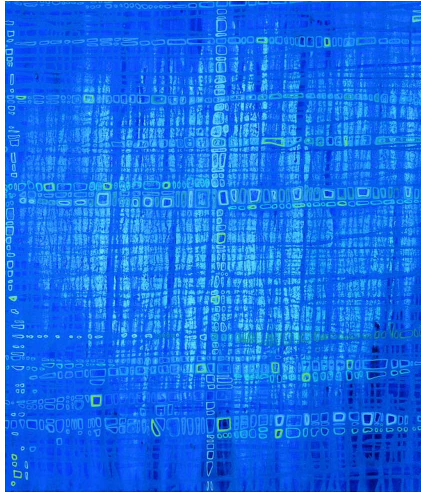
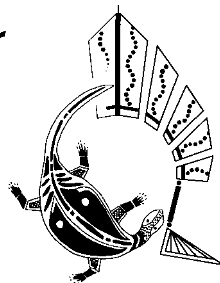


Social Justice Report

2002

Aboriginal & Torres Strait Islander Social Justice Commissioner



Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 46C(1)(a) Human Rights & Equal Opportunity Commission Act 1986.

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Artist Acknowledgement

The artwork reproduced on the cover is *Eternal Echo* by Bronwyn Bancroft, an Aboriginal artist and designer whose artworks have been collected by galleries and museums throughout Australia, in the USA and Germany. Exhibitions of her art have been shown in Australia as well as in Indonesia, New Zealand, the USA, France and Germany. A descendant of the Bundjalung people of New South Wales, Bronwyn grew up in the small country town of Tenterfield. She now lives in Sydney with her three children.

Bronwyn Bancroft states that: '*Eternal Echo* is my representation of the voice of many people, their lives and memories, enmeshed in the mystery of time.'

We thank Bronwyn for granting us permission to reproduce the painting. Copyright is held by the artist.

About the Social Justice Commission logo

The right section of the design is a contemporary view of a traditional Dari or head-dress, a symbol of the Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission'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 Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

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Human Rights and Equal Opportunity Commission

24 December 2002

The Hon Daryl Williams AM QC MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

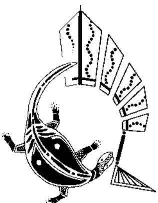
I am pleased to present to you the *Social Justice Report 2002.*

The report is provided in accordance with section 46C of the *Human Rights and Equal Opportunity Commission Act 1986*, which provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner is to submit a report regarding the enjoyment and exercise of human rights by Aboriginal persons and Torres Strait Islanders, and including recommendations as to the action that should be taken to ensure the exercise and enjoyment of human rights by those persons.

Yours sincerely

W. Jonas

Dr William Jonas AM
Aboriginal and Torres Strait Islander
Social Justice Commissioner



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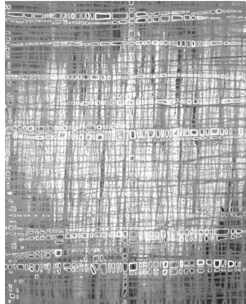

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Chapter 1

Introduction

This year's Report discusses a large number of initiatives currently underway or in development at the federal, state and territory levels in relation to policy making in Aboriginal and Torres Strait Islander Affairs. It notes for example the following positive developments in Indigenous policy:

- The commitment of governments at all levels to partnerships with Indigenous people, including through statements of commitment to negotiate service delivery arrangements with Indigenous organisations and commitments to negotiating justice agreements;
- The commitment of the federal Government to principles for the equitable provision of services to Indigenous people as part of a broad-ranging response to the Commonwealth Grants Commission's Report on Indigenous funding;
- Recognition by governments of the central importance of capacity building of Indigenous communities and of supporting and developing Indigenous governance structures;
- The commitment of the Council of Australian Governments to processes for addressing Indigenous disadvantage, including the establishment of a framework for reporting on Indigenous disadvantage, the formulation of action plans at the inter-governmental level in specific areas and a trial in ten communities of a whole-of-government approach to service delivery; and
- Support of the federal Government at the international level to the effective operation of the newly created United Nations Permanent Forum on Indigenous Issues.

Overall, however, the Report evidences that the past year has been another difficult one for Indigenous people in this country. In trying to provide a snapshot of the status of Indigenous policy making and achievements by governments over the past year, it is difficult to see any consistent forward trend. There have been marginal improvements in some statistical indicators, but deterioration in others. The policy approaches of governments are ultimately full of inconsistencies, ad hoc developments, and commitments that not only remain unmet but which are not adequately supported by institutional developments.

The framework for Indigenous policy making at the federal level has also become an ever-reductive one, constantly becoming more limiting and constraining of Indigenous peoples' aspirations. This has occurred through three significant High Court decisions which have destroyed the capacity for native title to be anything more than a marginal influence and through the continued rejection by the federal Government of anything that does not meet its expectations for 'practical' reconciliation.

There have been two particularly worrying trends that have been confirmed over the past year at the federal level. The first is a continuation of the antagonistic and adversarial approach to Indigenous policy by the Government. Substantial bi-partisan support for reconciliation and directions in Indigenous policy has been undermined by the limited focus of the Government. Those areas on which there is common ground are relatively few – and basically relate to agreement on the need to overcome Indigenous disadvantage – and there is even less agreement on what are the best ways to address such issues.

The second worrying trend is what has effectively been the relegation of Indigenous issues to a second tier issue for the Government. While reconciliation was a priority for the second term of the Government, it does not even rate a mention in recent announcements of the Government's strategic long term vision for Australian society. Indigenous issues are not treated as a national priority, and there are no public commitments to timeframes for achieving results in areas on which there is substantial agreement – such as Indigenous disadvantage.

At the state and territory levels, there is much goodwill being expressed with extensive commitments to partnerships with Indigenous people. These partnerships remain works in progress and it is unfortunate that they have not yet been accompanied by the necessary institutional support or action.

In Queensland, for example, the Queensland Government continues to implement its ambitious program under the Ten Year Partnership, including through the development of the regional Cape York Partnership and significant changes to liquor canteen management. At the same time, little progress is being made in relation to proposals for regional autonomy in the Torres Strait and progress in addressing one of the headline commitments under the Ten Year Partnerships – halving Indigenous over-representation in corrections within the decade – is getting worse rather than better. Similarly, against the backdrop of the partnerships approach the Government has failed to enter into good faith negotiations with Indigenous people to settle a longstanding injustice in relation to the control of wages and savings under the protection acts over the past century.

In New South Wales, the Government has entered into a Justice Agreement committing it to reduce Indigenous over-representation in custody and to work in partnership with Indigenous communities to develop a Justice Plan to underpin criminal justice issues. It has also overseen the introduction and rapid development of circle sentencing. At the same time, Indigenous people continue to be the silent victims of election sloganeering aimed to prove who is toughest

on crime. Amendments to bail provisions introduced during the past year, for example, are expected to have a significant negative impact on Indigenous people in the criminal justice system.

In Western Australia, rates of Indigenous over-representation in custody are steadily declining. This is likely to continue with proposed changes to laws removing sentences under 12 months duration. At the same time, mandatory sentencing remains and there has been little action to address serious concerns about the operation of juvenile diversionary schemes raised in the *Social Justice Report 2001* and other reviews. Similar examples can be provided for each state and territory.

The one true highlight of the past year, however, has been the demonstration through a range of processes that Indigenous people are not going to sit back and wait for governments to solve the various problems faced in communities. Indigenous communities across the country are demonstrating that they are not passive victims but distinct peoples fighting hard for the survival and recognition of their cultural distinctiveness.

At two major conferences during the year on Indigenous governance and the treaty process, it became clear that Indigenous communities across the country know what they want and are working towards building their capacity and striking agreements with governments to implement it.

The highest profile of these is the partnerships approach in Cape York. Of equal importance and substance are the efforts of the ATSIC Murdi Paaki regional council, the Torres Strait Regional Authority, the Ali Curung community or the Mutitjulu community to name but four. There have been variable levels of success through these and other processes to date. Each process faces common barriers of building up local community expertise to be self-determining and getting agreement from governments at all levels to enter into partnerships with them and remove the controlling hand over their destinies.

When these developments are viewed alongside the growth of initiatives such as the Australian Indigenous Leadership Centre, I end the year full of optimism that Indigenous people are slowly but surely moving towards achieving greater control over their life circumstances.

There are two main issues that run through this Report. The first is that it continually seeks to give meaning and content to the words and symbols used by the Government.

