivery level, tension can arise between the individual rights of children to be safe and free from violence and the collective rights of Indigenous peoples to know who they are, where they come from and maintain contact with their culture and family.

Whilst the rights of children to be safe from harm will always be of paramount importance, I believe that a more nuanced consideration, beyond a simple competition between apparent 'individual' and 'collective' rights, is required.

I will always maintain that all children, including Aboriginal and Torres Strait Islander children, should be protected from all forms of abuse and harm. However, I believe that there is great value in a pluralistic human rights-based approach that attempts to realise both the individual rights of children to safety as well as their rights to identity.

It is through strengthening the collective rights of our communities that we may be better able protect and realise the individual rights of Aboriginal and Torres Strait Islander children and young people.¹⁰

5.3 Statistical overview

When the BTH report was published in 1997, there were 12,363 children in out-of-home care, 2,419 of whom were of Aboriginal and Torres Strait Islander descent.¹¹

At 30 June 2014, there were 43,009 children in out-of-home care, 14,991 were Aboriginal and Torres Strait children, a rate of 51.4 per 1,000 children.

In all jurisdictions the rate of Indigenous children in out-of-home care was higher than the rate of non-Indigenous children.¹² For example, Aboriginal and Torres Strait Islander children were:

- 15.5 times more likely to be in care in Western Australia
- 12.3 times more likely to be in care in Victoria
- 11.4 times more likely to be in care in the Australian Capital Territory
- 9.7 times more likely to be in care in New South Wales
- 9.3 times more likely to be in care in South Australia
- 8.3 times more likely to be in care in Queensland
- 8.1 times more likely to be in care in Northern Territory
- 2.9 times more likely to be in care in Tasmania.¹³

(a) Reasons for removal

The reasons that Aboriginal and Torres Strait Islander people come into contact with the child protection and out-of-home care system are complex and varied.

The legacy of past removal policies such as intergenerational trauma, cultural differences in child rearing practices and the history of social disadvantage continue to play a large role in the ongoing contact of Aboriginal and Torres Strait Islander families with the child protection system.¹⁴

Issues such as substance abuse, poverty and family violence are also key factors to consider.¹⁵

Recent data shows that neglect is the most common reason for removing Aboriginal and Torres Strait Islander children; accounting for 40.6 per cent of all substantiated notifications.¹⁶ This is followed by emotional abuse (33.7 per cent), physical abuse (16.9 per cent) and sexual abuse (8.9 per cent).¹⁷

(b) Neglect

Neglect refers to 'the failure (usually by the parent) to provide for a child's basic needs, including failure to provide adequate food, shelter, clothing, supervision, hygiene or medical attention'.¹⁸

It is generally accepted that there is a connection between higher rates of neglect and lower socio-economic status.¹⁹ This is particularly the case for Aboriginal and Torres Strait Islander communities, where social disadvantage persists around housing, access to services and unemployment.²⁰ We also know that the prevalence of this type of abuse is influenced by other factors such as alcohol and substance abuse.²¹

Malnutrition or 'failure to thrive' continues to be a prominent reason for the removal of our children today, particularly in remote communities.²²

(c) Family violence

It is widely acknowledged that family violence is a significant issue facing all communities, but particularly in Aboriginal and Torres Strait Islander communities.

The term ‘family violence’ captures the range of physical, sexual, emotional, spiritual, psychological, social, cultural and economic abuses.

This definition acknowledges the broader impact on Aboriginal and Torres Strait Islander communities, families, including extended families and kinship groups.²³

We know that Aboriginal and Torres Strait Islander peoples experience violence at a disproportionately higher rate than non-Indigenous Australians.²⁴

Statistics show that Aboriginal and Torres Strait Islander peoples are between two and five times more likely than non-Indigenous people to experience violence as both victims and offenders.²⁵

Aboriginal and Torres Strait Islander women are also 35 times more likely to be hospitalised as a result of family violence compared to non-Indigenous women.²⁶

Family violence is often categorised as ‘emotional abuse’ by child welfare agencies.

However, while emotional abuse is reported as the second most common type of harm experienced by Aboriginal and Torres Strait Islander children who come into contact with child protection authorities,²⁷ specific data regarding the incidence of family violence is not readily available.²⁸

The lack of reliable data as it relates to child protection is generally well acknowledged.²⁹ The reasons for this include under-reporting, incomplete identification of Aboriginal and Torres Strait Islander status, and the quality and comparability of data sets across different agencies.³⁰

Reports provided by police, health and other government agencies provide an incomplete picture about the nature and extent of this type of abuse.

Given what we do know about the prevalence of family violence in Aboriginal and Torres Strait Islander communities, we can reasonably assume that this issue presents a significant problem for the safety and wellbeing of Aboriginal and Torres Strait Islander children.³¹

This includes the likelihood of our children being exposed to other forms of abuse and is compounded by a fear of children being removed from families by the authorities if victims of family violence seek help.

The case study in Text Box 5.1 below demonstrates the prevalence of family violence within the context of child protection matters concerning our children. It is just one approach which has enabled us to gain a better understanding of maltreatment than current data allows.

Text Box 5.1: Taskforce 1000

Taskforce 1000 was established by the Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, and the Victorian Department of Human Services (DHS) in 2014. This followed a commitment he made a year earlier to review the case of every Aboriginal child living in out-of-home care in the state: a total of approximately 1,000 children.³²

The aim of Taskforce 1000 is to discover why Aboriginal children are in care, what the barriers are, as well as how to improve outcomes for the children through greater oversight of their plans and cultural, educational and health needs.³³

Taskforce 1000 found that family violence is the single largest driver of child protection removals for Aboriginal and Torres Strait Islander families in Victoria, with approximately:

- two-thirds of Aboriginal and Torres Strait Islander children who are removed from their families experiencing family violence
- most incidents being perpetrated by Koori men and coupled with drug and alcohol misuse.³⁴

Statistics reported by DHS in 2009 also indicated that family violence was a factor affecting 64 per cent of Indigenous child protection removals.³⁵

Whilst the Taskforce 1000 initiative found that male perpetrated family violence and child removal was almost always accompanied by drug and alcohol misuse, it also identified a number of other common factors, such as:

- sexual abuse and mental health issues
- poor housing and transience
- intergenerational trauma and prior parental involvement in the child protection and justice systems.³⁶

A report by the Department for Child Protection and Family Support in Western Australia also found that:

- over 50 per cent of all referrals to child protection are related to family and domestic violence
- that children are present at 7 out of 10 family and domestic violence incidences attended by the police
- 1 in 4 non-Aboriginal children and 1 in 2 Aboriginal children are exposed to family and domestic violence during childhood.³⁷

Intergenerational trauma is a common factor in Indigenous child welfare matters and will be explored in more detail later in this chapter.

5.4 Current approaches to child welfare

The policy framework surrounding the Australian child welfare system is a complex array of Commonwealth and state arrangements, laws, policies and partnership agreements.

State and territory governments are responsible for the delivery of child protection services to their constituents, including Aboriginal and Torres Strait Islander peoples.

This assistance is generally provided to children under the age of 18 years and includes services for unborn children who may be at risk of harm.³⁸

State and territory governments investigate and manage child neglect and abuse allegations as well as refer vulnerable families to support services.

Where necessary, state and territory departments are required to intervene if there is 'serious risk of harm'.³⁹ This may take the form of court orders for the care and protection⁴⁰ of children, including the removal and placement of children in out-of-home care.

While child protection is fundamentally a state and territory responsibility, work at the national level offers the opportunity to move from seeing protecting children merely as a response to abuse and neglect to one of promoting the safety and wellbeing of children.⁴¹

Work at the national level involves the *National Framework for Protecting Australia's Children 2009-2020* (the National Framework), the Indigenous Advancement Strategy (IAS), Council of Australian Governments (COAG) National Partnership Agreements, and the Closing the Gap framework.

(a) National Framework for Protecting Australia's Children 2009-2020

The National Framework is underpinned by a tri-partite governance arrangement between the Australian Government, state and territory governments, and the non-government sector.

The National Framework is a long-term strategy which was endorsed by COAG in 2009 with the aim of achieving 'a substantial and sustained reduction in child abuse and neglect in Australia over time'.⁴² The Department of Social Services is primarily responsible for its administration.

The National Framework represents a desire to shift from incident based and crisis-driven systems to a public health model which emphasises the importance of providing targeted and universal supports to families in the first instance and tertiary responses as a mechanism of last resort.⁴³

The National Framework is underpinned by six major supporting outcomes:

- children live in safe and supportive families and communities
- children and families access adequate support to promote safety and intervene early
- risk factors for child abuse and neglect are addressed
- children who have been abused or neglected receive the support and care they need for their safety and wellbeing
- Indigenous children are supported and safe in their communities
- child sexual abuse and exploitation is prevented and survivors receive adequate support.⁴⁴

The National Framework progresses its work through a series of three year Action Plans.

