

Chapter 1 Introduction

A united Australia which represents this land of ours; values the Aboriginal and Torres Strait Islander heritage and provides justice and equity for all.

Vision of Reconciliation, Council for Aboriginal Reconciliation.¹

This is my fifth *Social Justice Report* as the Aboriginal and Torres Strait Islander Social Justice Commissioner. The focus of this year's report is on human rights protections for Indigenous peoples, remote Indigenous education, Indigenous healing and the progress on achieving Indigenous health equality by 2030.

1. A time for change

As I reflect on the past eighteen months, it is the National Apology to the Stolen Generations on 13 February 2008 that stands out as the most meaningful moment. The Prime Minister's Apology to the Stolen Generations transformed decades of fear, pain and hurt into a moment of national reconciliation for Australia. The Apology was the first step in setting a bold and ambitious future for Indigenous peoples in Australia.

The Apology was a milestone that marked a change in attitude, a new way of doing business, a new partnership between Indigenous peoples and governments.

Over the last 18 months, there have been changes across most areas of Indigenous affairs. Some communities have had to deal with changes to local government, regionalisation of their representative structures, as well as changes to the Community Development Employment Program (CDEP), Welfare to Work and other welfare programs and reforms to Indigenous education assistance. Indigenous communities have also been dealing with significant changes to the rules that govern Indigenous corporations being phased in, as well as changes to native title laws, issues relating to water rights, environmental protection and climate change, and so forth. I am consistently told by Indigenous peoples that they are overwhelmed by the level and the constant nature of change occurring in their communities.

However, as the federal government has clearly marked, now is the time for change and to borrow the words of Barack Obama, its time to set a vision for 'change we can believe in'.

The reference to Barack Obama is a timely one. The sense of hope and ambition that he has engendered among the American community and across the world is extraordinarily exciting. It is amazing for the feeling of unity and inclusion that it creates.

Obama has been described by a number of commentators as a 'transformational' figure. Transformation is what we also need here in Australia on issues facing Aboriginal and Torres Strait Islander peoples.

¹ Council for Aboriginal Reconciliation, *The Council for Aboriginal Reconciliation Vision Statement*, http://www.austlii.edu.au/au/orgs/car/council/spl98_20/council.htm (viewed 6 February 2009).

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The Prime Minister himself has voiced this possibility. In the Apology speech he expressed this hope as follows:

let us seize the day... Let (the Apology) not become a moment of mere sentimental reflection. Let us take it with both hands and allow this day, this day of national reconciliation, to become one of those rare moments in which we might just be able to transform the way in which the nation thinks about itself...²

So if we look back to such events at the beginning of the Rudd government, we can see that transformation of this situation is possible and that with leadership it can capture the imagination of the Australian community, unify us and make us stronger.

Just as many people will remember what they were doing when Barack Obama was elected President of the USA, an overwhelming majority of Australians will remember what they were doing when the Prime Minister apologised to the stolen generations.

I think many people were taken aback by how powerful and emotional the Apology was, given that, for many years this was something that many Australians had been led to believe was something to fear.

It provided a glimpse – if just for one day – of what our society can be at its very best and how *good it feels*.

The Apology is also emblematic of what governments should generally be striving to achieve – namely, that their efforts should be based in a steely determination to uplift and support communities.

The Prime Minister has made very clear what is critical in achieving this – a new partnership and a new relationship. As he stated in the Apology speech:

symbolism is important but ... It is not sentiment that makes history; it is our actions that make history. Today's apology... is also aimed at building a bridge between Indigenous and non-Indigenous Australians—a bridge based on a real respect...³

Our challenge for the future is to cross that bridge and, in so doing, to embrace a new partnership between Indigenous and non-Indigenous Australians.

I have taken the Apology in the spirit that I believe it was intended – as the 'line in the sand' that marks the beginning of a new relationship and a new era of respect.