What, for example, should we make of the Government's rejection of the concept of a treaty when it is accompanied by a commitment to work in partnership and to make agreements with Indigenous peoples? What do we make of the Government's suggestion that the Council for Aboriginal Reconciliation's proposals provide 'support' to the Government practical approach at the same time that they reject the majority of their recommendations? And what does a commitment to self-empowerment and self-management as the underlying basis of Indigenous policy formulation mean when it is offered as an alternative to the unacceptable principle of self-determination?

The Report continually seeks to establish whether the Government's preference for certain words and symbols is merely rhetorical and is consistent with the principles that they symbolically reject, or whether it in fact amounts to a substantive change of direction in Indigenous policy.

The second feature of the Report is that given the minimal framework for Indigenous policy being set by the federal Government, it deliberately seeks to place Indigenous issues within a broader context. It reports not only on what is happening at various levels of government, but on what is missing from the policy framework. In particular, the Report highlights the differences between self-determination and self-empowerment; practical reconciliation and progressive realisation and a rights framework for addressing Indigenous disadvantage; and by considering international developments in the recognition of Indigenous rights. Each demonstrates the severely constrained approach that has been adopted by the federal Government and hints at the potential in a broader, rights-based approach.

Chapter 2 of the Report – titled 'Self-determination: the freedom to live well' – examines the core principles which underpin the federal Government's approach to Indigenous affairs. Since 1998, the Government has openly rejected self-determination as the basis of policy formulation and preferred concepts of self-empowerment and self-management. This chapter provides an overview of international developments on Indigenous self-determination. It then compares this to the way the Government explains its policy approach in order to identify its limitations and considers options for addressing these.

Chapter 3 – 'National progress towards reconciliation in 2002 – an equitable partnership?' – then provides a progress report on reconciliation over the past twelve months. It notes developments at the inter-governmental level, the federal Government's responses to the documents of the Council for Aboriginal Reconciliation and the Report of the Commonwealth Grants Commission, and the Government's agenda for reconciliation as set out in a number of speeches and processes. Ultimately it questions the basis on which the Government seeks to engage with Indigenous people, and the lack of equality in the partnerships that it seeks to enter.

Chapter 4 – 'Measuring Indigenous disadvantage' – then provides a detailed analysis of current approaches and research on addressing Indigenous disadvantage. It draws on significant international developments in countering poverty and economic marginalisation, as well as international human rights standards. The chapter also considers in depth the framework for measuring Indigenous disadvantage that is currently being instituted at the inter-governmental level. There are some clear contrasts between the limiting framework of practical reconciliation and the more focused and accountable approach based on international guidance and standards.

Chapter 5 – 'Indigenous women and the criminal justice system - A landscape of risk' – then follows up on an issue of great concern raised in the introduction of the *Social Justice Report 2001*. It focuses on Indigenous women and their

experiences of contact with criminal justice processes. This chapter paints a disturbing picture of the lack of support provided to Indigenous women in many areas of society and its consequent impact through criminalisation. The lack of attention to these issues by policy makers to date is a matter of great shame. This review is preliminary by nature and will require further attention in coming years.

Chapter 6 – 'International developments in the recognition of the rights of Indigenous peoples' – then places discussions of Indigenous policy within an international context. It notes the extensive developments in the recognition of Indigenous rights at the international level over the past thirty years. These are considered within two main contexts – the current review taking place within the United Nations of all the existing mechanisms at the UN dealing with Indigenous issues; and the International Decade for the World's Indigenous Peoples which is now in its final two years. This review illustrates how Australia has moved towards the most conservative end of the spectrum in addressing Indigenous rights, a factor which is reinforced in the domestic policy approach.

The Report then concludes with an appendix which summarises partnerships and agreements that have been entered into between Indigenous people and state or territory governments in recent years.

Chapter 2

Self-determination – the freedom to 'live well'

Aborigines and Torres Strait Islanders continue to state their desire to be self-determining. Recent years, however, have been characterised by an increased attack by the Government and a range of conservative commentators on the legitimacy of such aspirations. At the same time that the nation as a whole, through the reconciliation process, has been contemplating what changes are necessary to make the relationship with Indigenous peoples more equitable, the federal Government has expressed its absolute opposition to any recognition of a right to self-determination or collective status for Indigenous peoples in its domestic policy approach. Instead the Government has preferred concepts relating to individual empowerment and responsibility, as if such attributes were in conflict with self-determination. The question is whether the difference is merely a rhetorical one or whether it has significant implications for the policy approach to Indigenous issues in this country.

The rejection of Indigenous self-determination has been even more fervently pursued by the Government in the international arena. Australia is one of only four countries that actively pursue the rejection of Indigenous peoples' self-determination and collective rights in the annual negotiations on the Draft Declaration on the Rights of Indigenous Peoples at the United Nations. In both the domestic and international arenas, Australia's opposition to recognition of a right to self-determination has been based on simplistic, and often legally incorrect, assumptions which present self-determination as purely symbolic, as a catchcry for all the failings of Indigenous policy in the past thirty years, or as 'a rigid choice between all or nothing – between the forming of an independent state or complete denial of a cultural and political identity'.[1] The reality of Indigenous self-determination, however, lies between these extremes and is a process of negotiation, accommodation and participation. Importantly, it is also about Indigenous peoples accepting responsibility and governments removing the controlling hand in order to ensure that such acceptance is meaningful and has consequences.

1 Mayor, F, 'Message from the Director-General of UNESCO', in van Walt van Praag, M, *The implementation of the right to self-determination as a contribution to conflict prevention*, UNESCO Centre of Catalonia, Barcelona, 1999, p14.

In this chapter I answer the question 'what is Indigenous self-determination?' by examining how this concept has developed in international law. I then examine the Government's position on self-determination in both the domestic and international arenas and provide an analysis of their approach. This analysis builds on the discussion of the importance of recognising self-determination as part of the reconciliation process that was contained in the *Social Justice Report 2000*.[2]

Self-determination and the 'politics of symbolism'

The past four years have seen the Government systematically lock into place its ideological approach to Indigenous affairs. 'Practical reconciliation' has been continually refined and has now infused (or perhaps infiltrated) into all areas of policy making and programme design – including at the inter-governmental level. In March 2002, the Minister for Aboriginal and Torres Strait Islander Affairs even went so far as to seek to repackage this approach as something new by proclaiming at the ATSIC National Policy Conference that the Government was 'changing direction' on Indigenous policy.[3] The reality, however, has been 'business as usual'.

The principal indicator of a change in direction in Indigenous policy occurred between 1996 and 1998 when the Government decided that it would no longer support the principle of self-determination as the basis of Indigenous policy formulation and in particular, when it announced that it would actively oppose recognition of Indigenous peoples' entitlement to such a right in international negotiations. In explaining the decision the Minister for Foreign Affairs stated that the Government would argue 'that it might be better to use the term self-management rather than leaving an impression that we are prepared to have an Indigenous state'.[4]

Speaking at the United Nations Working Group on Indigenous Populations in 1999, the then Minister for Aboriginal and Torres Strait Islander Affairs drew the now familiar distinction between so-called 'real' as opposed to 'symbolic' issues. He suggested that negotiations on the United Nations Draft Declaration on the Rights of Indigenous Peoples and its emphasis on self-determination and collective rights risked becoming 'a distraction from the real tasks and priorities at hand'. Instead, he stated the Government rejected 'the politics of symbolism' and was instead focused on 'practical measures leading to practical results'.[5]

---

2 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, Chapter 2. (Herein 'Social Justice Report 2000'). See also: Aboriginal and Torres Strait Islander Social Justice Commissioner, *An Australian perspective on self-determination*, UN Doc: E/CN.4/2002/WG.15/WP.1, 21 October 2002, available online at: www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/cf03e35f75a32a36c1256c68004df6ce?Opendocument.

3 Ruddock, P, 'Changing direction', Speech, ATSIC National Policy Conference – Setting the Agenda, 26 March 2002, www.minister.immi.gov.au/atsia/media/transcripts02/change_dir_0302.htm.

4 Downer, A, quoted in Forbes, M, 'Downer fears phrase will split Australia', *The Age* 22 August 1998.

5 Herron, J, *Statement on behalf of the Australian Government at the 17th session of the United Nations Working Group on Indigenous Populations*, Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, 29 July 1999, p7.

The Government then stated its preference for the concepts of self-management and self-empowerment rather than self-determination.

Historically, the term self-determination was first applied to Indigenous policy by the Whitlam government in 1972. It replaced the by then largely discredited policy of assimilation. The most immediate impact of the adoption of the language of self-determination was to unequivocally reject the paternalism of policies of the past. It was a statement of the practical reality that assimilation simply didn't work.