(i) First and Second Action Plans

Across both the First and Second Action Plans, there was a commitment to identify and report on Indigenous specific priorities, including how the objectives of Closing the Gap are met.⁴⁵

Specific Indigenous priority areas and outcomes identified through the Action Plans are included in Text Box 5.2 below.

Text Box 5.2:

Indigenous specific priority areas and outcomes

Priority areas

- enhance the application and nationally consistent reporting of the Aboriginal and Torres Strait Islander Child Placement Principle (the Principle)
- improving the evidence base about Aboriginal and Torres Strait Islander children
- undertaking research in diverse communities, including Aboriginal and Torres Strait Islander children and young people
- work towards building a community development approach to child protection in remote communities
- share strategies to encourage Aboriginal and Torres Strait Islander peoples to work in child protection and family support
- expand training and support for Indigenous carers.⁴⁶

Outcomes

- development and production of the Winangay Indigenous kinship carer resources to support carers and staff working in the field
- establishment of 50 new Indigenous Parenting Support Services to promote positive outcomes for vulnerable Indigenous families with young children
- two high level workshops held in May 2013 and June 2013 to identify strategies for improving application of the Principle and working more closely with Indigenous leaders and communities.⁴⁷

Positive outcomes of the First Action Plan⁴⁸ include the adoption of National Standards for out-of-home care and the establishment and appointment of the National Children's Commissioner.⁴⁹

In April 2012, the Australian Government announced the establishment of the National Children's Commissioner within the Australian Human Rights Commission. The first National Children's Commissioner, Megan Mitchell, began her appointment on the 25 March 2013⁵⁰ and is an active member of the National Forum of the National Framework.

One of the National Children's Commissioner's core functions is to provide an annual statutory report to Parliament on matters relating to the enjoyment and exercise of human rights by children in Australia.

In 2014, Commissioner Mitchell conducted an examination into intentional self-harm and suicidal behaviour in children aged 0 to 17 years. In 2015, Commissioner Mitchell examined the impact of family and domestic violence on children. The 2014 and 2015 *Children's Rights Reports* have included an analysis on how Aboriginal and Torres Strait Islander children are affected by these issues.

(ii) Development of the Third Action Plan (2015-2018) of the National Framework

The Department of Social Services began conducting a series of roundtable consultations in early 2015 to inform the development of the Third Action Plan (2015-18) of the National Framework.⁵¹

This involved undertaking a number of roundtable discussions with sector experts, including Aboriginal and Torres Strait Islander peoples in various locations across Australia. Participants were also invited to make written submissions.⁵²

Commissioner Mitchell and I were invited by the Department of Social Services to contribute to the development of the Third Action Plan (2015-18) through an Indigenous focused workshop. Commissioner Mitchell and I co-chaired this workshop in May 2015.

Various members of the Indigenous sectoral leadership attended, including:

- the Secretariat for National Aboriginal and Islander Child Care (SNAICC)
- the Victorian Aboriginal Child Care Agency (VACCA)
- Aboriginal Child, Family and Community Care State Secretariat (AbSec)
- Queensland Aboriginal and Torres Strait Islander Child Protection Peak
- North Australian Aboriginal Justice Agency
- the office of the Commissioner for Aboriginal Children and Young People (Victoria).

A number of key issues were raised at the meeting, including the need for improved investment in the Indigenous workforce, better early intervention responses, as well as better funding and engagement with Aboriginal and Islander Child Care Agencies (AICCA's).

During my involvement in this process, I have maintained the need for supports and standards in the child protection and out-of-home care systems to be strong for all children, including Aboriginal and Torres Strait Islander children and young people.

Feedback from the consultation process will be used to inform priorities under the Third Action Plan, due to be launched later in 2015.⁵³ The Third Action Plan will involve a renewed focus on prevention and early intervention.⁵⁴

It is my hope that the Third Action Plan will heed the concerns of AICCA's and continue to work with our communities to address the overwhelming challenge that we face regarding the safety and wellbeing of our children.

This will also require a more coordinated effort across governments to do better, to give more considered attention to the expertise of our agencies and to consider the value of new approaches to child welfare.

(b) Indigenous Advancement Strategy

The restructure to the Indigenous Affairs portfolio that occurred through the Department of the Prime Minister and Cabinet (PM&C) and the IAS is also relevant to child protection services.

The rationalisation of programs into five funding streams reflected an intention by the Australian Government to simplify and improve service delivery for Indigenous Australians. This included increased efforts towards achieving the Closing the Gap targets, with particular emphasis on:

- getting children to school to provide the best chances of enjoying success in school and later in life
- getting adults into work to ensure Indigenous Australians participate in the modern economy
- making Indigenous communities safer for people to live, work and raise their families.⁵⁵

Many agencies delivering child focused services to Aboriginal and Torres Strait Islander people applied for funding under the IAS.

Successful organisations primarily received funding through the *Safety and Wellbeing, Culture and Capability*, and *Children and Schooling* funding streams.

The programs that received funding mainly focus on supporting healing, and improving community safety and wellbeing, including support for family violence and treatment for alcohol, drugs and substance abuse.⁵⁶

The *Children and Schooling* program places particular emphasis on the importance of promoting early childhood development. This includes care and education programs that contribute to school readiness with a view to promoting and supporting the capacity building of parents, carers and communities.⁵⁷

Later in this chapter, I will explore what the transition to the IAS has meant for our agencies and families.

(c) National Partnership Agreement on Indigenous Early Childhood Development

The National Partnership Agreement on Indigenous Early Childhood Development (NPA on IECD) also prioritised the health and developmental outcomes for Aboriginal and Torres Strait Islander children as a part of efforts towards the Closing the Gap framework.⁵⁸

This commenced in 2009 as a commitment between the Australian, state and territory governments.⁵⁹

Under this framework, early childhood outcomes were identified as central to addressing Indigenous disadvantage in the long-term.⁶⁰

It is within this context that the NPA on IECD set the following objectives:

- improving developmental outcomes for Indigenous children and achieving key targets as agreed by COAG
- achieving sustained improvements in pregnancy and birth outcomes for Indigenous women and infants
- improving Indigenous families' use of the early childhood development services they need to optimise the development of their children
- implementing the NPA on IECD in a way that also contributes to COAG's social inclusion, early childhood development, education, health, housing, and safety agendas, by identifying reforms and models of service delivery that will improve outcomes for Indigenous children.⁶¹

In order to achieve these aims, \$564 million was provided under the NPA on IECD over six years, including \$547.2 million agreed to by COAG, building on the \$16.8 million already committed to Indigenous Child Care Hubs.⁶²

Managed by PM&C and the federal Department of Health, the NPA on IECD established antenatal, pre-pregnancy and support services for Aboriginal and Torres Strait Islander mothers and babies.

It also created 38 Aboriginal Children and Family Centres (ACFCs).⁶³

(i) Aboriginal Children and Family Centres

The establishment of ACFCs was a key priority area for supporting Outcomes 1 and 2 of the National Framework for Protecting Australia's Children, which emphasised the need for:

- children to live in safe and supportive families and communities
- children and families to access adequate support to promote safety and intervene early.⁶⁴

ACFCs provide early childhood education and care, similar to long day care centres and preschools. They have integrated support services built on the varying needs of the community.

Generally, support services focus on health, behavioural management, parenting, legal, housing and family violence services.⁶⁵ This creates a holistic service that places ACFCs at the centre of Aboriginal and Torres Strait Islander communities.

These services also provide employment opportunities and self-governance for local Aboriginal and Torres Strait Islander communities.⁶⁶

(ii) What does the evidence say?

It is widely accepted that investment in early childhood development and education is critical to child wellbeing. This is particularly the case for Aboriginal and Torres Strait Islander children, who generally experience greater social disadvantage and lower levels of participation in early childhood services.⁶⁷

The Australian Institute of Health and Welfare stresses the importance of early childhood interventions, noting that such services are critical:

- for children who are at risk of poor developmental and educational outcomes
- for providing key assistance to families and communities to develop supportive and effective relationships with their children which is an important protective factor
- in the development of community partnerships, providing culturally appropriate training and support and embedding Indigenous knowledge.⁶⁸

There is also a need for more non-stigmatising and integrated early years support services such as those provided by ACFCs.⁶⁹

The coordinated interventions offered by ACFCs engage vulnerable families across a range of complex social issues, including child protection and child wellbeing.

The role of ACFCs is also identified by the National Framework as a key means of supporting Indigenous kinship carers for children who have been abused or neglected.⁷⁰

It is for these reasons that services such as ACFCs have been recognised as having the best chance of success.⁷¹

However, these impacts will be limited if they are not part of a broader structural response to reform.⁷²

The NPA on IECD expired on 30 June 2014 and was not renewed in the 2015-16 Budget.⁷³ Despite the known benefits of ACFCs, this funding was also discontinued.

5.5 Investment in child welfare services

(a) Cost

The financial cost of providing child protection and associated child welfare measures through the previously described policy frameworks are significant.