2. Milestone achievements

In the course of the past year I delivered six speeches in a series I called *Essentials for Social Justice*. Each speech discussed a particular challenge that we face as a nation if we are to realise true equality and respect for our Aboriginal and Torres Strait Islander brothers and sisters. The speeches identify shared ambitions where every Australian, both in government and in the community, has a role to play:

- With governments providing leadership, being accountable for their actions, embracing genuine partnership with Indigenous peoples and not being the barrier to our advancement – as they so often are.
- With Indigenous peoples embracing the prospect of a better life for our children and families, recognising that we need to be at the centre of creating such change and accepting the primary responsibility for the wellbeing of our communities.

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 172 (The Hon Kevin Rudd MP, Prime Minister).

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 171 (The Hon Kevin Rudd MP, Prime Minister).

- And with the broader Australian community offering their support and treating us with dignity and respect, with the firm *expectation* that we will have the same opportunity to thrive and prosper as *all other* Australians do, and where our cultures are celebrated as among the great strengths of our diverse nation rather than being feared.

The first speech in this series, entitled *Sorry* and delivered in December 2007 outlined an agenda for addressing the needs of the stolen generations and the delivery of a national apology.

The second speech, entitled *Reform*, outlined an agenda for changing the way governments do business and are accountable for their performance.

The third speech, entitled *Protecting Indigenous children*, identified a range of lessons that we can all learn from Indigenous communities that are facing up to the violence in their communities. I also identified a way forward on the Northern Territory Intervention to ensure that it is non-discriminatory and ultimately capable of creating sustainable outcomes for our communities.

Close the Gap, the fourth speech, reflected on what is needed to achieve health equality for Indigenous Australians within a generation, and to create equal life chances for Indigenous children. There were some good advances on this deceptively difficult challenge over the past year, but there is still much to do.

The fifth speech, entitled *Caring for Culture, Caring for Country*, discussed the role of our traditional lands and culture in achieving economic development for our communities as well as in contributing to the challenges of climate change and other environmental issues.

The speeches identified major challenges for this nation in developing options for mitigating climate change without further displacing the rights of Indigenous peoples. For example, the ongoing lack of engagement with the Indigenous nations of the Murray-Darling and the lack of respect for the cultural importance of this area is extremely disturbing. It amounts to a contemporary form of dispossession of Indigenous peoples from their lands and waters.

The final speech, simply entitled *The future*, reflected on the achievements in the first twelve months of the new government performance in addressing these essentials for social justice. And in doing so, I also identified the challenges that exist for the future:

- first, to engender a sense of hope and ambition that things can change for the better; and
- second, to identify what some of the critical elements of this change might involve or look like.

The other milestone event that comes to mind as I reflect is the signing of *Statement of Intent to Close the Gap on Indigenous Health Equality* ('Statement of Intent').

Building on the recommendations of the *Social Justice Report 2005*, the National Indigenous Health Equality Summit in Canberra (18 – 20 March 2008) brought to culmination the two years of work of the Close the Gap Campaign on Indigenous Health Equality, since 2005. The Statement of Intent commits government to work in partnership, to:

Developing a comprehensive, long-term plan of action, that is targeted to need, evidence-based and capable of addressing the existing inequities in health services, in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians by 2030.⁴

4 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008). At www.humanrights.gov.au/social_justice/health/statement_intent.html (viewed 28 January 2009).

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And the government has committed to do so with the full participation of Aboriginal and Torres Strait Islander peoples; by respecting and promoting the rights of indigenous peoples, and by monitoring efforts, in accordance with benchmarks and targets.

We have now made a substantial breakthrough on this most pressing human tragedy. That breakthrough is to convince policy makers, politicians and the general public that the goal of health equality for all Australians within a generation is realistic and achievable if we act together in partnership, and in a targeted and determined manner.

These commitments provide the basis for the cultural shift necessary to face up to the challenges that exist for Indigenous peoples in this country. While the commitments were made in relation to Indigenous health equality, they also form a template for the type of approach that is needed across all areas of poverty and disadvantage experienced by Indigenous peoples.

The government has recognised this, and has made equally important commitments in the areas of education, employment and early childhood development.

The Statement of Intent is one of the most significant compacts between Australian governments and civil society in Australian history. It should be seen as a foundation document for a national effort to achieve Indigenous health equality by 2030, setting out key principles that should underpin national efforts to that end. It was another hallmark and indication of the ambitious agenda government and Indigenous peoples can set and achieve together.