There is some continuity in language of the current Government's approach with that of the Fraser government from 1975. Upon election it had 'retreated somewhat from the rhetoric of self-determination in Australian Indigenous policy, preferring instead the term "self-management"… with an emphasis on responsibilities as much as, if not more than, on rights'.[6] The retreat was, however, largely symbolic 'as it overlay a continuity of institutional development'[7] and reform of Indigenous policy and programmes, most notably in the development of Indigenous community organisations and through the introduction of land rights legislation in the Northern Territory.

The Hawke and Keating governments both used the term self-determination almost interchangeably with that of self-management through the 1980's and early 1990's. By 1992, however, all Australian governments officially endorsed self-determination as the basis of policy development in responding to the recommendations of the Royal Commission into Aboriginal Deaths in Custody. This was reinforced through the Council of Australian Government's 1992 *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders* which established as a guiding principle for service delivery by all levels of government the 'empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders'.[8]

In light of this broad acceptance of self-determination by Government for just under thirty years, the question that has to be asked is how have we now reached the situation where the Government has rejected self-determination on the basis that it is purely a matter of 'symbolism' divorced from the day to day lives of Indigenous peoples in this country?

In my view, there are four main answers to this question. The first is political in nature – that the concept of self-determination has never transcended its historical roots in Australia. Self-determination has in many ways been defined by what it is not, i.e. assimilation, with an occasional lack of clarity as to what people actually mean when they use the term. For many it has become a political slogan and a rhetorical device.

6 Sanders, W, *Towards an Indigenous order of Australian Government: Rethinking self-determination as Indigenous affairs policy*, Centre for Aboriginal Economic Policy Research (CAEPR) Paper No. 230/2002, CAEPR, Canberra, 2002, p2.

7 *ibid*.

8 Council of Australian Governments, *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders*, COAG, Perth, 1992, para 4.1.

In its 1972 version, self-determination has been synonymous with a notion of community control or empowerment. It saw a shift from a situation of total control by government, with limited flexibility and involvement of Indigenous people in decision-making processes, to the other extreme of simply handing over control to Indigenous communities and organisations, with limited focus on accountability to government or back to that community. In some ways we have not moved beyond this 1972 concept, which may also explain why critics of self-determination so often and so easily revert to assimilationist ideology in identifying the way forward.

The second reason is more institutional in nature – a bureaucratic version of self-determination has been imposed on communities, often fitting them into a different straight-jacket for service delivery and decision-making to the one that previously existed. This version has required Indigenous communities to incorporate as associations in order to receive the necessary funding grants. The result in many communities is a plethora of separate organisations each established to meet usually just one particular need of the community, who are continually required to submit numerous separate funding grant applications in order to receive short term funding for their activities. It has resulted in uncoordinated service delivery that administratively has been highly inefficient, which has not allowed communities to plan their activities in a coordinated, holistic and longer term manner. This version of self-determination has also seen communities 'handed' control and resources through this new organisational sector with limited efforts to develop their institutional capacity to manage and control the process effectively.

The third reason is that, while this bureaucratic version of self-determination may have overseen the vast development of an Indigenous community sector, it has left Indigenous communities tied to the control of government. It has been a largely rhetorical version of self-determination which has maintained the existing power balances and ensured that the control mechanisms are retained by governments. Institutional reform has been limited to the creation of new layers of bureaucracy. It has to a large extent, and with some exceptions, not extended to changes in the structure and responsibilities of the institutions of government.

The fourth reason is that for all the commitments to self-determination, such as through COAG's 1992 National Commitment and the responses to the Royal Commission into Aboriginal Deaths in Custody, these were in reality never implemented. Self-determination as the centre-piece of Indigenous policy has to a large extent been a statement of intention rather than of action. Real self-determination has never been tried.

From this we can see the basis of why the former Minister for Aboriginal and Torres Strait Islander Affairs described the policy of self-determination as the 'politics of symbolism'. It is wrong, however, to suggest that self-determination is purely symbolic. It has been Government's attempts to implement it that has been symbolic and that has distanced aspirations for self-determination from the real issues.

There clearly remains an ongoing need for the policy approaches of Government to break from the past – but this does not mean discarding self-determination

as a relic of that past. Instead, we need to address the deficiencies in the implementation of self-determination over the past thirty years. We need to reconceptualise self-determination and restore meaning and content to it.

(Re-)Defining self-determination

> Self-determination means the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours… [Indigenous peoples'] goal has been achieving the freedom to live well and humanly – and to determine what it means to live humanly. In my view, no government has grounds for fearing that.[9]
>
> *Professor Erica-Irene Daes, Former Chair – United Nations Working Group on Indigenous Populations*

In this section I provide a detailed discussion of the key features of self-determination as it has evolved in international law to date. While debate on the application of self-determination to the situation of Indigenous peoples remain among the most difficult and controversial currently taking place in any area of the United Nations, there are a number of features about this right that are now established in international law. There are also a range of social and political matters which are also of relevance in understanding self-determination. They are of great assistance in evaluating the adequacy of the current approach to policy formulation in Australia, as well as in explaining the key sticking points in debate over the recognition of Indigenous self-determination in international negotiations.

The right of self-determination is Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Australia is a party to both of these covenants and is bound to act in compliance with their terms. Common Article 1 reads as follows.[10]

> **Article 1**
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

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9 Daes, E, 'Striving for self-determination for Indigenous peoples' in Kly, Y, and Kly, D (Eds), *In pursuit of the right to self-determination*, Clarity Press, Geneva, 2000, p58.

10 For a commentary on these provisions see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* 1999, HREOC, Sydney, 2000, pp 89-97.

Article 1 appears simple in its formulation. It is, however, full of complexities. The Article does not define self-determination. It also does not identify the forms it may take. In terms of whom it applies to, Article 1 states that self-determination is a right of 'all peoples'. There is, however, no internationally agreed definition of a 'peoples'.

While the lack of definition on these points may be frustrating to some, it has ensured that the concept of self-determination has not been frozen in time and has been able to evolve to changing global circumstances. Debates about the application of self-determination to Indigenous peoples, for example, move us beyond the de-colonisation framework of the post-world war two period. This debate would not have taken place if more closed definitions had been taken in Article 1.

Article 3 of the Draft Declaration on the Rights of Indigenous Peoples seeks to declare that Indigenous peoples are in fact a 'peoples' within the meaning of the term. It states:

> **Article 3**
>
> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This proposed language is identical to that in Article 1(1) of the two international covenants, with the substitution of the phrase 'indigenous peoples' for 'all peoples'. As noted, Article 3 (and the Draft Declaration) is still under negotiation at the United Nations and has not been adopted as yet. There are, therefore, two main processes for the recognition of Indigenous self-determination internationally: first, by recognising Indigenous peoples as 'peoples' under Article 1 of the covenants and second, by declaring that Indigenous peoples possess the right through Article 3 of the Draft Declaration.

While there are a range of other Articles in the Draft Declaration that elaborate on the dimensions of this right to self-determination, the following two Articles have been of particular importance in international negotiations defining the scope of Indigenous self-determination.

> **Article 31**
>
> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.
>
> **Article 45**
>
> Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

Much of the international debate about self-determination in relation to Indigenous peoples has revolved around the wording of Article 3 and its relationship to these (and other) Articles. Given that Indigenous peoples' right

to self-determination can separately be recognised within the framework of the two international covenants, and noting that a number of governments are currently attempting to explicitly place limitations on the right of self-determination within Article 3, it is important to note that the Draft Declaration also provides that:

> Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination…
>
> **Article 44**
>
> Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

There are two main areas of debate about the provisions of the Draft Declaration as well as about the application of the provisions of the international covenants. First, is whether Indigenous peoples are entitled to a right of self-determination. Second, if they are, what is the content of that right and what are the limitations on its exercise (or put simply, what is Indigenous self-determination?).

a) Do Indigenous peoples have a right to self-determination?

There have been three main processes involving government decision-making at the international level which have sought to grapple with the issue of whether Indigenous peoples have a right to self-determination over the past twenty five years. Two of these processes – the Organisation of American States negotiations on a proposed American Declaration on the Rights of Indigenous Peoples and the International Labour Organisation's negotiation of Convention No. 169 – have delayed answering the question by using a disclaimer that the use of the term 'peoples' in the declaration or convention respectively shall not be construed as having any implications as regards the rights which may attach to the term under international law. The third process directly considering this issue is the negotiations on the Draft Declaration on the Rights of Indigenous Peoples. Political recognition of the application of self-determination to Indigenous peoples by the governments of the world remains forthcoming in this process.

By contrast, there have been two main developments through the independent, expert bodies of the United Nations that suggest that Indigenous peoples *do* have a right to self-determination.

First, recent practice by the United Nations Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights (i.e., the two committees that operate under and interpret the standards in the two international covenants) clearly identifies self-determination as a right held by Indigenous peoples, including in Australia. This can be seen from the following concluding observations and jurisprudence of the committees.