The costs of providing child protection and out-of-home care services are increasing. Nationally, approximately \$3.3 billion was spent in 2013-14, which represents a \$77.8 million increase from the previous year and a total increase of \$543.4 million since 2009-10.⁷⁴

Text Box 5.3:

Costs of child protection services, 2013-14⁷⁵

Cost per notification:

NSW: \$513, VIC: \$309, QLD: \$996, WA: \$1,178, SA: \$687, TAS: \$358, ACT: NA, NT: \$549

Cost per notification investigated:

NSW: \$1,111, VIC: \$1,626, QLD: \$2,322, WA: \$1,843, SA: \$1,395, TAS: \$2,080, ACT: \$1,461, NT: \$1,204

Cost per child commencing protective intervention who is on an order:

NSW: \$24,262, VIC: NA, QLD: \$16,328, WA: \$8,793, SA: \$9,108, TAS: \$4,433, ACT: \$7,530, NT: \$17,087

Cost per placement night:

NSW: \$123, VIC: \$152, QLD: \$143, WA: \$174, SA: \$170, TAS: \$122, ACT: \$146, NT: \$279

In 2007, the estimated lifetime costs of children in Australia who are abused was estimated to be approximately \$6 billion.

A best estimate given by a Victorian study in 2009-10 put the average lifetime financial cost of abuse per child in the order of \$300,000.⁷⁶

These figures take into account costs associated with:

health system expenditure, additional educational assistance, protection programs, productivity losses, government expenditure across jurisdictions and other factors that make up the 'burden of disease' over a lifetime, the costs extend into the billion.⁷⁷

However, they do not capture the ongoing personal and intergenerational costs associated with abuse and neglect. These costs include drug and alcohol abuse, mental illness, relationship issues, poor physical health, homelessness, unemployment, criminal offending and incarceration.

There is significant overlap between those who are in the care and protection system and those who come into contact with both the juvenile and adult criminal justice systems.⁷⁸

Investment in early intervention and prevention can reduce the rate of our children entering the care and

protection system, and the subsequent financial and personal costs.

Having said this, it is important to acknowledge that in some cases the removal of Aboriginal and Torres Strait Islander children from their families will be in their best interests.

As a first step, at-risk and vulnerable families must be given support which assists them to stay together. The extent to which our children are currently overrepresented within the system would perhaps suggest that the provision of this type of support is an area that should be prioritised.

(b) Funding

Funding and resourcing are core issues affecting the administration and delivery of Indigenous child welfare services. Indeed, a common cause for concern amongst AICCAs has been the impact of recent funding losses to the sector and the inability of funding levels to meet the increasing demand for child protection and out-of-home care services.⁷⁹

Funding was consistently raised as a priority this year, with the non-renewal of funding through the NPA on IECD and the administration of funding through new arrangements under the IAS identified as key problem areas.

(i) National Partnership Agreement funding

The expiration of the NPA on IECD left many Indigenous early childhood development services with only partial funding until June 2015.⁸⁰

The loss of these services is hard to fathom given their vital nature and alignment with key Australian Government priorities aimed at making communities safer and improving child health and wellbeing.

(ii) The Indigenous Advancement Strategy experience

Numerous AICCAs made submissions to the Senate Finance and Public Administration References Committee inquiry into the IAS, which commenced earlier this year. These included various Aboriginal and Torres Strait Islander peak bodies, health organisations and early childhood services concerned with child welfare.

Some organisations questioned whether the catch-cry of ‘adults into work, kids into school and safer communities’ reflected the complex social needs of Aboriginal and Torres Strait Islander peoples, particularly within the child protection context where trauma is ever-present and intensive healing is required.⁸¹

I am disappointed that many of the organisations that applied for funding in the IAS open competitive grants round were also frustrated by the inadequate engagement that characterised this process.

Organisations reported being confused about what funding existed and under which program areas funding was available. Misinformation also meant that some organisations were told that they were ineligible for funding through other agencies such as the Department of Social Services, which was inaccurate and may have prevented them from applying for the additional funding.⁸²

Whilst some organisations were successful, agencies reported that despite the energy that they invested into the development of ‘innovative’ services, as prioritised by the process, that these were largely not funded.⁸³

Other agencies reported that their organisation was successful under funding streams that they had not even applied under.⁸⁴ This left them with concerns about the nature of the funding assessment process itself.

Even those organisations such as VACCA, who were successful for most of the project funding that they

applied for, expressed concern about not having confidence in the IAS process, particularly in regards to the decision making process.⁸⁵

(iii) Impact on Aboriginal and Islander Child Care Agencies

As I indicated in Chapter 1, I am concerned that the chaotic nature of the IAS funding process has disadvantaged a number of well-established Aboriginal and Torres Strait Islander agencies that are equipped with the knowledge and expertise to provide culturally safe and appropriate services to our communities.

This is particularly the case given the concerns raised by AICCA's of having to align existing programs and expertise with the narrow objectives set by the funding process.⁸⁶

Whilst the fallout and service gaps that may arise from the IAS funding process are not yet fully known, early indications are not reassuring. Key organisations such as the Marninwarntikura Fitzroy Women's Resources Centre (MWRC) and SNAICC have been partially defunded through this process.⁸⁷ These developments are concerning given the past performance of both organisations in providing key services to and advocacy for Aboriginal and Torres Strait Islander families.

The MWRC has reported that it has been defunded to the tune of 60 per cent.⁸⁸ SNAICC was also unsuccessful in its applications for a number of programs.⁸⁹

Given that SNAICC is the peak policy and advocacy agency, I am concerned about the impact of these funding cuts on Indigenous child welfare. More detail regarding the importance of maintaining a national Aboriginal and Torres Strait Islander peak child welfare agency is in Text Box 5.4.

Given the numerous concerns regarding the IAS funding process, I look forward to the forthcoming review process and gaining a clear understanding of the basis on which decisions such as these were made.

Text Box 5.4:

The importance of a national peak Aboriginal and Torres Strait Islander child welfare body

The importance of maintaining a national Aboriginal and Torres Strait Islander peak body such as SNAICC in the child welfare sector was stressed by a number of organisations during the reporting period.

Many AICCA's are member organisations of SNAICC and see the role of a peak body as being critical to the delivery of child welfare policy, advocacy and services for our children, particularly around:

- the coordination of national priorities that are reflective of broader issues of systemic disadvantage which place Aboriginal and Torres Strait Islander children at greater risk of coming into contact with the child protection system
- providing a holistic approach as a means of addressing the overrepresentation of Aboriginal and Torres Strait Islander children in care
- information sharing across jurisdictions, particularly regarding effective and innovative approaches
- strengthening the knowledge base of frontline Aboriginal and Torres Strait Islander community-controlled agencies.⁹⁰

(iv) Strengthening funding to the sector

There are many potential avenues of funding and reporting processes that are applicable to Indigenous child welfare.

It is therefore important that information about the nature of them is clear across all agencies, particularly when significant changes occur in how they are administered, as happened with the IAS.

The lack of effective communication and engagement was consistently raised as problematic during the transition to the IAS process. This has impacted on services delivered by AICCAs.

Funding that has occurred through IAS and the National Partnership Agreements highlights the need for long-term funding to be provided to AICCAs in order to produce sustainable results. This did not occur under the National Partnership Agreements and even though some AICCAs were successful under the IAS, this has only guaranteed short-term funding which has had an impact on the capacity of organisations in terms of both staff and programming.⁹¹

5.6 Continued importance of the Bringing Them Home Report

The BTH report captures the personal stories of Aboriginal and Torres Strait Islander families and the effects of forcible removal policies on them.

It documents the experiences of Aboriginal and Torres Strait Islander children who were removed from their families and became known as the ‘Stolen Generations’.

It articulates the devastating impact of past laws, policies and practices on removed children, and their parents and families, as well as the ongoing effects of this on Aboriginal and Torres Strait Islander peoples and communities.

The BTH report noted the difficulty in estimating the number of children removed under this policy given the fact that many records have not survived or did not record a child’s Aboriginality.⁹²

Whilst the BTH report recognised that the full scale of removals may never be known, it confidently proposed that between ‘one in three and one in ten Indigenous children were forcibly removed from their families from approximately 1910 through to 1970.’⁹³

Historians have estimated that this number would mean between 20,000 and 25,000 Aboriginal and Torres Strait Islander people were removed from their families under the policy.⁹⁴

This has particular significance when considering the development of new approaches to protect the wellbeing of Aboriginal and Torres Strait Islander children and their families.

There is significant evidence regarding contemporary child removals of our children, which point to the intergenerational impact of these past removal policies.⁹⁵ I will explore this issue at the end of this chapter.

(a) Reforms

The BTH report made 54 recommendations, which included reparations, education, compensation, support and healing for victims, as well as reforms for child protection authorities when dealing with Aboriginal and Torres Strait Islander peoples.

The recommendations made in the BTH report also called for attention to be given to existing placement and care of Aboriginal and Torres Strait Islander children, with particular reference to the principle of self-determination.⁹⁶

A number of reforms were made to the various child protection systems across Australia, reflecting some of the recommendations of the BTH report.