3. Follow-up action on *Social Justice Report 2007*

In my *Social Justice Report 2007* I committed to report on 'the actions taken by the government to address the concerns identified in this report relating to non-compliance with Australia's human rights obligations and the *Racial Discrimination Act 1975* (Cth) (*'Race Discrimination Act'* 'RDA'). In particular, the Social Justice Commissioner will identify the response of the Australian Government to the 14 recommendations contained in this report'.⁵

The first two of these recommendations related to family violence and child abuse in Indigenous communities. The remaining 12 recommendations came out of my human rights analysis of the Northern Territory Emergency Response ('NTER'/'NT Intervention').

Disappointingly, the Government has not implemented the majority of the recommendations contained in my *Social Justice Report 2007*. In particular, I note that there continues to be in place legislation and measures that are racially discriminatory, that are not compliant with the *Race Discrimination Act* and raise significant human rights concerns.

In spite of this, I am pleased to report that the following few elements of the 14 recommendations have been implemented since my last report:

- With respect to Recommendations 1 and 2 on addressing family violence and child abuse in Indigenous communities, I welcomed the government's initiative in establishing the National Council to Reduce Violence against Women and their Children (the 'Council') on 26 May 2008. The Council was given the responsibility to oversee the Government's commitment to establish and implement the *National Plan to Reduce Violence against Women and their Children* (the 'Plan'). The Commission has made

5 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), p 309.

submissions and held discussions with the Council on addressing family violence in Indigenous communities. The Council was expected to release its report in December 2008.

- Recommendation 7 was in response to my concerns with changes to the permit system under the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (effective 17 February 2008) and the extent to which they could be classified as a ‘special measure’ under the RDA. Although not fully implementing this recommendation, I note that the Minister has not exercised her discretion to remove permits.

The Minister for Families, Housing, Community Services and Indigenous Affairs also introduced a Bill in Parliament in February 2008⁶ to reinstate aspects of the permit systems that were removed under the NT Intervention. The Bill proposes to remove the provisions enacted by the former Government, but retain the capacity of the Commonwealth Minister to permit selected individuals or classes of individuals to enter any specified Indigenous land. However, the Senate did not pass the Bill and voted in support of retaining the existing measures that are not compliant with the RDA.⁷

- Recommendation 11(a) to reinstate CDEP in the 25 prescribed communities and five town camp regions in the Northern Territory was implemented on 30 June 2008. The government has also distributed a discussion paper on ‘The Future of CDEP and Indigenous Employment Programs’ in May 2008, with a view to reviewing CDEP and preparing a report to be completed in 2009.
- Recommendation 11(b–d) pertained to introducing voluntary income management measures; reviewing and amending the income management scheme to ensure compliance with human rights standards; and developing and introducing voluntary income management and financial literacy programs for welfare recipients.

Since my last report, the Government has confirmed it will maintain the mandatory income management scheme under the NT Intervention, but that it will look to revise the scheme to ensure it will conform with the RDA and will not involve suspension of the Act.⁸ In addition it has also introduced the following new income management schemes under the NT Intervention legislation:⁹

6 Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Emergency Response Consolidation) Bill 2008.

7 In my *Social Justice Report 2007* I found that the RDA excludes from the ‘special measures’ exemption any provisions that authorise management of property without the consent of Aboriginal and Torres Strait Islander people or prevent them from terminating management by another of land owned by them. To be consistent with the RDA, the measures relating to the management of land must be undertaken with the consent of the landowners, and this was not obtained for the changes to the permit system. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2007), p 263.

8 Commonwealth Government, Statement: ‘Australian Government Initial Response to the NTER Review’ (23 October 2008).

9 *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*

- The Family Responsibilities Commission (FRC) commenced in Queensland on 1 July 2008.¹⁰ The FRC has the power to recommend Indigenous and non-Indigenous individuals who have lived in the designated areas of Hope Vale, Aurukun, Mossman Gorge, and Coen for three months, who are recipients of a welfare payment or are CDEP participants, and who aren't meeting parental and community responsibilities¹¹ for income management.