Human Rights Committee (HRC)

- *Concluding observations on Australia*, UN Doc CCPR/CO/69/AUS, which states at para 10 that 'The State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources

(Article 1, para 2)'. The List of Issues of the Committee (UN Doc: CCPR/C/69/L/AUS, 25/04/2000, Issue 4) had asked 'What is the policy of Australia in relation to the applicability to the Indigenous peoples in Australia of the right of self-determination of all peoples?'

- *Concluding observations on Canada*, Un Doc: CCPR/C/79/Add.105, 7/4/99, paras 7,8.
- *Concluding Observations on Norway*, UN Doc: CCPR/C/79/Add.112, 05/11/99, paras 10 and 17, which provides (at para 17) that 'the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that Article'.
- *Concluding observations on Sweden*, UN Doc: CCPR/CO/74/SWE, 24/4/2002, para 15;
- *Lubicon Lake Band v Canada* (1990) Un Doc: CCPR/C/38/D/167/1984; and
- *Marshall (Mikmaq Tribal Society)* (1991) UN Doc: CCPR/C/43/D/205/1986.

Committee on Economic, Social and Cultural Rights (CESCR)

- List of Issues: Australia, UN Doc: E/C.12/Q/AUSTRAL/1, 23/05/2000, Issue 3: 'What are the issues relating to the rights of Indigenous Australians to self-determination, and how have these issues impeded the full realisation of their economic, social and cultural rights?'
- *Concluding observations on Canada*, UN Doc: E/C.12/1/Add.31, 10/12/98 (see also CESCR, List of issues: Canada, UN Doc: E/C.12/Q/CAN/1, 10 June 1998, Issue 23);
- *Concluding observations on Columbia*, UN Doc: E/C.12/1/Add.74, 30/11/2001, paras 12, 33.

The second development which lends support to the position that Indigenous peoples constitute a 'peoples' under international law is in relation to the categorisation of Indigenous peoples as distinct in status from minorities. This has taken place through a variety of studies and processes within the United Nations over the past thirty years.

Some of the issues that the UN has had to face in this regard have included whether minorities should be considered 'peoples' within the terms of the UN charter; whether Indigenous Peoples are 'peoples' or 'minorities'; and if Indigenous peoples are not 'minorities', what rights should be accorded them?[11]

Historically, the early decades of the United Nations saw significant attention to and acceptance of the importance of promoting self-determination and the protection of human rights for the purpose of maintaining peace and friendly relations between nations. Despite this, until the 1970s the United Nations had devoted very little attention to the application of these principles to the situation of Indigenous peoples and of minorities within nations.

Sharon Venne has argued that developments relating to self-determination up to the 1970s – such as General Assembly Resolution 1514[12] (the *Declaration on*

11 Venne, S, *Our elders understand our rights: Evolving international law regarding Indigenous rights*, Theytus Books Ltd, Penticton, British Columbia 1998, p68.

12 General Assembly Resolution 1514 (XV), 14 December 1960.

the Granting of Independence to Colonial Countries and Peoples) and General Assembly Resolution 2625[13] (the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*) in particular – have resulted in 'a double standard and unequal application of the principles as set down by the General Assembly'[14] for Indigenous peoples. This is by creating an artificial distinction between the colonialism that they have suffered and other forms of colonialism to which the decolonisation process applies.

Since that time, there have been five major reports prepared by Special Rapporteurs to the Sub-Commission on the Protection and Promotion of Minorities that have considered these issues.[15] These are the reports by the Special Rapporteurs Critescu (1976), Capotorti (1979), Gros Espiell (1980), Deschenes (1985) and Cobo (1987).

In the first major study of the right of self-determination, conducted by Special Rapporteur Aureliu Cristescu, it was concluded that no distinction between 'peoples' and 'indigenous peoples' could be found. He acknowledged that Indigenous peoples, such as in the Americas, are appropriate peoples to whom the right of self-determination as a legal principle should be applied, and stated that 'the struggle against colonialism is the most important field of application of the principle of equal rights and self-determination of peoples'.[16]

A subsequent study on self-determination and its relationship to the implementation of UN resolutions was completed by Special Rapporteur Hector Gros Espiell in 1980. He noted that self-determination 'is a right of peoples, in other words of a specific type of human community sharing a common desire to establish an entity capable of functioning to ensure a common future'.[17] On this basis he concluded that 'under contemporary international law minorities do not have this right'.[18]

Difficulties remained however due to the lack of definition of the term 'minorities'. Studies were subsequently completed by Francesco Capotorti in 1979 on the right of persons belonging to ethnic, religious and linguistic minorities[19] and Mr Justice Jules Deschenes in 1985 on the definition of minorities.[20] In both studies definitions of 'minority' were proposed, although no definition has been adopted internationally. Around the same time, Jose Martinez Cobo was undertaking his

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13 General Assembly Resolution 2625 (XXV), 24 October 1970.

14 Venne, S, *op cit*, p75.

15 For an overview of these reports see *ibid*, pp75-82.

16 Critescu, A, *The historical and current development of the right to self-determination on the basis of the Charter of the United Nations and other instruments adopted by the United Nations organs, with particular reference to the promotion and protection of human rights and fundamental freedoms*, UN Doc: E/CN.4/Sub.2/L.641, 8 July 1976, para 140; as cited in *ibid*, p76.

17 Espiell, H, *The right of self-determination – implementation of United Nations resolutions*, UN Doc: E/CN.4/Sub.2/405/Rev.1, para 56; as cited in *ibid*, p77.

18 *ibid*.

19 Capotorti, F, *Study on the rights of persons belonging to ethnic, religious and linguistic minorities*, UN Doc: E/CN.4/Sub.2/384/Rev.iii, 1979.

20 Deschenes, J, *Promotion, protection and restoration of human rights at the national, regional and international level – Prevention of discrimination and protection of minorities, Proposal concerning a definition of the term 'minority'*, UN Doc: E/CN.4/Sub.2/1985/31 and Corr.1.

landmark study on the problem of discrimination against Indigenous populations, where he was grappling with issues of definition of Indigenous peoples.

Ultimately no official definition of Indigenous peoples was adopted, with Cobo agreeing with Indigenous peoples that the imposition of a definition may be limiting and potentially wrongly exclude some people from having their indigenous origin recognised. He reiterated self-identification as a fundamental aspect of Indigenous peoples' right to self-determination. Cobo did, however, offer a working definition as follows:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.[21]

In looking to develop a definition of 'minority' Justice Deschenes looked to this definition of Indigenous peoples to see whether the categories of minorities and Indigenous peoples could be combined. While he acknowledged that there are a number of characteristics shared between the two groups he ultimately concluded that there were aspects of the situation of Indigenous peoples that were unique and that the description of Indigenous peoples could not be used as 'a general definition of minorities'. He continued:

> it would seem appropriate... to include indigenous peoples as a separate category and pay attention to their specific needs and rights. Indigenous peoples do not necessarily constitute minorities and their situation is in many respects different from that of national, ethnic, religious and linguistic minorities.[22]

In a recent working paper on the relationship and distinction between the rights of persons belonging to minorities and those of Indigenous peoples, Asbjorn Eide looks at developments in the international system that have taken place since these studies. The findings of these studies were largely followed with the consequence that 'a dual track has emerged in United Nations standard-setting with regard to minorities and indigenous peoples'.[23]

This is demonstrated by examining the four sets of rights that have emerged in the international human rights system to date. These are:

> **a)** **The general, [individual]… human rights to which everyone is entitled**, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966…

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21 Cobo, J.M, *Study of the problem of discrimination against indigenous populations: Volume V, Conclusions, Proposals and Recommendations*, United Nations Geneva 1987, UN Doc: E/CN.4/Sub.2/1986/7, para 362.

22 Deschenes, J, *op cit*, para 29.

23 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 22.

b) **The additional rights specific to persons belonging to national or ethnic, religious or linguistic minorities**, found in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities ("Minority Declaration"), and in several regional instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States have some duties to minorities as collectivities, however…[24]

Special minority rights can be claimed by persons belonging to national or ethnic, linguistic or religious minorities, but also by persons belonging to indigenous peoples. The practice of the Human Rights Committee under Article 27 of the ICCPR bears this out…[25]

c) **The special rights of indigenous peoples** and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and – if and when adopted – in the Draft Declaration on the Rights of Indigenous Peoples ("draft indigenous declaration"), adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now before the Commission on Human Rights. They are mostly rights of groups ("peoples") and therefore collective rights…[26]

The rights of indigenous peoples, which, under present international law, are found only under ILO Convention No. 169, can only be asserted by persons belonging to indigenous peoples or their representatives. Members of non-indigenous minorities cannot assert the(se) rights...[27]

d) **The rights of peoples as provided for in common Article 1 to the two International Covenants** of 1966. These are solely collective rights...[28] There is still no consensus as to which collectivities are the beneficiaries of the right to self-determination under Article 1.[29]

The specific rights of minorities and indigenous peoples that have been recognised are qualified by the requirement that their enjoyment shall not prejudice the enjoyment by all persons of the universally recognised human rights and fundamental freedoms (in category a) above). In other words, while there are specific rights to protect the distinct cultural characteristics of minorities and Indigenous peoples there is no scope for them to do so to the detriment of other people or to impede the rights of individuals within those groups.