These included:

- the provision of an Aboriginal and Torres Strait Islander Child Placement Principle through national standards legislation⁹⁷
- the involvement of Aboriginal and Torres Strait Islander organisations in child welfare decision making processes⁹⁸
- the need for a national framework to strengthen responses to Indigenous child welfare⁹⁹
- the importance of incorporating principles of self-determination within existing and new child protection frameworks.¹⁰⁰

There has been varying levels of success in terms of implementing the recommendations and some recommendations have not been implemented.

(i) Aboriginal and Islander Child Care Agencies

The BTH report emphasised the need for greater focus on the cultural needs of Aboriginal and Torres Strait Islander children, as well as the participation of Aboriginal and Torres Strait Islander families and organisations in decisions concerning the wellbeing of Aboriginal and Torres Strait Islander children.

The first Aboriginal and Torres Strait Islander child welfare agencies were established in Australia in the 1970s.¹⁰¹ Known collectively as Aboriginal and Islander Child Care Agencies (AICCAs), they were set up to address the impact of Indigenous child removals and were heavily influenced by the success of approaches developed by Native Americans.¹⁰²

AICCAs were also set up in recognition of the adverse impact of non-Indigenous child welfare structures, and the need for Aboriginal community controlled services to advocate for the best interests of Aboriginal and Torres Strait Islander children and their families.¹⁰³

There are over 100 AICCAs in Australia today across most states and territories.¹⁰⁴ These organisations provide a variety of child focused services to Aboriginal and Torres Strait Islander families, including recruitment and training of kinship and foster carers, adoption and fostering services, early intervention and support, as well as capacity building for families working towards having their children returned to their care.¹⁰⁵

These agencies also provide advice to government child protection agencies regarding placement and other cultural matters concerning Aboriginal and Torres Strait Islander children.

In 1981, the AICCAs established SNAICC in order to provide a unified approach to Indigenous child wellbeing.

SNAICC opened its offices in 1983 and provides a 'strong national voice'¹⁰⁶ as the peak body representing the interests of Aboriginal and Torres Strait Islander families.

However, as I have already indicated in this chapter, there have been recent developments, which may have negative implications for the future of SNAICC and its role in the sector.

(ii) Nature and role of AICCAs

The nature and role of AICCAs are quite diverse. While AICCAs provide an array of services to Aboriginal and Torres Strait Islander children, families and carers in the out-of-home care context, they also shape the development of laws and policies through providing advice to the courts and to government related to the wellbeing of Aboriginal and Torres Strait Islander children.

In some states, legislation provides the basis for the interaction of AICCAs regarding decisions concerning Aboriginal and Torres Strait Islander children.

In Queensland, mandatory provisions exist to ensure that Aboriginal agencies are consulted regarding all 'significant' decisions affecting Aboriginal and Torres Strait Islander children,¹⁰⁷ with a general obligation to consult for all other general matters.

Similar requirements exist in South Australia, which stipulate that no orders can be made about the placement of Aboriginal and Torres Strait Islander children without first consulting with a recognised Aboriginal organisation.¹⁰⁸

The views of Aboriginal and Torres Strait Islander community members are also given weight in Victoria, with respect to any decision regarding an Aboriginal or Torres Strait Islander child. This includes a requirement that no permanent care orders can be made without first consulting with an Aboriginal agency or AICCA.¹⁰⁹

Beyond these provisions, which are generally relevant to contact and placement, there are broader provisions

in places such as the Northern Territory, Queensland, South Australia and New South Wales. These give the relevant Ministers the power to assist the Aboriginal community or AICCAs to develop programs to address the contact of Aboriginal and Torres Strait Islander children with the welfare system.¹¹⁰

Text Box 5.5 demonstrates the importance of AICCA's in addressing the needs of Aboriginal and Torres Strait Islander families who come into contact with, or are at risk of coming into contact with, child protection systems.

Text Box 5.5:

The Lakidjeka Aboriginal Child Specialist Advice Support Service and the Victorian Aboriginal Child Care Agency

'Lakidjeka' is a Yorta Yorta word meaning 'the child' or 'children'.¹¹¹

The Lakidjeka Aboriginal Child Specialist Advice Support Service (Lakidjeka) is run by the Victorian Aboriginal Child Care Agency (VACCA) and operates 10 offices across Victoria.

Lakidjeka provides culturally appropriate advice and consultation around case planning and general decision making concerning Aboriginal and Torres Strait Islander children who come into contact with child protection authorities in Victoria.¹¹² Lakidjeka also looks at the future of at-risk children, including whether there is a need for removals, as well as issues of relocation.

VACCA was the first AICCA in Australia, having started in 1977 to provide state-wide support and child protection services to Koorie families.¹¹³ Today, VACCA is the leading Indigenous child welfare agency in Victoria and provides a range of services to Aboriginal and Torres Strait Islander families and communities such as:

- early intervention
- specialist advice to government
- training and development support for carers
- placement and support for carers who look after Koorie children
- policy, planning and strategic projects
- Link-Up services
- services aimed at strengthening culture
- VACCA playgroup for Koorie children.¹¹⁴

The prominence of AICCAs in Australian child protection systems has increased with greater emphasis being placed on the cultural needs of Aboriginal and Torres Strait Islander children.

However, the extent of an AICCA's involvement is determined by the statutory child protection authority rather than Aboriginal and Torres Strait Islander people, resulting in their role often being consultative and occurring outside of the crucial decision making phases.

(iii) Aboriginal and Torres Strait Islander Child Placement Principle

One of the most significant reforms resulting from the BTH report was to encourage the introduction of the Aboriginal and Torres Strait Islander Child Placement Principle (the Principle) in legislation across all states and territories.

The implementation of the Principle resulted from the efforts by many AICCA's to address the growing number of Aboriginal and Torres Strait Islander children in the care of non-Indigenous families.¹¹⁵

The Principle articulates the preferred order of placement of Aboriginal and Torres Strait Islander children in out-of-home care and recognises that Aboriginal and Torres Strait Islander people are best placed to care for Aboriginal children where it is possible and safe to do so.¹¹⁶ In doing so, it acknowledges the importance of enhancing and maintaining the connections of our children to their family and community as well as their identity and culture.

The preferred placement hierarchy of Aboriginal and Torres Strait Islander children as applied across state and territory law and policy is:

1. Placement with the child's immediate or extended Aboriginal family.
2. Placement with a member of the child's Aboriginal or Torres Strait Islander community.
3. Placement with some other member of the Aboriginal or Torres Strait Islander community.
4. Placement with a non-Indigenous carer.¹¹⁷

Organisations such as SNAICC have argued that the Principle must be conceptualised in broad terms which recognise the interrelated elements such as prevention, partnership, participation and connection.¹¹⁸

The Principle is also underpinned by other distinct elements, namely:

- each child has the right to be brought up within their own family and community
- the participation of Aboriginal and Torres Strait Islander community representatives, external to the statutory agency is required in all child protection decision making, including intake, assessment, intervention, placement and care, and judicial decision making processes
- the requirement of consultation with Aboriginal and Torres Strait Islander families, communities and organisations about child protection intervention, placement and care
- Aboriginal and Torres Strait Islander children in out-of-home care are supported to maintain connection to their family, community and culture, especially children placed with non-Indigenous carers.¹¹⁹

This broader conceptualisation of the Principle recognises the importance of maintaining cultural connections and particularly the BTH report recommendations that no decisions regarding the placement of Aboriginal and Torres Strait Islander children should be made without the participation of AICCA's.¹²⁰

(iv) Application of the Aboriginal and Torres Strait Islander Child Placement Principle

A common criticism in relation to the Principle, particularly amongst Aboriginal and Torres Strait Islander peoples, is the extent to which it is consistently applied in practice.

Some evidence in relation to the application of the Principle suggests that:

- 67 per cent of Aboriginal and Torres Strait Islander children were placed with Indigenous carers, including relatives and non-relatives in placements in 2013-14¹²¹

- a majority of Aboriginal and Torres Strait Islander children have been placed with an Aboriginal relative or kin since 2005¹²²
- the number of placements with non-relative Aboriginal carers has also decreased from 27.5 per cent at 30 June 2004 to 16.3 per cent at 30 June 2013.¹²³

Research released by the Queensland Commission for Children and Young People and Child Guardian suggests that the Principle is only being fully applied in as few as 13 per cent of matters involving Aboriginal and Torres Strait Islander children.¹²⁴

Available information regarding the application of the Principle only measures the outcome of placement decisions and does not capture 'whether the process of achieving children's safety and familial and cultural connection outlined by the Principle has been followed'.¹²⁵

In particular, this data does not tell us if or to what extent Aboriginal and Torres Strait Islander organisations and families participate in decision making about the placement of Aboriginal and Torres Strait Islander children, as is required by various state and territory legislation.¹²⁶

Importantly, this data says nothing about the culture of the systems that identify, support and encourage the participation of Aboriginal and Torres Strait Islander peoples in the lives of our children.