Although the majority of people subject to the FRC are Indigenous, the application of Part II of the *Race Discrimination Act* is suspended for the FRC, which includes the operative provisions prohibiting racial discrimination.

However, unlike the mandatory income management scheme in the Northern Territory, under the FRC, income management is a measure of last resort and only applies to identified individuals, rather than automatically applying to everyone within the designated areas.

- Trial income management scheme – Kununarra and Cannington, WA: Commenced in WA on 24 November 2008.¹² Under the scheme up to 70% of welfare payments and 100% of lump sum payments can be quarantined from parents whose children are considered at risk.

Like the Queensland scheme, the WA trial is a measure of last resort and only applies to identified individuals, rather than to everyone within the trial site.

However, it differs from the other schemes identified above in that at least one of the trial sites is not predominantly populated by Indigenous peoples and it is subject to the RDA.

Although the government has not implemented my recommendations for income management to date, aspects of the schemes that the Government has introduced have begun to be responsive to my recommendations. For example, both the Queensland and WA schemes are a preferable approach to differing degrees because they are applied on the basis of the individual circumstances of families, and so have the capacity to be more targeted to need. Further, making the WA scheme subject to the *Race Discrimination Act* provides for the scheme to be applied in a non-discriminatory way.

However, I have also noted that for such schemes to be effective, there also needs to be proper engagement with communities that ensures affected people are provided the assistance they need to ensure their children are fed, clothed and schooled. I have also noted that any form of income management needs to be accompanied by a suite of services to assist families – income management of itself is a blunt tool to meet the challenges facing many people.

The government has indicated that it will be drawing on the findings of each of the three income management models to implement broader

10 The Family Responsibilities Commission was established by legislation (*Family Responsibilities Act 2008* (QLD)) that is authorised by the same legislative provisions as the income management regime of the Northern Territory Intervention.

11 For instance in situations where: a child has three unexplained absences from school; a person is subject to a child safety notification or report; or is convicted of an offence; or breaches a public housing tenancy agreement.

12 The WA Welfare trials were introduced under the *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth).

welfare reforms, possibly within 12 months. It is hoped that the further welfare reforms will ensure they are consistent with human rights standards, as per my recommendations.

- The Review of the NT Intervention implemented my fourteenth recommendation to: independently monitor Intervention measures, 12 months following their commencement.

In its submission to the Review, the Commission noted the limited time and capacity provided for the Review. The Commission also noted the Review would be constrained by the lack of benchmarking and monitoring data collected prior to the Northern Territory Emergency Response Review Board's ('Review Board') formation in June 2008. At the commencement of the NT Intervention the Commission noted that there were insufficient baseline measures in place to allow a comparison of the circumstances of Indigenous peoples before and after the NT Intervention.¹³ The lack of benchmarking and monitoring data and processes limits the capacity to assess the effectiveness of the NT Intervention.

The Commission, in light of the limited progress made by government in implementing the 14 recommendations of the *Social Justice Report 2007*, recommended the Review Board call for the full implementation of the ten point plan and associated recommendations made in the *Social Justice Report 2007*.

The Review Board's report, released in October 2008 found that the NT Intervention had made some positive changes in the Northern Territory, for instance in terms of increased police presence in communities, measures to reduce alcohol-related violence, improving quality and availability of housing, health and wellbeing of communities and education. However, the Review Board noted that the NT Intervention had in many respects not succeeded because it had failed to engage with the very people it was intended to help. The Review Board noted that local communities saw the significant government investment under the NT Intervention as 'an historic opportunity wasted because of its failure to galvanise the partnership potential of the Aboriginal community'.¹⁴

Despite the advantages and disadvantages of the NT Intervention, in light of the acute levels of deprivation and disadvantage continuing to exist in many communities, the Review Board found that the NT Intervention should be continued, but that there needed to be improvements made. This was particularly in terms of better coordination by government in delivery of services and increased engagement with affected communities on the design and delivery of services. The Review Board placed significant emphasis on the need for the government to reframe the NT Intervention so that it is undertaken in conjunction with Indigenous communities, rather than involuntarily imposed on them:

The most essential element in moving forward is for government to re-engage with the Aboriginal people of the Northern Territory.¹⁵

The three overarching recommendations made by the Review Board were:

- The Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably

13 Milroy, H., (Associate Professor, Centre for Aboriginal Medical and Dental Health University of Western Australia) personal email correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2007.