Asbjorn Eide identifies significant differences in the development of minority rights as opposed to Indigenous rights in the international system. He states:

> The difference can probably best be formulated as follows: whereas… instruments concerning persons belonging to minorities aim at ensuring a space for pluralism in togetherness, the instruments concerning

24 *ibid*, para 2.
25 *ibid*, para 18.
26 *ibid*, para 2.
27 *ibid*, para 19.
28 *ibid*, para 2.
29 *ibid*, para 21.

> indigenous peoples are intended to allow for a high degree of autonomous development. Whereas [minority rights place]… considerable emphasis on effective participation in the larger society of which the minority is a part…, the provisions regarding indigenous peoples seek to allocate authority to these peoples so that they can make their own decisions… The right to participation in the larger society is… given a secondary significance and expressed as an optional right. Indigenous peoples have the right to participate fully, *if they so choose*, through procedures determined by them, in devising legislative or administrative measures that may affect them… The underlying assumption must be that participation in the larger society is not necessary when they have full authority of their own to make the relevant decisions.
>
> Closely linked to this point is the difference concerning rights to land and natural resources. [Minority rights]… contain no such (recognition), whereas these are core elements (of indigenous rights). Other examples could be mentioned to explain the fundamental difference between the thrust of the rights of persons belonging to minorities and those of indigenous peoples. **It is logically connected to the basic point that the minority instruments refer to rights of (individual) persons, whereas those concerning the indigenous refer to rights of peoples**.[30]

In answering the question of the relationship between minority rights and the rights of Indigenous peoples, on the one hand, and the rights of peoples to self-determination as set out in common Article 1 to the International Covenants on the other hand (i.e. who is entitled to category d) above), he notes:

> For the rights of persons belonging to minorities, the answer is simple: the relevant instruments provide no right to group (collective) self-determination. The rights of persons belonging to minorities are individual rights, even if they in most cases can only be enjoyed in community with others.[31]

These developments can be summarised as follows:

1. The rights of persons belonging to minorities have developed by focusing on individual rights and in a way that does not recognise a collective status as ‘peoples’. International law has not recognised a right to self-determination for minorities.
2. By contrast, the rights of Indigenous peoples have developed in a way that recognises that they are distinct from minorities and that a key reason for this is that they possess a collective status.
3. This leads to the irresistible conclusion that Indigenous peoples are in fact ‘peoples’ within the context of Article 1 of the international covenants. Some UN studies have concluded as such.
4. This conclusion has also been reached by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, i.e. the two committees operating under the international covenants.

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30 *ibid*, paras 8-9, emphasis added.
31 *ibid,* para 10.

5. Based on these factors, the contention that Indigenous peoples constitute a 'peoples' and possess the necessary collective identity to be recognised as enjoying a right to self-determination can no longer be challenged with any legitimacy or credibility.
6. The ongoing debates over Article 3 of the Draft Declaration, the Organisation of American States Draft Declaration and the provisions of ILO Convention 169 indicate, however, that States have not yet accepted this conclusion.

b) What is Indigenous self-determination?

So what is Indigenous self-determination? And does international law place any limitations on its exercise and if so, what are they?

An international conference of experts was convened by UNESCO in 1998 to consider the role of self-determination in preventing conflict and contributing to peace and security. It developed the following description of self-determination.

> **[Self-determination is] an ongoing process of choice for the achievement of human security and fulfilment of human needs with a broad scope of possible outcomes and expressions suited to different specific situations. These can include, but are not limited to, guarantees of cultural security, forms of self-governance and autonomy, economic self-reliance, effective participation at the international level, land rights and the ability to care for the natural environment, spiritual freedom and the various forms that ensure the free expression and protection of collective identity in dignity**.[32]

This description identifies a number of salient features of Indigenous self-determination. Primary among these is the recognition that *self-determination is a process for the achievement of human security and the fulfilment of human needs.* In the words of the UNESCO conference:

> Peoples and communities strive to gain control over the means to satisfy the human needs of their members. The most important of these are the needs for human security and welfare. By security, in this view, is included economic, health, environmental and food security as well as security of the person from physical violence, communal security (in terms of cultural integrity) and political security, meaning respect for human rights and freedoms. Thus, a variety of means, political structures and arrangements can be conceived which would satisfy the human needs of communities and their members.[33]

There is an objective dimension to the provision of such security which is reflected in the institutional processes that are put in place in accordance with the exercise of self-determination. But there is also a subjective element to the attainment of such security:

> Especially for peoples who have been disenfranchised, oppressed… etc. the *need* for security can be a prime objective in the struggle for

32 UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag, M (Ed), *The implementation of the right to self-determination as a contribution to conflict prevention*, UNESCO Centre of Catalonia, Barcelona, 1999, p19.

33 *ibid*, p28.

> self-determination…[For example,] culture, being a core element of distinctiveness of peoples… is often at the centre of a claim for self-determination when the cultural identity and expression of the community is suppressed or threatened. Respect for distinct cultural values and diversity is fundamental to the notion of self-determination. For some communities the recognition within the state of the value and distinctiveness of a group can be an expression of the implementation of their right to self-determination. For others, the authority and capability to exercise full cultural authority within a set territory (or to exercise it in a non-territorial manner) is an essential component of their exercise of self-determination.[34]

This subjective element of self-determination should not be under-estimated. As Erica-Irene Daes notes:

> Self-determination means the freedom for indigenous peoples to live well, to live according to their own values and beliefs, and to be respected by their non-indigenous neighbours… The protection of this freedom unquestionably involves some kind of collective political identity for indigenous nations and peoples, i.e. it requires official recognition of their representatives and institutions. However, the underlying goal of self-determination for most indigenous peoples *has not* been the acquisition of institutional power. Rather their goal has been achieving the freedom to live well and humanly – and to determine what it means to live humanly…
>
> It is important that we must try to guard against a kind of false consciousness with respect to achieving the true spirit of Indigenous self-determination… the true test of self-determination is not whether indigenous peoples have their own institutions, legislative authorities, laws, police and judges. The true test of self-determination… is whether Indigenous peoples themselves actually feel that they have choices about their way of life. The existence of a genuine right to self-determination cannot be only determined from the outward form of indigenous peoples' self-governing or administrative institutions. The true test is a more subjective one which must be addressed by indigenous peoples themselves.[35]

Accordingly, *essential to the exercise of self-determination is choice, participation and control*. As the International Court of Justice notes in its Advisory Opinion on Western Sahara, the essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned.[36]

It follows that a further essential feature of self-determination is that *it does not have a prescribed or pre-determined outcome*. There are as many outcomes possible as there are ways of governing, exercising control and administering decisions. This may involve the exercise of choice by an Indigenous group 'to cede their right to make decisions'[37] over particular issues or alternatively the choice to maintain decision-making and control within the community.

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34 *ibid*.

35 Daes, E, 'Striving for self-determination for Indigenous peoples' in Kly, Y, and Kly, D (Eds), *op* cit, p58.

36 van Walt van Praag, M (Ed), *op cit*, p27; Advisory Opinion on Western Sahara (1975) ICJ 12, pp32-33.

37 Nystad, R, 'Self-determination and the Sami people' in Kly, Y, and Kly, D (Eds), *op cit*, p115.

Similarly, *self-determination is a process that is ongoing*. It is not a one off event or something that is defined as at a particular moment in history:

> Self-determination should not be viewed as a one time choice, but as an ongoing process which ensures the continuance of a people's participation in decision-making and control over its own destiny… This view makes it possible for incremental changes to be implemented rather than forcing parties to agree on definitive changes which can be too radical for some and insufficient for others. Rather, it should be seen as a process by which parties adjust and re-adjust their relationship, ideally for mutual benefit.[38]

Self-determination therefore requires first, that a State acknowledges that there exists within, perhaps crossing, its borders a distinct group who legitimately have claims to recognition as a 'peoples'; and second, that the State agrees to enter a relationship with that group on the basis of equality and mutual respect, to negotiate the basis of that group's engagement and participation in the society.