There are some concerns in the sector that this one-dimensional application of the Principle actually legitimises the placement of our children with non-Indigenous people.¹²⁷

Unfortunately there are a number of reasons that the Principle is not consistently applied across states and territories. These reasons include:

- a shortage of the number of Aboriginal and Torres Strait Islander carers compared to the number of Aboriginal and Torres Strait Islander children coming into out-of-home care
- poor systems for the identification and assessment of potential carers
- a lack of understanding regarding the full application of the Principle
- it may not always be in the best interests of children to be placed with their family.¹²⁸

The Principle remains a key priority area amongst AICCAs for future reform.¹²⁹ It has been a focus in the development of the Third Action Plan under the National Framework for Protecting Australia's Children.

In 2012, the Committee on the Rights of the Child urged the Australian Government to intensify its efforts with Aboriginal and Torres Strait Islander peoples to fully realise the Principle and to 'find suitable solutions' for our children in need of alternative care arrangements.¹³⁰

Given the centrality of the Principle to our rights to self-determination, our culture and our identity as Aboriginal and Torres Strait Islander peoples, I hope that efforts to better monitor and implement the Principle are prioritised.

(v) Cultural care plans

Care plans are developed for each child that is placed in out-of-home care in accordance with state and territory legislation.¹³¹

Care plans attempt to address the long-term needs of children whilst they are in out-of-home care. These plans cover issues such as placement, who will have parental responsibility for the child, and arrangements for family contact.

In the case of Aboriginal and Torres Strait Islander children, care plans and long-term placements must consider how a child will maintain connections to their family and culture.

Current reporting on the application of the Principle is silent on the status of cultural care plans during a child's time in out-of-home care.

Some report that whilst this planning is integral to the best interests of Aboriginal and Torres Strait Islander children, it is often applied on an ad hoc basis, without any mechanisms to monitor compliance.¹³²

Another concern is that these plans are often static documents that do not evolve as the child develops and matures. They can become a 'tick-the-box' exercise that limits cultural planning to intermittent cultural activities such as NAIDOC week and do not promote a meaningful role of culture in the child's lived experience.¹³³

Victorian statistics indicate that, at June 2013 cultural plans were being implemented in less than 10 per cent of all cases. This raises significant questions about the implementation of these practices nationally.¹³⁴

Persistent concerns about the lack of an Indigenous workforce, particularly within government departments, and inadequate participation of AICCA's in child protection matters pose obvious barriers for the effective implementation of cultural plans.

Our children have a right to their culture in a way that meaningfully maintains their connections and relationships to other Aboriginal and Torres Strait Islander peoples.

As Andrew Jackomos, Victorian Commissioner for Aboriginal Children and Young People, highlights:

Cultural rights directly impact on a child's ability to meaningfully enjoy every other human right and freedom, let alone their health. Like all human rights, they are universal, indivisible and interdependent.¹³⁵

With so many of our children in out-of-home care, it is clear that we must do better to ensure that the cultural rights of Aboriginal and Torres Strait Islander children are fully realised.

5.7 The need for change

Despite the reforms resulting from the BTH report, Aboriginal and Torres Strait Islander children are still coming into out-of-home care at alarmingly high rates.

Unfortunately, it seems that regardless of efforts across government and non-government agencies we are seeing little impact on this situation.

Whilst the changes brought about by the BTH report have brought greater attention to the cultural needs of Aboriginal and Torres Strait Islander children, alone this is not sufficient.

The role of AICCAs is largely restricted to collaborative and consultative roles where government still holds ultimate decision making power. These agencies, whilst providing specialist and overwhelmingly positive services are generally engaged once families have already come into contact with the care and protection system.

There has been little work done to progress the ultimate goal outlined in the BTH report's recommendations, which is for Aboriginal and Torres Strait Islander people to own and manage their own child welfare services in a true demonstration of self-determination.¹³⁶

Self-determination and self-management are not a panacea to the overwhelming challenge that we face in addressing Indigenous child protection. However, this approach is a necessary foundation to addressing the overrepresentation of our children in out-of-home care.

We know that Aboriginal and Torres Strait Islander people are best placed to provide the solutions to the challenges facing us and a mechanism that facilitates this across the sector is urgently needed.

This must be coupled with a system that also monitors the safety and wellbeing of our children in a way that continually highlights what progress is being made.

It is clear that current approaches to reducing the rate at which our children come into contact with the care and protection system are not working.

To change this, there should be increased efforts to tackle this issue across governments, including measures that prioritise long-term funding, build the capacity of communities, and look beyond the symptoms of disadvantage towards trauma and healing informed approaches.

(a) Child welfare targets

I have previously advocated for the inclusion of justice targets alongside existing Closing the Gap targets to address the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

The contact of our families with the care and protection system is also at crisis point, with little indication that this will improve without significant changes to the way that we monitor and report on these circumstances.

I believe that the development of child welfare targets are urgently needed to address the extent to which our children come into contact with the care and protection system, compared to non-Indigenous children.

The need for targets has been raised previously within the child welfare sector, as well as within the context of developing the National Framework. As Brian Babington has argued:

It is important that tangible, measurable and meaningful goals are set, to which all parties can aspire, and which can give the broader community some confidence that the problem of child abuse and neglect can be addressed.¹³⁷

(i) Why are they important?

I think that the adoption of child welfare targets will give both the Aboriginal and Torres Strait Islander community, as well as government and service providers some assurances that these very difficult matters can be tackled, with better accountability, strategic direction and leadership.¹³⁸

Targets are important because they set goals for government and policy makers that emphasise outcomes and outputs as opposed to just inputs.¹³⁹ As performance measurement tools, they are also a critical means of measuring success within particular time frames.

Child welfare targets will provide a mechanism of accountability and a means by which governments can report on the progress being made.

As with the Closing the Gap targets, I believe that adopting child welfare targets will provide a much needed platform to raise the profile of the social disadvantage of our communities in this area and the need for targeted action.

Of course, targets are not just aspirational goals that are pulled out of thin air. They are the result of a considered and highly technical process informed by experts and an evidence base.¹⁴⁰ Importantly, our communities and organisations must have a central role in the development of any targets.

As I raised in last year's *Social Justice and Native Title Report* in relation to justice targets, they should also be informed by the 'SMART' model used by the National Indigenous Health Equality Council, namely:

- **Specific**
- **Measurable**
- **Achievable**
- **Realistic**
- **Time-bound**¹⁴¹

I believe that a process for the development of child welfare targets is urgently needed so that the gulf that exists between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians is visible.

This could then provide the basis for targeted government and non-government action, guided by a reporting mechanism similar to the Prime Minister's annual Closing the Gap report.

Child welfare is a key area of social disadvantage that is inextricably linked to areas already captured by the Closing the Gap targets.

I believe that through a more holistic approach to existing benchmarks which include the areas of child protection and justice, we can start to address the broader picture of social disadvantage facing our communities.

(b) Specialist Aboriginal and Torres Strait Islander Children's Commissioners

Evidence shows us that when Aboriginal and Torres Strait Islander people exercise control over their own affairs, this results in improved outcomes.¹⁴²

However, we know the role that Aboriginal and Torres Strait Islander people play in the care and protection system is currently limited.

Generally, there is a lack of oversight of child protection systems by Aboriginal and Torres Strait Islander peoples.

The introduction of the role of the Victorian Commissioner for Aboriginal Children and Young People in 2013 has shown great promise. For example, the Commissioner's Taskforce 1000 project, discussed earlier in this chapter, has drawn significant attention to the experiences of Aboriginal children and young people in the child protection system.

This has resulted in some leaders in the sector calling for the creation of additional Aboriginal and Torres Strait Islander Children's Commissioners in other jurisdictions.¹⁴³

As with targets, the introduction of a Commissioner in every state and territory across the country could bring much needed accountability, focus and expertise to issues facing Aboriginal and Torres Strait Islander children.¹⁴⁴

This will also create a platform for the provision of advice about policies, practices and services aimed at promoting the safety, welfare and wellbeing of our communities.

The creation of these positions, alongside improvements to the roles already offered by AICCAAs could bolster the participation and leadership of Aboriginal and Torres Strait Islander peoples.

(c) Institute of Excellence in Indigenous Child Welfare

Another area of reform that has been proposed by the Australian Centre for Child Protection is the creation of a National Institute of Excellence in Indigenous Child Welfare (Institute of Excellence).¹⁴⁵

The Institute of Excellence could complement existing structures, be led by Aboriginal and Torres Strait Islander peoples, and provide the missing link between research, policy and practice.

This would help build the evidence base about what mechanisms and interventions best meet the needs of Aboriginal and Torres Strait Islander children and families.

This is critical given the inability of current data to accurately articulate the underlying reasons that children come into out-of-home care and how this is best addressed.