14 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 10.

15 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 11.

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high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory;

- In addressing these needs both governments acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership; and
- Government actions affecting Aboriginal communities respect Australia's human rights obligations and conform to the *Racial Discrimination Act 1975*.¹⁶

In addition the Review Board made recommendations in relation to: welfare reform, employment, law and order, education, family support, health, housing, land reform, coordination, re-engagement, funding, governance, data and evaluation.

The recommendations of the Review Board were closely consistent with the recommendations made in my *Social Justice Report 2007*, particularly with regards to removing suspensions of the *Race Discrimination Act* and addressing the human rights concerns I had identified with the Intervention.

On 23 October 2008, the federal government issued an Initial Response to the Review Board's report,¹⁷ outlining the government's intention to continue the current stabilisation phase of the NTER for the next twelve months before transitioning to a long-term, development phase. The government stated that it agreed with the Report's three overarching recommendations and will act on them in progressing towards the development phase of the Intervention.

The key elements of the stabilisation phase identified in the Minister's statement included:

- maintaining compulsory income management, the five-year leases, and alcohol and pornography controls;
- legislating in the first half of 2009 to ensure people subject to the NT income management regime have access to the full range of appeal mechanisms afforded to other Australians, including through the Social Security Appeals Tribunal and the Administrative Appeals Tribunal;
- asking the NT Valuer-General to determine a reasonable rent for all existing five-year leases and payment commencing automatically; and examining the scope to reduce the current boundaries of five-year leases; and
- negotiating with traditional owners for long term leases to continue. This is to ensure that beneficial activities already under way, in particular, the Australian Government's \$547 million investment in new housing, housing upgrades and reformed tenancy arrangements, can be progressed.

The elements of the transition period between the stabilisation phase and the development phase are:

- the ongoing development and implementation of our policies to close the gap on Indigenous disadvantage;
- an immediate, renewed emphasis on community engagement and development to build the foundations for more lasting change; and

16 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 12.

17 Commonwealth Government, Statement: 'Australian Government Initial Response to the NTER Review' (23 October 2008).

- the Government designs and consults on a new compulsory income management policy which does not involve the suspension of the *Race Discrimination Act*. These consultations will acknowledge that not all welfare recipients are unable to manage their finances in the interests of dependent women and children.

The commencement of the development phase will be marked by the introduction of legislation to lift the suspension of the *Race Discrimination Act* in the Spring 2009 sittings of the Parliament.

However, beyond this initial commitment made in October 2008, as at the time of writing this report, the Government has issued no further detailed response addressing the majority of recommendations of the report. Irrespective of this absence of a considered response, the government has continued to implement the NT Intervention without adequately addressing the significant problems highlighted both in my *Social Justice Report 2007* and in the Review Board's report:

Addressing specific concerns in Aboriginal communities does not require the exclusion of fundamental human rights such as the *RDA*. This was also made clear in the Aboriginal and Torres Strait Islander Commissioner's Social Justice Report which identified a 10-point 'action plan' to modify the NTER to ensure compliance with human rights.

From the Board's perspective, it is critical to ensure that the fundamental issues concerning the exclusion of the *RDA*, the right to procedural fairness including the right to seek external merits review, the exclusion of anti-discrimination laws in the Northern Territory and the deeming of measures as 'special measures', are all matters that require immediate change. Changes to other measures, such as income management, the acquisition of land, the development of community development partnership agreements and community development plans also need to be made, but may require an intermediate period to transition from the present scheme to alternative arrangements as identified by the Board in its recommendations in chapter 3.

In the Board's view, there are no convincing arguments for excluding human rights principles and the *RDA*. Consistent with a key theme of the review the Board believes the re-engagement process has to be underpinned by acknowledgment of the informed consent principle and human rights provisions.