What is apparent from these features is that *a notion of popular participation is inherent to self-determination*. As the Australian delegation stated to the United Nations General Assembly in 1992:

> Realisation of the right to self-determination… entails the continuing right of all peoples and individuals within each nation State to participate fully in the political process by which they are governed. Clearly, enhancing popular participation in this decision-making is an important factor in realising the right to self-determination. It is evident that, even in some countries which are formally fully democratic, structural and procedural barriers exist which inhibit the full democratic participation of particular popular groups.[39]

There are a number of issues relating to the type of participation that is integral to the realisation of self-determination in democratic countries like Australia. The first goes to the core of the meaning of democracy. There is a tendency – which has been particularly exacerbated in Australia in the past eighteen months – to equate democracy solely with majority rule. Indigenous peoples, who make up 2% of the total population, can never be part of this majority and are subject to the goodwill of the rest of the society. The suggestion that democracy means solely majority rule, however, is a fallacy – it is not one of the basic democratic principles but instead 'a second best procedural device for settling disagreement when other methods have been exhausted'.[40] Clearly, *Indigenous peoples' right to self-determination is not safeguarded or respected by a reliance on majority rule. Self-determination raises the issue of representativeness and participation within the democratic principle.*

The second issue is that of the existence in democratic societies of 'structural and procedural barriers' which may act to inhibit full participation. As I noted in

38 van Walt van Praag, M (Ed), *op cit*, pp27-28.

39 Wilenski, P, Speech on behalf of the Government of Australia to the 44th session of the United Nations General Assembly 1992, as quoted in Frankovits, A, 'Towards a mechanism for the realisation of the right to self-determination' in Kly, Y, and Kly, D (Eds), *op cit*, p28.

40 Beetham, D, 'Democracy and human rights: contrast and convergence', Speech, United Nations High Commissioner for Human Rights seminar on the Interdependence between democracy and human rights, Geneva, 25-26 November 2002, www.unhchr.ch/democracy/, p8.

the *Social Justice Report 2000*, one of the ongoing impacts of the past treatment of Indigenous peoples in Australia is the fact that the historic 'lack of respect for, and failure to recognise the value of, Indigenous cultures permeates the design of the institutions of society and government'[41] today.

The existence of such institutional barriers in Australia has been identified in numerous government reports. Most recently, it was graphically illustrated by the inaccessibility of mainstream government services to Indigenous peoples that was uncovered by the Commonwealth Grants Commission's report on Indigenous funding.

Such institutionalised barriers, however, can be masked by commitments to democratic ideals – such as commitments to formal equality of treatment. As Dr Y Kly notes:

> In situations of minority oppression, racism and discrimination is usually given by States as the reason for the maldevelopment of such non-dominant nations relative to dominant nations in multinational states, and the solution voiced by many governments is simply non-discrimination, as politically defined by the state concerned. There is little or no comment on the need for or type of institutional changes and special measures or self-determination as is sought in… the indigenous situation…
>
> Many multinational states wishfully take great pride in their melting pot assimilationist policies or tradition as proof of their commitment to non-discrimination – as defined by them. But there can be a gross contradiction between non-discrimination as politically defined by most states, and melting pot policies or traditions which may often serve as a linguistic euphemism and cover for what can in reality be more accurately defined as the forced assimilation of nations, minorities and indigenous peoples, and the resultant retardation of their social-economic and cultural development…
>
> Where minority resistance is limited, such as in the situation of… indigenous people, melting pot policies themselves, when enforced by government in conjunction with societal institutions, may become a chief reason for institutional and systemic racial discrimination… This leaves groups open to an almost unlimited assault on their human dignity, values, community cohesion and economic independence, reducing the individual member of such groups to a state of almost complete dependency in all societal sectors, where his/her success is measured in terms of majority-dominated processes and norms.[42]

As I also noted in the *Social Justice Report 2000* a commitment to equality that extends no further than sameness of treatment confirms 'the position of Indigenous people at the lowest rungs of Australian society. Demands for identical or 'sameness' of treatment are tantamount to 'keeping us in our place'.[43] The nature of participation and representativeness required by self-determination necessitates going beyond such sameness of treatment and to strive for institutional innovation.

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41 *Social Justice Report 2000*, *op cit*, p12.

42 Kly, Y, 'Exploring the concept of the right to self-determination in international law and the role of the United Nations' in Kly, Y, and Kly, D (Eds), *op cit*, pp43-44.

43 *Social Justice Report 2000*, *op cit*, p19.

There are further implications flowing from this requirement for States to be representative and facilitate popular participation. Ultimately, *the maintenance of the territorial integrity of the State is linked to respect for self-determination*.

This can be seen from the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960), the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (1970) (the Friendly Relations Declaration),[44] and the *Vienna Declaration and Programme of Action of the World Conference on Human Rights* (1993). The Friendly Relations Declaration states, for example, that the recognition of the right of all peoples to self-determination shall not:

> be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

As Erica-Irene Daes notes:

> The meaning of the aforesaid provisions is plain. Once an independent State has been established and recognised, its constituent peoples must try to express their aspirations through the national political system, and not through the creation of new States. This requirement continues unless the national political system becomes so exclusive and non-democratic that it no longer can be said to be 'representing the whole people'. At that point, and if all international and diplomatic measures fail to protect the peoples concerned from the State, they may perhaps be justified in creating a new State for their safety and security. Indeed, in such a state of affairs, legal arguments cease to have any real significance since peoples will defend themselves by whatever means they can. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.[45]

There are two consequences of this. *First, States have a responsibility to be representative and accountable in accordance with the right of self-determination. Second, territorial integrity will be guaranteed so long as they meet these obligations.*[46]

Article 45 of the Draft Declaration on the Rights of Indigenous Peoples was quoted at the beginning of this section. It has the effect of qualifying the recognition of Indigenous self-determination in Article 3 of the Draft Declaration by making it subject to the provisions of the Friendly Relations Declaration (among others). This means that, subject to these conditions, *the recognition*

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44 For a discussion of these declarations see Venne, S, *op cit*, pp73-75.

45 Daes, E, *Explanatory note concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc: E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, para 21.

46 See also van Walt van Praag, M (Ed), *op cit*, p31.

of Indigenous self-determination through the Draft Declaration is qualified in a way that guarantees the territorial integrity of States.[47]

A source of government fears about secession and territorial integrity is the implications of recognising Indigenous peoples' relationship to traditional lands and resources. In many instances this is one of the most significant institutional barriers to the realisation of Indigenous self-determination. As Erica-Irene Daes notes in her final report on *Indigenous Peoples and their relationship to land*:

> it is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of indigenous societies… [There is an] urgent need for understanding by non-indigenous societies of the spiritual, social, cultural, economic and political significance to indigenous societies of their lands, territories and resources for their continued survival and vitality.[48]

In particular, there are four key elements which are unique to Indigenous peoples relationship to land:

> (i) a profound relationship exists between indigenous peoples and their lands, territories and resources; (ii) this relationship has various social, cultural, spiritual, economic and political dimensions and responsibilities; (iii) the collective dimension of this relationship is significant; and (iv) the intergenerational aspect of such a relationship is also crucial to indigenous peoples' identity, survival and cultural viability.[49]

Respect for Indigenous peoples' relationship to land and resources is an integral component of self-determination, from an economic, social, political and cultural dimension.

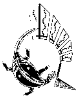
This relationship to land can ordinarily, in my view, be recognised without impacting on the territorial integrity of the State. Asbjorn Eide usefully explains why by differentiating between territorial autonomy and what he terms cultural autonomy:

> Conceptually and in practice, territorial autonomy should be kept separate from cultural autonomy… Generally, it is difficult to accept a principle of territorial autonomy based strictly on ethnic criteria, since this ran counter to the basic principles of equality and non-discrimination between individuals on racial or ethnic grounds. There are, on the other hand, strong arguments in favour of forms of cultural autonomy which would make it possible to maintain group identity. What is special for indigenous peoples is that the preservation of cultural autonomy requires a considerable degree of self-management and control over land and other natural resources. This requires some degree of territorial

47 As quoted at the beginning of this section, Article 1 of the international covenants are similarly qualified, meaning that Indigenous self-determination can only threaten territorial integrity in the event that the State becomes unrepresentative.

48 Daes, E, *Indigenous peoples and their relationship to land,* UN Doc: E/CN.4/Sub.2/2001/21, 11 June 2001, para 12-13.

49 *ibid*, para 20.