The paucity and quality of data in this field are common barriers that significantly limit the ability of governments and communities to respond effectively to child protection concerns.¹⁴⁶

The Institute of Excellence could address current gaps, including:

- improving information regarding the extent of abuse and neglect in our communities
- improving information regarding the prevalence of family violence and intergenerational trauma as key drivers in child welfare matters
- providing evaluations for what works in the child welfare space, particularly around healing, early intervention and community led models
- workforce development
- innovation and new models of service delivery
- continuous quality improvement for departments and agencies to strive to deliver best practice.

An Institute driven by Aboriginal and Torres Strait Islander people will also provide the leadership and expertise that is necessary to guide future work in the area of child protection.

5.8 The importance of healing

The importance of healing and trauma informed approaches have consistently been highlighted as critical to addressing the child protection challenges facing our communities.

There is currently no overarching strategy that recognises and seeks to address the prevalence of trauma that exists within our communities. This needs to change.

(a) Healing and child welfare

In 2008, former Prime Minister Kevin Rudd delivered the National Apology to the Stolen Generations, which identified the devastating impact of past removal policies on Aboriginal and Torres Strait Islander families.

It was this moment of national reconciliation that not only saw the establishment of the Aboriginal and Torres Strait Islander Healing Foundation in 2009 (the Healing Foundation), but highlighted the need for healing to address past injustices and trauma experienced by our communities.

The impact of intergenerational trauma on current generations of Aboriginal and Torres Strait Islander children continues to be a key factor for their involvement with the child protection system.

However, other than trauma initiatives funded by the Healing Foundation,¹⁴⁷ there is no coherent national strategy to address the underlying healing and trauma needs of Aboriginal and Torres Strait Islander children and communities.

(b) Intergenerational trauma

The impact of colonisation and past policies of removal against Aboriginal and Torres Strait Islander peoples is not something that is confined to history or members of the Stolen Generations who were directly affected by these experiences.

Rather, these practices continue to have a devastating effect on the lives of other Aboriginal and Torres Strait Islander peoples, particularly our young people who come into contact with the child protection system today.¹⁴⁸

Intergenerational trauma refers to the process by which:

historical trauma is transmitted across generations... it is transferred from the first generation of survivors that directly experiences or witnessed traumatic events to the second and further generations.¹⁴⁹

In this context, the impact of intergenerational trauma has manifested itself in many ways through issues such as family violence, excessive drug and alcohol use, as well as knowledge of parenting itself.¹⁵⁰

As noted by the BTH report, the impact of intergenerational trauma has meant that Aboriginal and Torres Strait Islander peoples, particularly those who have been forcibly separated from their own families have been 'deprived of the experiences to become "successful" parents themselves'.¹⁵¹

The Western Australian Aboriginal Child Health Survey conducted in 2005 also found that Aboriginal and Torres Strait Islander peoples who had been forcibly removed from their parents were also more likely to have contact with mental health services and the criminal justice system but less likely to seek support.¹⁵²

The prevalence of this type of trauma as a factor in current child protection matters is reflected in the fact that:

- intergenerational trauma was present in at least one or more of the child's parents in the Taskforce 1000 study¹⁵³
- children coming to the attention of child welfare agencies frequently had parents who had been removed as children.¹⁵⁴

It is clear that new methods for addressing the contact of Aboriginal and Torres Strait Islander peoples with the child protection system are needed. The Healing Foundation has developed a number of intergenerational trauma projects, one of which will be explored later in Text Box 5.6.

(c) Healing and trauma informed practice

Understanding the links between trauma, social disadvantage and child abuse and neglect are critical to breaking the cycle that brings Aboriginal and Torres Strait Islander children into contact with child protection authorities.¹⁵⁵

It is important that this information, in conjunction with a trauma and healing informed approach is incorporated into future systems of service delivery, policies, laws and programs.¹⁵⁶

While evaluations on healing initiatives, particularly within the child protection context are in their infancy, research undertaken by the Healing Foundation has started to show some promising results.

The Healing Foundation has supported a number of community based initiatives since its establishment and these are starting to show clear links between the benefits of healing and the Closing the Gap objectives:

- with over 72 per cent of coverage given to these priorities and particularly the areas of economic participation, governance and leadership, health, and safe communities¹⁵⁷
- 92 per cent of healing project participants reported improved physical, social, emotional and cultural wellbeing.¹⁵⁸

Healing Foundation projects have also demonstrated clear synergies with IAS frameworks, namely:

- generating 149 employment opportunities for Aboriginal and Torres Strait Islander peoples across 47 projects in 2012-13
- increasing school engagement, behaviours and social skills of Aboriginal and Torres Strait Islander students.¹⁵⁹

Consistent with the international literature, emerging evidence in Australia is pointing to the importance of culturally informed practices as a means of addressing the trauma found in Aboriginal and Torres Strait Islander communities.

We already know that culture is a strong protective factor that promotes resilience and wellbeing. This is particularly the case when healing informed approaches are led by our people and are relevant to our local and collective cultural experiences.¹⁶⁰

The Healing Foundation has identified eight critical components of an Indigenous healing program. These are shown in the diagram below:



(d) Case study: The Murri School

Healing programs that blend traditional and western knowledge systems such as those offered by the Aboriginal and Islander Independent Community School (The Murri School) are showing promise.

These initiatives provide culturally appropriate mental health and social interventions that embed both cultural and clinical practice in Aboriginal and Torres Strait Islander communities.¹⁶¹

The Murri School is an important service that is a key point of engagement between marginalised and vulnerable families and a range of healing, health, and child-focused services. As the case study in Text Box 5.6 demonstrates, a trauma informed and multidisciplinary approach to healing is key to enhancing outcomes for children and their interaction with the child protection system.

Text Box 5.6:

Aboriginal and Islander Independent Community School

Context

The Aboriginal and Islander Independent Community School (The Murri School), is an independent Aboriginal owned and run school that was established in 1986.¹⁶² The school is a coeducational facility that educates children from preschool to year 12. Approximately 95 per cent of the school population are of Aboriginal and Torres Strait Islander descent.

The school is renowned for successfully addressing student attendance and retention rates and uses a model of excellence that encourages and affirms the positive contributions students can make to society.¹⁶³

Approximately 60 per cent of the school population are the subject of a child protection, out-of-home care or juvenile justice order and many of the children are also in kinship or foster care placements. These factors, combined with the prevalence of 'complex trauma' in the lives of the student population means that there is an identified need for a healing service.

How does the program work?

The healing program began in 2012 and is delivered via the 'soft' entry point of the school to encourage children and families to thrive through a combination of:

- therapeutic intervention
- service coordination and family case work
- family camps
- cultural and group activities
- (re)connection with educational and sporting activities.

Since this time, the initiative has developed a comprehensive network of relationships with health, child protection, legal, counselling, mentoring, housing and educational services.

These networks have enabled The Murri School to provide a culturally safe and child-centric initiative that fosters a 'community of care' approach between children, families and other agencies. It provides advocacy for children and uses a bicultural approach to healing that helps families understand the impacts of intergenerational trauma.

The bicultural healing team consists of child and family workers, psychologists, cultural experts and others to work with children and their families and the wider community. Not only does the program act as a cultural brokerage point between families and non-Indigenous agencies, but the breadth of its approach means that it also provides a holistic, 'wrap around service'.¹⁶⁸

Approximately 220 to 300 children and young people access the service in any given six month period. This is complemented by a significant number of family members who also access the service.¹⁶⁹

The activities are designed and delivered to:

- strengthen sense of positive self and cultural identity
- reduce psychological distress
- provide opportunities for healing
- strengthen connection to culture.¹⁷⁰

Goals

The Murri School healing program strives to achieve the following goals:

- children and families are culturally strong, resilient and have high levels of social and emotional wellbeing
- relationships between children and families are healthy, positive and meaningful
- provide a holistic education system that supports the social, emotional and cultural development of children and families.¹⁷¹

However, the program has also identified a number of long, medium and short-term outcomes, including:

- **Long-term:** improved participation and classroom behaviour, improved family functioning, decrease in the length of time families are involved in the child protection system, increase in help seeking behaviours by families.
- **Medium-term:** increased referrals and uptake by families of support services, improved coping skills, family prioritising the wellbeing needs of children.
- **Short-term:** families feel safe and respected; children and families engage with and participate positively in healing activities, greater relationships amongst key stakeholders.¹⁷²

Outcomes achieved

The Murri School healing program is tracking well against its short-term outcomes, having only begun in 2012. So far, the following achievements have been made:

- students are more engaged at school and their behaviour has improved
- healing camps are well attended
- students have developed positive relationships with staff

- improved relationships between children and parents and families.

However, an evaluation of the project has also identified that a number of the program's long-term objectives have been met, namely:

- improved social and emotional wellbeing of young people
- improved resiliency of young people
- improved relationships between young people and their families
- improved service coordination for young people and their families.¹⁷³

It is clear that healing is a critical issue facing Aboriginal and Torres Strait Islander families within the context of child protection. Indeed there is a great need to build the evidence base for healing in Aboriginal and Torres Strait Islander contexts through sustainable funding, research and evaluation of these initiatives.¹⁷⁴

However, whilst targeted strategies and funding are an important means of addressing this complex issue, it must be acknowledged that healing is an ongoing process that will not be solved through one or two programs or funding cycles.¹⁷⁵

Greater awareness about the need for a healing and trauma informed approach to service delivery, including protection and prevention strategies would improve the experience of our people with existing systems.