Recommendations on human rights: Government actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975*.¹⁸

The recommendations of the NT Review Board provide government an opportunity to re-engage with Indigenous communities and give Indigenous communities both a role in the running of their communities and in determining their own futures. Hopefully it will be an opportunity that is taken.

4. *Native Title Report 2008*

The election of the new federal government in 2007 brought a raft of policies aimed at improving the social and economic situation of Aboriginals and Torres Strait Islanders, many of which are inextricably linked to native title.

The National Apology highlighted the devastating impacts of dispossession and removal of Indigenous peoples from their traditional lands, resulting in the disruption of connection to their country and their culture. This continues to impact upon the ability or success of Aboriginal and Torres Strait Islander peoples claiming native title,

18 Northern Territory Emergency Review Board, *Northern Territory Emergency Response: Report of the NTER Review Board*, Commonwealth of Australia (2008), p 47.

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with the cruel twist that the more an Aboriginal or Torres Strait Islander has been hurt by government policy, the less likely they are to have their native title recognised.

In this year's *Native Title Report*, in addition to examining the progress the government has made in achieving greater rights and equality for Indigenous peoples, through native title, the two thematic foci for this year's report are climate change and water. While both issues are of national significance, I focus on the specific implications and impacts on Indigenous peoples and their rights. I also examine the protection of Indigenous knowledge in policies and processes developed in response to these issues.

In examining the effect of climate change and water on Indigenous peoples in Australia, I make a number of recommendations aimed at heightening Indigenous participation and engagement in meeting these challenges. I have included two case studies which illuminate the importance of these issues, exploring the potential impacts of climate change on a number of human rights of Torres Strait Islanders and the Indigenous nations of the Murray-Darling Basin.

The report also considers three important native title cases before the courts in 2007–2008; Noongar, Rubibi and Griffiths, followed by a discussion of the Blue Mud Bay case which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These cases consider how the *Native Title Act* and other legislation impacts on the human rights of Aboriginal and Torres Strait Islander peoples.

As I have endeavoured to do in previous reports, the *Native Title Report 2008* considers issues relevant to Aboriginal and Torres Strait Islander peoples now and for the future.

5. Contents of the *Social Justice Report 2008*

At a time now where we can believe change is possible, where there is a level of bipartisan support, as well as support across federal and state and territory governments, we have an unprecedented opportunity to turn these commitments into sustained action.

Chapter two examines the current gaps in protection for Indigenous peoples' human rights and identifies formal protections needed to protect Indigenous peoples' rights into the future.

Since 1788, as Indigenous peoples we have consistently asserted our rights. We have repeatedly and publicly called upon governments to formally recognise our human rights and to protect us from racial discrimination.¹⁹

Our legal system has enshrined very few of the rights contained in the two main international human rights treaties, on economic, social and cultural rights and civil and political rights. While this affects all Australians, the consequences of such a lack of protection impacts the most on those who are the most vulnerable and marginalised in our society – such as Indigenous peoples.

The end result is a legal system that offers minimal protection to human rights and a system of government that treats human rights as marginal to the day to day challenges that we face.

We need better protection of human rights in our legal system as well as mechanisms to ensure that the courts, the executive and the cabinet have human rights at the forefront of their thinking at all times.

¹⁹ For a thorough historical account of calls for Indigenous rights protection, see B Attwood and A Markus, *The Struggle for Aboriginal Rights* (1999).

Democratic accountability, parliamentary scrutiny and a strong separation of powers in Australia did not prevent Aboriginal peoples being disenfranchised and excluded from the national census for the best part of the 20th century.

The protections of the common law did not prevent the removal of Aboriginal and Torres Strait Islander children from their families and has since provided limited redress for the ill-treatment of children removed.

The clear deficiencies in our existing system of human rights protection leave Indigenous peoples either without protection or with protection that is vulnerable to being overridden by competing priorities.

The new Commonwealth government has announced a broad national consultation process to consider the adequacy of human rights protections in Australia. The Prime Minister has also raised the possibility of constitutional reform to recognise Indigenous peoples and has identified processes to improve Indigenous representation – two key issues that will impact on the adequacy of rights protection for Indigenous peoples.