> autonomy. The scope of and limits to such autonomy are difficult to specify, however, both in theory and on the ground in specific cases.[50]

This leads us to discussion of the main concern of States about Indigenous self-determination – the possibility that it could lead to secession or the creation of separate Indigenous states. Many governments participating in negotiations on the Draft Declaration on the Rights of Indigenous Peoples do not oppose recognition of Indigenous self-determination *per se*. Instead, they challenge the content and form that Indigenous self-determination might take by seeking to:

- guarantee that its recognition will not affect their territorial integrity;
- place limitations on its definition by recognising Indigenous peoples' right to internal (as opposed to external) self-determination; or
- limit its recognition to situations of autonomy by attempting to re-draft Article 31 of the Draft Declaration (quoted at the beginning of this section) so that it reflects autonomy as the maximum form of self-determination that can be recognised rather than as an illustration or 'a specific form' of Indigenous self-determination.

What underlies each of these positions is concern that recognition of Indigenous self-determination will provide legitimacy to claims of secession or the creation of separate Indigenous states. Governments seek guarantees that this will not take place.

Secession is an extreme expression of self-determination and one that will only occur in the rarest of cases when all other processes have failed. It cannot be absolutely discounted as a possible expression of self-determination. The situation in East Timor is an excellent example of why it should not be discounted. As the UNESCO conference noted:

> In the broader context of self-determination, *separation or secession from the state of which a people forms a part should be regarded as a right of last resort*. Thus, if the state and its successive governments have repeatedly and for a long period oppressed a people, violated the human rights and fundamental freedoms of its members, excluded its representatives from decision-making especially on matters affecting the well-being and security of the person, suppressed their culture, religion, language and other attributes of the identity valued by the members, and if other means of achieving a sufficient degree of self-government have been tried and have clearly failed, then the question of secession can arise as a means for the restoration of fundamental rights and freedoms and the promotion of the well-being of the people... People and communities may attempt to secede because independent statehood appears to them to form the only means of obtaining the level of freedom and security which they aspire to…[51]

There are six main problems with the concerns expressed by governments as they relate to secession. The first is that the approach of governments is ultimately a pragmatic and political one. They do not argue that Indigenous peoples are

50 Eide, A, and Daes, E, *op cit*, para 15.
51 van Walt van Praag, M (Ed), *op cit*, pp30-31.

not *entitled* to self-determination as a matter of law. Instead they look immediately to the most extreme potential impact of the exercise of that right on the status quo. It is a political preference to preserve the status quo.

The second is that the fear of secession immediately conflates Indigenous self-determination with the concept of state-hood. Indigenous peoples' aspirations are cast in terms of the most extreme form of self-determination, the creation of separate states. This is a fundamentally flawed approach. As noted above, there are a range of international declarations which protect the territorial integrity of states who meet their obligations to citizens.

The equation of self-determination with secession is made without reference to the existing state of international law and without an eye to history. Consequently, it is an assumption that is 'neither legally correct nor politically necessary, and… dangerously counter-historical in a world now beset by inter-group conflicts far more complex than those the UN faced or fathomed at the end of World War II'.[52]

The third broad factor is that this approach simply lacks reality. We need only look to the struggle of the East Timorese to know that international recognition of statehood requires more than recognising a peoples' entitlement to self-determination. In Australia, for example, the absence of any conflict or political movement for secession by Indigenous peoples is an obvious indicator of the lack of reality, indeed the absurdity, of any such claims.

The fourth factor is the one of overarching concern. As Mililani Trask has noted, the attempts to explicitly place limitations upon Indigenous peoples' right to self-determination through the Draft Declaration – where limitations apply to no other peoples – places at stake the fundamental basis of the entire international human rights system. Suggestions that Indigenous self-determination be qualified to guard against secession mean that:

> There is a crisis emerging in the field of human rights… At stake is nothing less than the fundamental principle that human rights are universal. The Charter of the United Nations, the Universal Declaration of Human Rights and the International Human Rights Conventions are founded upon this principle.[53]

The fifth factor is that fears of secession by governments overlook the fact that *self-determination is not self-executing, unilateral or absolute in its application* and that it is a process of engagement and negotiation. When balanced against principles such as the protection of territorial integrity, the international community is highly unlikely to recognise secessionist movements in States that are conducting themselves in good faith.

The sixth factor is that for over twenty years in the Working Group on Indigenous Populations, and in each session of negotiations on the Draft Declaration, *Indigenous peoples have indicated that generally they do not aspire to secession*.

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52 Lâm, M, *At the edge of the State: Indigenous peoples and self-determination*, Transnational Publishers, New York, 2000, pxxiii.

53 Trask, M, 'Future perspectives on the Draft Declaration on the Rights of Indigenous Peoples: Human rights at the crossroads' (2002) 1 *Indigenous Affairs* 20, p20.

In the Australian context, Indigenous peoples are so numerically inferior and geographically dispersed that it is nonsense to suggest that the creation of separate states would be feasible. Indeed, in those areas of Australia where Indigenous peoples are most numerous, culturally distinct and have greater access to traditional land and resources – such as the Northern Territory and Torres Strait – recent processes indicate that there are no proposals on intentions for separatism.[54] At no stage have any Indigenous Australians participating in international negotiations on self-determination suggested that secession is a realistic option.

The fear of governments of secession is not soundly based in existing law or indeed in political reality. It has been suggested that to broach this impasse will require States to take a leap of faith and take Indigenous peoples at their word. This may be so, but it is an extremely kind way of referring to the actions of States to date. Instead, I would suggest that *what is required is for governments to stop acting in bad faith by equating self-determination with secession.*

Government fears of secession have also led to suggestions that Indigenous self-determination should be limited to internal dimensions, as opposed to external dimensions. There is, in my view, *no justification for imposing an arbitrary restriction to internal self-determination on Indigenous peoples*. The participation of Indigenous peoples in UN processes and in negotiations on the Draft Declaration on the Rights of Indigenous Peoples demonstrates that there are other external dimensions of Indigenous self-determination to secession. The UNESCO conference also notes that:

> The external aspect of the right to self-determination is generally considered to be the right to separate from the existing state. But there are other external aspects which are of considerable relevance to the exercise of self-determination, but which do not necessarily entail the creation of an independent state…
>
> Indigenous peoples… consider it important to participate in decision-making processes at national and international levels relating to the conservation of nature or its exploitation. By the same token, any people or community may consider it of importance to include in its exercise of self-determination the authority to participate in international discussions or be included in international organisations where decisions are taken that affect core aspects of their existence and development. This could include participation… in regional organisations (examples include the Sami Council's membership in the Nordic Council and the Circumpolar conference), global organisations (the establishment of a Permanent Forum for Indigenous Peoples within the United Nations system could be an example of such participation) or in cultural or religious organisations…[55]

It is unfortunate that the debate on the implications for secession of the recognition of Indigenous self-determination has not moved beyond the discussion of these matters in the Cobo study on the problem of discrimination

54 For case studies of the self-determination claims in the Torres Strait and central Australia see Aboriginal and Torres Strait Islander Social Justice Commissioner, *An Australian perspective on self-determination*, *op cit*.

55 van Walt van Praag, M (Ed), *op cit*, pp31-32.

against indigenous populations, undertaken throughout the early 1970s and 1980s. In his final report and recommendations, Cobo stated:

> The unity which is a legitimate concern of many States, particularly those that have recently acceded to independence, can be achieved most fully and profoundly through a genuine diversity which respects differences between existing groups aspiring to a distinct identity within society as a whole. The desired unity will be achieved more fully if it is based on diversity, rather than an imposed uniformity inconsistent with the genuine feelings of the population. Within that diversity, each group would participate more fully since it would do so on the basis of its own conceptions, values and patterns, rather than attempting to use modes of expression which are foreign to it.[56]

Ultimately it is my view that the debate about Indigenous self-determination through the processes of the United Nations has become protracted and difficult because it exposes and challenges the fundamental flaw of the UN law-making process. Namely, that it is a process that depends on States (or governments) agreeing to set the standards that they will then apply to themselves. In relation to the situation of Indigenous peoples the world over, this means that States have self-interest and illegitimate gains to protect.

The analysis in this section demonstrates that in the international arena, the concerns about applying self-determination to the situation of Indigenous peoples are by and large not matters of law but are largely *political* matters which reflect the reluctance of States to recognise Indigenous peoples' rights for fear of the potential consequences. At core, the position of governments internationally exposes the gap between theory, legality and the legitimacy of the actions of governments, and the pragmatism of governments.

c) Summary – Defining Indigenous self-determination

In summary, the following factors can be identified about Indigenous peoples' right to self-determination.