In conjunction with greater structural reforms, enhanced AICCA participation, and accountability mechanisms, these changes, I believe, may have a positive impact on the rates of Aboriginal and Torres Strait Islander children entering the child protection system.

5.9 Conclusion and recommendations

Whilst the overall interaction of Aboriginal and Torres Strait Islander peoples with the child protection system is pretty bleak, there is some cause for cautious optimism.

The leadership provided by AICCA's is strong and the creation of positions such as that of the National Children's Commissioner and the Victorian Commissioner for Aboriginal Children and Young People has brought a greater profile to the needs of Aboriginal and Torres Strait Islander children.

The establishment of the Healing Foundation has also highlighted the importance of community-led healing and trauma informed approaches as key to addressing some of the challenges that we face in guaranteeing the wellbeing of our children.

Greater investment is urgently needed in systems of accountability, research, long-term funding and the expertise of our agencies in order to address the overrepresentation of our children in out-of-home care.

I am confident that these changes will go some way to improving outcomes for Aboriginal and Torres Strait Islander children and their families. We cannot afford to lose another generation of our children to the child protection system.

Recommendations

Recommendation 17: The Australian Government takes steps to include child welfare targets as a part of the Closing the Gap, to promote community safety and wellbeing and reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples within the child protection system.

Recommendation 18: State and territory governments take steps to establish Aboriginal and Torres Strait Islander Children's Commissioners in their jurisdictions.

Recommendation 19: Australian, state and territory governments should collaborate to support greater investment in research and the quality of information relating to child protection through greater funding and the establishment of a National Institute of Indigenous Excellence in Child Wellbeing.

Recommendation 20: The Australian Government recognises the crucial link between child wellbeing, and early childhood education and care services, and supports greater investment in early childhood services for Aboriginal and Torres Strait Islander children including through renewed funding for Aboriginal Children and Family Centres.

Recommendation 21: The Australian Government supports long-term investment in healing initiatives including services, research and evaluation.

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Appendix 1

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Appendix 2

International Developments

There have been a number of developments that have occurred at the international level during the reporting period from 1 July 2014 – 30 June 2015. Most notably, this included participation by Aboriginal and Torres Strait Islander peoples, including my office, in the following fora:

- the World Conference on Indigenous Peoples 2014 (WCIP) (22-23 September 2014)
- the 7th session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) (7-11 July 2014)
- Indigenous Women and the Commission on the Status of Women (CSW) (9-20 March 2015)
- the 14th session of the United Nations Permanent Forum on the Rights of Indigenous Peoples (UNPFII) (20 April – 1 May 2015).

(a) World Conference on Indigenous Peoples 2014

In last year's report I outlined the background and the preparatory meetings that informed the WCIP. This meeting was held on the 22-23 September 2014 at the United Nations in New York.

This meeting brought together Indigenous peoples from around the world, members of the United Nations, Heads of State, members of civil society and national human rights institutions.

The main purpose of the WCIP was to 'share perspectives and best practices on the realisation of the rights of Indigenous peoples and to pursue the objectives of the United Nations Declaration on the Rights of Indigenous Peoples' (the Declaration).¹

The WCIP produced an action oriented Outcome Document that was informed by extensive consultations with Member States and Indigenous peoples.

Beyond reaffirming the commitment of States to the Declaration, some of the core features of the Outcome Document include:

- encouraging States to ratify the International Labour Organization Indigenous and Tribal Peoples Convention 169 (ILO 169)
- committing States to take steps to implement the Declaration in cooperation with Indigenous peoples via their own institutions, including at the national level by legislative, policy and administrative measures
- committing States to addressing Indigenous disadvantage, particularly in relation to education, health, housing as well as the needs of women, children, youth and people with disability
- committing States to promoting the right of every child to enjoy his or her own culture
- inviting the Human Rights Council in conjunction with Indigenous peoples to review the mandates of its existing mechanisms such as EMRIP to better promote the ends of the Declaration
- committing States to consider ways to better enable the participation of Indigenous peoples' representatives and institutions in meetings of the United Nations
- giving due consideration to the rights of Indigenous peoples in the elaboration of the post-2015 developmental agenda.²

The Minister for Foreign Affairs, the Hon Julie Bishop MP, reiterated the Australian Government's commitment to promoting and protecting the rights of Aboriginal and Torres Strait Islander peoples at the WCIP.

Minister Bishop made specific reference to the Australian Government's commitment towards:

- addressing Indigenous disadvantage
- reconciliation and constitutional recognition
- getting children to school, adults to have a job and for communities to be safe and secure.³

She also stressed the importance of the Outcome Document in making a real difference to the lives of our communities and indicated the Australian Government's commitment to better engagement with our peoples on 'decisions that affect our lives'.⁴

Although, as already outlined in this report, engagement with Aboriginal and Torres Strait Islander peoples across many issues has been conspicuous by its absence, I welcome the Australian Government's willingness to breathe life into the Declaration.

I believe that steps to progress this must first start with meaningful engagement with our communities and a National Implementation Strategy, which I have raised in previous *Social Justice and Native Title Reports*.

(b) Expert Mechanism on the Rights of Indigenous Peoples

The 7th session of EMRIP was held in Geneva in July 2014. As one of two Indigenous specific fora, EMRIP has a standing agenda item on the Declaration. It also explored other issues, including the WCIP and continuation of the study on access to justice and the promotion and protection of the rights of Indigenous peoples.⁵

The Human Rights Council requested the EMRIP to continue its study on access to justice in resolution 24/10 and present its findings to the Council at its 27th session. The study had a focus on the promotion and protection of the rights of Indigenous peoples, particularly with regards to restorative justice, Indigenous juridical systems, Indigenous women, children and youth and persons with disabilities.

Alongside submissions from state and non-state actors as well as other Indigenous peoples from around the world, a number of submissions were made to this study by the Australian Government, Aboriginal and Torres Strait Islander organisations and the Australian Human Rights Commission.

The submissions highlighted the importance of recognising the unique needs and rights of Indigenous women, children and youth and persons with a disability.

In its report, EMRIP gave the following advice to States, including Australia, regarding ways to better promote Indigenous peoples' access to justice:

- States must recognise Indigenous peoples' right to maintain, develop and strengthen their own juridical systems
- States should adopt a holistic approach to access to justice for Indigenous women, children and youth and persons with disability and take measures to address the root cause of multiple discrimination facing these groups
- States should make greater effort to disaggregate data regarding their criminal justice systems so that a clearer picture of Indigenous women, children and youth and persons with disability in detention can emerge
- States should work with Indigenous peoples to develop alternatives for Indigenous children in

conflict with the law, including in the design and implementation of culturally appropriate juvenile justice services and the use of restorative justice approaches.⁶

(c) Indigenous Women and the Commission on the Status of Women

The 59th session for the CSW was held at the United Nations in New York from 9-20 March 2015. The primary focus for this event was the Beijing Declaration and Platform for Action, including current challenges affecting gender equality and the empowerment of women.

The session was also an opportunity to review progress on the implementation of the Beijing Declaration, 20 years after it was adopted at the Fourth World Conference on Women in 1995. This included an opportunity for both the Secretariat of the UNPFII and the International Forum on Indigenous Women to take stock of and celebrate the achievements of Indigenous women and girls worldwide in the realisation of the rights of their peoples in the international space during this time.

Some key achievements that were highlighted include:

- a great legacy of female leaders at the United Nations, from the Working Group on Indigenous Populations, to women appointed as Special Rapporteurs and on various EMRIP and UNPFII expert panels
- the strong voice of women and girls through groups such as the International Forum on Indigenous Women and the Women's and Youth Caucuses in fora such as EMRIP, WCIP, UNPFII and the CSW
- the general enrichment of all fora by the increased participation of Indigenous women from around the world including in key issues affecting Indigenous peoples and key work of the United Nations, such as the Declaration, Millennium Development Goals and WCIP
- over 100 recommendations adopted by the UNPFII directly referring to the situation of Indigenous women.⁷

(d) United Nations Permanent Forum on Indigenous Issues

The 14th session of the UNPFII was held in New York from 20 April – 1 May 2015. As with EMRIP, the UNPFII includes a standing agenda item on the implementation of the Declaration, however other items explored included:

- outcomes of the WCIP
- post-2015 development agenda
- youth, self-harm and suicide
- a half-day discussion on the Pacific region
- a half-day discussion on the Dialogue on an Optional Protocol to the Declaration
- a focus on the economic, social and cultural rights of Indigenous peoples.