It is therefore timely to consider an agenda to ensure adequate protection of Indigenous peoples rights into the future.

There are six main areas where reform is needed to ensure full protection for Indigenous peoples and to modernise our human rights system. These are as follows:

1. Commonwealth Government to formally declare its support for and implement the *Declaration on the Rights of Indigenous Peoples*;²⁰
2. A national Human Rights Act to be enacted in Australia that includes protection of Indigenous rights;
3. Constitutional reform to recognise Indigenous peoples in the preamble; remove discriminatory provisions from the Constitution and replace these with a guarantee of equal treatment and non-discrimination;
4. The establishment of a National Indigenous Representative Body and processes to ensure the full participation of Indigenous peoples in decision making that affects our interests;
5. The establishment of a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation; and
6. A focus on human rights education and the building of a culture of human rights recognition and respect.

Chapter three reviews the provision of education services in remote Australia with specific focus on the availability and accessibility of education services for Indigenous preschool, primary and secondary school students. A major finding of the chapter is that there is no accurate information to assess whether remote Indigenous students have reasonable access to education in their region. There is no data which matches populations of school-aged students against preschool, primary and secondary school services across Australia.

In line with the Commonwealth Government's commitment to improve the life chances of Indigenous Australians through education, this chapter outlines specific measures to address the considerable challenges of providing quality school education in remote Australia.

I focus on developing partnerships between Indigenous stakeholders and school service deliverers in remote regions so that decisions can be made at the local level.

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

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A partnership between Indigenous people, governments and others must be driven by local priorities if it is to be successful in improving education in remote Australia. Partnerships must establish common understandings of the roles and responsibilities of all education stakeholders as well as clear direction about the objectives and anticipated outcomes of the education service.

This chapter also looks at the issue of remote teachers and leaders and the extent to which this workforce is supported and resourced. It discusses the provision of early childhood education which, as we know is an essential building block in the education process.

Throughout the chapter I provide examples of initiatives which demonstrate good practice and I conclude with recommendations for government action to improve the systems that provide and deliver education services to remote Indigenous students.

The case studies in this chapter show that remarkable things can happen. There is an imperative for governments and other providers to act now on Indigenous education. There is an economic cost and a human cost to the poor educational performance of remote Indigenous students. We Indigenous people are best placed to be the architects of our own policies and services, but we can't do this alone and we can't do this without the infrastructure and the services which will give our children access to the best possible education.

Chapter four reflects on the undeniable and urgent need for healing in Indigenous communities. You only need to listen to the stories of members of the Stolen Generations; the stories of Indigenous women escaping family violence; the stories of Indigenous peoples in custody who know about the thin line between victim and perpetrator; and the Indigenous children that carry all of these stories around, to know that we need healing urgently.

This need is not new. There have been widespread calls for healing and healing programs to meet the recommendations for the *Bringing them home* report. However, we are also seeing renewed calls for healing to address broader issues like family violence, suicide and alcohol and other drug abuse.

I have argued in this chapter that I do think we have a rare confluence of events at the moment to address this need. The National Apology has stirred real compassion and understanding amongst Australians. Many are looking for ways that they can try and 'make good' for the past, but in a way that is also about achieving a better future. Healing holds that promise and I think it is something people will get behind if we put it firmly on the national agenda.

Healing has been taking place in many different Indigenous communities and contexts. But I have also found that many of the good examples of healing are *ad hoc* and poorly funded, when what is needed is consistent, long term support to heal the wounds of the Stolen Generations, their families and communities.

It is timely to bring healing to the fore of the national agenda on Indigenous affairs. In this chapter I aim to assist the context for a national discussion on Indigenous healing by articulating some of the common understandings of healing and healing programs. I provide examples of healing from around Australia and examine what we can learn from the decade of healing work in Canada. This year I carried out some consultations with Indigenous experts and representative organisations on suggestions for a national Indigenous healing body. I report on the feedback, highlighting what can be done to support and advance an agenda for healing.

However, I urge that action not be at the expense of proper consultation. This is too important an issue to rush in and develop healing policy without real community engagement. Experience tells us that this could be a once in a life opportunity so let's

do it in a way that respects human rights and will ultimately lead to better policy and outcomes.

Chapter five looks at progress made in addressing Indigenous health inequality since 2005. In the *Social Justice Report 2005*, I called for a national effort to close the gap in health inequality within a generation. Since 2006, I have led a substantial national campaign to garner public support for this goal and to articulate what is required to achieve it.

Close the Gap has become part of the lexicon. It is widely used to describe the policy aspirations of Australian governments across a range of areas of socio-economic disadvantage. This signifies the breakthrough we have made in convincing policy makers, politicians and the general public that the goal of health equality for all Australians within a generation is realistic and achievable if we act together in partnership, and in a targeted and determined manner.

Already, we have seen substantial investments and the beginning of health system reforms to back them up. Some of the significant achievements include: the commitments by the Council of Australian Governments in 2007, the commitments to the *Close the Gap Indigenous Health Equality Summit Statement of Intent*; the development of accountability measures in the *Close the Gap National Indigenous Health Equality Targets*; and the formation of the National Indigenous Health Equality Council, among others. These achievements have elevated the urgency of dealing with the Indigenous health crisis to a national priority and one that shares bipartisan support.

However, there is still much to do, and in this chapter I outline the measures that now need to be undertaken to consolidate and build on the achievements to date. Overall, I am cautiously optimistic that Indigenous Australians born in the year 2030 will look forward to the same long and healthy lives as their non-Indigenous counterparts so long as we continue to build on the substantial gains made since 2006.

Appendix 1 of this report contains a chronology of important events in Indigenous affairs from 1 July 2006 to 30 June 2007.

Appendix 2 provides a statistical overview of the current circumstances of the Aboriginal and Torres Strait Islander populations in Australia across a range of indicators including: health; education; employment; housing; and contact with criminal justice and welfare systems. This updates the statistical overview provided in the *Social Justice Report 2003*. Where possible data is provided that identifies absolute change in the situation of Indigenous peoples over the past five and ten years; and relative change in relation to the non-Indigenous population over the past five to ten years.

Appendices 3 and 4 of the report provide background information for chapter three on remote Indigenous education. Appendix 3 sets out the *National Aboriginal and Torres Strait Islander Education Policy* in full. Appendix 4 outlines definitions of ‘accessible’ and ‘available’ education.

6. Setting a new agenda

The exploration in this year’s report of Indigenous human rights protections, remote Indigenous education, Indigenous healing and Indigenous health equality provide the basis for identifying the important steps government needs to take over the following eighteen months, to set the new agenda for Indigenous affairs. These include:

- In partnership with Indigenous peoples, establish and put into place a credible national Indigenous representative mechanism that is respected by the government;

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- Creating a role for human rights as part of the architecture in building a new relationship with Indigenous peoples including:
 - formally declare support for and implement the *Declaration on the Rights of Indigenous Peoples*;²¹
 - enact a national Human Rights Act that includes protection of Indigenous rights;
 - amend the *Constitution* to recognise Indigenous peoples in the preamble; remove discriminatory provisions and provide a guarantee of equal treatment and non-discrimination;
 - establish a framework for negotiations/ agreements with Indigenous peoples to address the unfinished business of reconciliation; and
 - provide human rights education;
- Reinstating the application of the *Racial Discrimination Act 1975* (Cth) for the Northern Territory Emergency Response legislation;
- Developing a remote education strategy and accountability framework, embedded in the National Indigenous Reform Agreement and in the relevant National Partnership Agreements;
- Initiating an audit of populations and projected populations of remote pre-school and school-aged children by statistical sub-division to be measured against the relevant education infrastructure and services;
- Establishing, in consultation with the Commonwealth and state/ territory governments and Indigenous organisations and communities, an independent, Indigenous controlled national Indigenous healing body, responsible for developing and implementing a coordinated National Indigenous Healing Framework.
- Developing an appropriately funded, long-term national plan of action to achieve Indigenous health equality;
- Establishing adequate mechanisms to coordinate and monitor the multiple service delivery roles of governments that impact on Indigenous health, and to monitor progress towards the achievement of Indigenous health equality.

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