National Children's Commissioner Megan Mitchell and I delivered a joint statement with the Australian Government on the youth, self-harm and suicide agenda item, which highlighted that:

- despite making up less than 3 per cent of the Australian population, Aboriginal and Torres Strait Islander children and young people comprise 26.4 per cent of all suicide deaths for those under 18 years of age
- there was a great need for a focused national research agenda to inform an effective suite of intervention mechanisms
- a comprehensive whole of government response is required to address this issue.⁸

The Australian Government reiterated through its statement that this issue was a national priority that required new engagement with Aboriginal and Torres Strait Islander peoples to deliver real and lasting change.

It is important to acknowledge the election of Cobble Cobble Aboriginal woman Professor Megan Davis as Chair of the UNPFII during the 14th session, replacing Dr Dalee Sambo Dorouh on 20 April 2015.⁹

I wish to congratulate Professor Davis on this significant achievement and note the important role that she has played in the international space since being elected as a member of the United Nations body since 2010.

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Appendix 3

Australian Human Rights Commission complaints

The Australian Human Rights Commission (the Commission) fulfils a number of roles, including around human rights awareness, policy and advocacy and the investigation and conciliation of complaints made under federal human rights and discrimination law.

The Commission receives a wide variety of complaints, including from Aboriginal and Torres Strait Islander peoples concerning individual and systemic complaints of discrimination. The nature of these complaints help to inform the policy and advocacy work of the Commission.

As was the case in 2013-14, the nature of complaints made by Aboriginal and Torres Strait Islander peoples in 2014-15 were about racial discrimination, as seen in Table 1.1.

I thank the Commission's Investigation and Conciliation Service for providing these details for the purposes of this report and thank them for their continued assistance and significant work.

(a) Complaints by Aboriginal and Torres Strait Islander peoples received in 2014-15

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

Table 1.1: Number and percentage of complaints by Aboriginal and Torres Strait Islander peoples received 2014-15

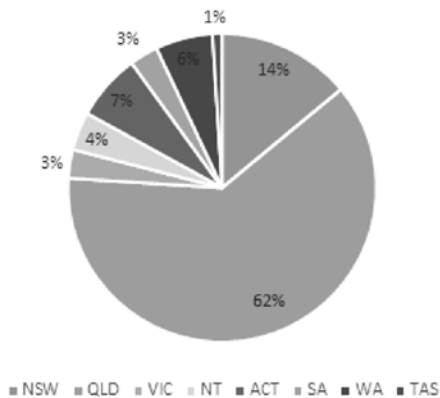
| | Racial Discrimination Act | | Sex Discrimination Act | | Disability Discrimination Act | | Age Discrimination Act | | Australian Human Rights Commission Act (AHRCA) | | Total | |
|------------------------------|---------------------------|-----|------------------------|-----|-------------------------------|-----|------------------------|-----|--|-----|-------------|-------------|
| Aboriginal | 151 | 38% | 8 | 2% | 21 | 3% | 3 | 2% | 12 | 3% | 195 | 9% |
| Torres Strait Islander | 1 | - | 0 | - | 0 | - | 0 | - | 0 | - | 1 | - |
| Both of the above | 0 | - | 1 | - | 1 | - | 0 | - | - | - | 2 | - |
| None of the above or unknown | 242 | 62% | 436 | 98% | 726 | 97% | 142 | 98% | 451 | 97% | 1997 | 91% |
| TOTAL | 394 | | 445 | | 748 | | 145 | | 463 | | 2195 | 100% |

Table 1.2: Outcome of complaints from Aboriginal and Torres Strait peoples finalised in 2014-15

| Outcome | Number of finalised complaints by ATSI peoples | Percentage of finalised complaints by ATSI peoples | Percentage of all finalised complaints |
|-----------------------|--|--|--|
| Conciliated | 121 | 61% | 51% |
| Terminated/declined | 47 | 24% | 23% |
| Withdrawn | 10 | 5% | 16% |
| Discontinued | 19 | 10% | 9% |
| Reported (AHRCA only) | - | - | 1% |
| Total | 197 | 100% | 100% |

Figure 1.1 provides the geographic origin of Aboriginal and Torres Strait Islander complainants for the year 2014-15

Figure 1.1: Complaints received from ATSI peoples in 2014-15 by State/Territory of complainant*



* The percentage of complaints received from QLD in this reporting year is comparatively very high due to receipt of a number of individual complaints relating to the same issue.

(b) Examples of complaints from Aboriginal and Torres Strait Islander peoples

The following are examples of complaints from Aboriginal and Torres Strait Islander peoples conciliated by the Commission in 2014-15:

(i) Complaint about transport services

The complainant who is Aboriginal, advised that he has a number of disabilities including an acquired brain injury and a genetic condition that causes inflammation of the blood vessels, including bloodshot eyes. The complainant said that because of his disabilities he cannot drive and so relies on a private bus company for transport. The complainant claimed that on a number of occasions, a driver employed by the company refused to let him on the bus because of his disabilities.

On being advised of the complaint, the company indicated a willingness to participate in a conciliation process. The complaint was resolved with an agreement that the driver and the company would provide the complainant with a written apology and the company would pay the complainant \$15,000 compensation. The company also agreed to tell drivers about the assistance the complainant needed when using the service and provide the complainant with a contact point in the company if he experiences any future problems. The company confirmed that the driver in question had been disciplined.

(ii) Complaint of racial discrimination and racial hatred in employment

The complainant's son is Aboriginal and worked as an apprentice in a small business. The complainant's son claimed that in referring to Aboriginal people, his boss said "*just shoot'em, just shoot the f***ing c***s*". The complainant's son left his apprenticeship.

On being advised of the complaint the business agreed to participate in conciliation. The complaint was resolved with an agreement that the business would pay the complainant's son \$5,000 in compensation for hurt and distress, introduce an anti-discrimination policy and undergo Aboriginal cultural awareness training.

Appendix 4

History of the First Peoples Disability Network

The origins of the First Peoples Disability Network as an organisation can be traced back to a 1999 meeting in Alice Springs at which Aboriginal and Torres Strait Islander people with disability came together from all states and territories.

This gathering unified Aboriginal and Torres Strait Islander people with disability together under a shared purpose to advance their rights and interests.

Since that watershed moment, the First Peoples Disability Network, initially as an unincorporated body, has been a fierce active advocate for the rights of Aboriginal and Torres Strait Islander people with disability.

In 2002 the Aboriginal Disability Network NSW incorporated to give Aboriginal and Torres Strait Islander people with disability living in NSW a voice of their own. Lester Bostock was the inaugural chair with Damian Griffis the Executive Officer.

Damian Griffis then undertook a major consultative project in 2004-05, visiting Aboriginal communities across NSW to discuss the unmet needs of Aboriginal people with disability, concluding with the *Telling It Like It Is* report.

Over the next 3 to 4 years a number of national gatherings of Aboriginal people with disability were held which culminated in the First Peoples Disability Network (Australia) being incorporated in 2010 as the national peak body organisation to advocate for the rights of Aboriginal and Torres Strait Islander people with disability, their families and communities.

The First Peoples Disability Network is proudly constituted and governed by Aboriginal and Torres Strait Islander people with disability. Gayle Rankine was the inaugural chair and Damian Griffis the CEO.

From 2013 onwards the First Peoples Disability Network began to make its mark on the Aboriginal and Torres Strait Islander landscape and finally the issues confronting Indigenous Australians with disability were receiving the attention they warranted.

Their presence was well and truly on the table when they launched their *Ten Point Plan for the Implementation of the National Disability Insurance Scheme in Aboriginal and Torres Strait Islander Communities* at Parliament House, Canberra in May 2013.

The CEO, Damian Griffis chaired a Ministerial Indigenous Working Group to provide advice to the Australian Government about access targets for First Peoples under the National Disability Insurance Scheme and the First Peoples Disability Network appeared before the United Nations Committee on the Rights of Persons with Disabilities in Geneva.

In November 2014, the Network took on a leadership role in the roll out of the National Disability Insurance Scheme, chairing an intra-agency meeting of Australian Government departments to develop an Aboriginal and Torres Strait Islander disability action plan under the National Disability Strategy.

Recognition of both the efforts and advocacy of the Network at an organisational and personal level came in late 2014 when the First Peoples Disability Network was awarded the Improving Human Rights Award at the National Disability Awards.

Then at the Australian Human Rights Commission Awards in 2014, CEO Damian Griffis was awarded the Tony Fitzgerald Memorial Community Award in recognition of his long record of advocating the rights of Aboriginal and Torres Strait Islander people with disability.

The First Peoples Disability Network has, at long last, given Aboriginal and Torres Strait Islander people with disability a voice and has made them visible to the Australian community.

Note: Terminology

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

The word 'peoples' recognises that Aboriginal peoples and Torres Strait Islanders have both a collective and individual dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.¹

There is a growing debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.²

Accordingly, the terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this Report.

Sources quoted in this Report use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. International documents frequently use the term 'indigenous peoples' when referring to the Indigenous peoples of the world. To ensure consistency, these usages are preserved in quotations, extracts and in the names of documents.

¹ GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 30 September 2015).

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 30 September 2015).

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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/>