1. Self-determination is an ongoing process of choice for the achievement of human security and fulfilment of human needs.
2. Respect for distinct cultural values and diversity is fundamental to the notion of self-determination.
3. The protection of self-determination unquestionably involves some kind of collective political identity for indigenous nations and peoples, i.e. it requires official recognition of their representatives and institutions.
4. Respect for Indigenous peoples' relationship to land and resources is an integral component of self-determination, from an economic, social, political and cultural dimension. A lack of control of traditional lands and resources is often a significant institutional barrier to the realisation of Indigenous self-determination.
5. Self-determination contains a subjective element – it cannot be judged solely from objective criteria. The true test of self-determination is

56 Cobo, J M, *op cit,* para 401.

whether Indigenous peoples themselves actually feel that they have choices about their way of life.

6. Essential to the exercise of self-determination is choice, participation and control. The essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned.
7. Self-determination does not have a prescribed or pre-determined outcome.
8. Self-determination is a process that is ongoing. It is not a one off event or something that is defined as at a particular moment in history.
9. A notion of popular participation is inherent to self-determination.
10. In a democracy, Indigenous peoples' right to self-determination is not necessarily safeguarded or respected by a reliance on majority rule. Self-determination raises the issue of representativeness and participation within the democratic principle.
11. The existence in democratic societies of structural and procedural barriers which inhibit the full participation of Indigenous peoples must be recognised. The nature of participation and representativeness required by self-determination necessitates going beyond such sameness of treatment and to strive for institutional innovation.
12. Ultimately, the maintenance of the territorial integrity of the State is linked to respect for self-determination. Numerous UN declarations, such as the Friendly Relations Declaration, limit the exercise of self-determination so that it does not threaten territorial integrity or political unity of States so long as those states conduct themselves in compliance with the principles of equal rights and self-determination of peoples and are representative.
13. Continued government representivity and accountability is therefore a condition for enduring enjoyment of the right of self-determination, and for continued application of the territorial integrity and national unity principles.
14. Article 45 of the Draft Declaration on the Rights of Indigenous Peoples similarly qualifies the recognition of Indigenous self-determination in Article 3 of the Draft Declaration by making it subject to the provisions of the Friendly Relations Declaration (and other UN provisions). Hence, the recognition of Indigenous self-determination through the Draft Declaration is qualified in a way that guarantees the territorial integrity of States.
15. Secession is an extreme expression of self-determination and one that will only occur in the rarest of cases when all other processes have failed. Separation or secession from the State of which a people forms a part should be regarded as a right of last resort.
16. The fear of secession by States immediately conflates Indigenous self-determination with the concept of state-hood. The equation of self-determination with secession is made without reference to the existing state of international law and without an eye to history.
17. In Australia, the absence of any conflict or political movement for secession by Indigenous peoples is an obvious indicator of the lack of reality, indeed the absurdity, of the claim that recognition of self-determination could lead to secession.

18. Self-determination is not self-executing, unilateral or absolute in its application and is a process of engagement and negotiation. When balanced against principles such as the protection of territorial integrity, the international community is highly unlikely to recognise secessionist movements in States that are conducting themselves in good faith.
19. Indigenous peoples have indicated that generally they do not aspire to secession. Examples from Australia indicate that there are no aspirations for secession by Indigenous Australians.
20. The fear by governments of secession is not soundly based in existing law or political reality. What is required for progress in recognition of Indigenous self-determination is for governments to stop acting in bad faith by automatically equating self-determination with secession.
21. There is no justification for imposing an arbitrary restriction to internal self-determination on Indigenous peoples. The participation of Indigenous peoples in UN processes and in negotiations on the Draft Declaration on the Rights of Indigenous Peoples demonstrates that there are numerous external dimensions to their right to self-determination, other than secession.
22. Attempts to qualify the recognition of Indigenous self-determination place the universality of human rights at risk.

The Government's approach to self-determination

So what exactly is the Government's position on self-determination and how does it seek to justify that position?

Since 1999, the Government has made clear that it does not support self-determination as the underlying principle for Indigenous policy development in Australia. The reasons for this, however, are more elusive to track down. As the Government has gone about the task of locking into place its practical reconciliation approach it has simply disengaged on issues that it does not agree with. Consequently, there has been very little effort by the Government to elaborate a detailed position on self-determination. Accompanying this trend has been the tendency for the Government to co-opt language that has traditionally been used in relation to self-determination. An important question that must be addressed therefore is whether their opposition to self-determination is largely rhetorical and simply reflects a preference for a different word, or whether it is a genuine rejection of the legal concept of self-determination.

There are three main ways that we can piece together the Government's overall perspective on self-determination. These are through its response to the reconciliation process; responses to broader debates on Indigenous policy such as the rights agenda, treaty and governance reform; and through international negotiations on the Draft Declaration on the Rights of Indigenous Peoples.

a) Reconciliation

In May 2000, the Council for Aboriginal Reconciliation released its documents of reconciliation. These constituted the actions that they recommended should be taken principally by governments to achieve reconciliation. These documents are the *Australian Declaration Towards Reconciliation* and the *Roadmap to*

reconciliation. The Roadmap contained summaries of the Council's four, inter-related national strategies for achieving reconciliation: namely, the strategies for overcoming Indigenous disadvantage; achieving economic independence; recognising Aboriginal and Torres Strait Islander rights; and sustaining the reconciliation process. Between May and December 2000, the Council then released expanded versions of the four national strategies detailing the basis for the recommendations contained in the Roadmap as well as identifying key objectives and areas for implementation. The Council's final report titled *Australia's challenge* was then released in December 2000. It contained further recommendations for the giving effect to the actions identified in the four national strategies and the Roadmap.

Each of these documents contains recognition of the importance of Indigenous self-determination for the reconciliation process. The *Australian Declaration towards Reconciliation*, for example, includes the phrase 'And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation'.[57]

In the *National Strategy for the Recognition of Aboriginal and Torres Strait Islander Rights* the Council for Aboriginal Reconciliation identifies the 'formal recognition of the right of Aboriginal and Torres Strait Islander peoples to self-determination within the life of the nation'[58] as an important objective for reconciliation to be achieved. The Council indicated that it 'supports self-determination as the guiding principle for government policy on Aboriginal and Torres Strait Islander affairs at all levels'.[59] Accordingly, the rights strategy recommends that:

> A. Governments at all levels acknowledge Aboriginal and Torres Strait Islander peoples' right to self-determination as the basis for policy on Aboriginal and Torres Strait Islander affairs.
>
> B. Governments at all levels enter into negotiations with Aboriginal and Torres Strait Islander peoples in order to realise self-determination goals.
>
> C. Commonwealth Government, ATSIC and Reconciliation Australia work together to promote discussion and education on the meaning of self-determination in the context of Aboriginal and Torres Strait Islander peoples.[60]

The Council explained that 'Aboriginal and Torres Strait Islander peoples never had the opportunity to participate in the nation-building surrounding federation. For Aboriginal and Torres Strait Islander peoples… the need to negotiate this relationship is central to their aspirations. It is often referred to in terms of self-determination'.[61]

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57 Council for Aboriginal Reconciliation, *Australian Declaration Towards Reconciliation*, online at: www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm.

58 Council for Aboriginal Reconciliation, *Recognising Aboriginal and Torres Strait Islander rights – Ways to implement the National Strategy to Recognise Aboriginal and Torres Strait Islander Rights*, CAR Canberra 2000, Online at: www.austlii.edu.au/au/other/IndigLRes/car/2000/9/.

59 *ibid*.

60 *ibid*.

61 *ibid*.

The Council also noted, in support of its position, that:

> The meaning of self-determination is often confused by references to secession and separate statehood, but such references are unfairly inflammatory and do not reflect Aboriginal and Torres Strait Islander aspirations. Self-determination is much more about the process of decision-making. It reflects the need for Aboriginal and Torres Strait Islander peoples to negotiate a relationship with the Australian Government, which may lead to many outcomes that have the potential to enhance rather then undermine our sense of national unity. It also reflects the kind of autonomy and decision-making that is already being exercised by communities who take responsibility for the delivery of services or programs. That is, self-determination is reflected in the recognition by governments of Aboriginal and Torres Strait Islander peoples right to exercise a sphere of authority and responsibility and the communities' exercise of that right.
>
> In international law self-determination is 'the right of all peoples to freely determine their political status and to pursue their own economic, social and cultural development'. It has its origins in the theory of self-government – that a society should be able to determine for themselves how they are to be governed and to make the decisions that directly affect them.[62]

The Final Report of the Council, titled *Australia's challenge*, took these proposals one step further. Having acknowledged that Indigenous peoples have been excluded from nation building in Australia, they recommended that:

- Each government and parliament recognise that the settlement of Australia took place without consent or treaty and accept the desirability of negotiating agreements or treaties to progress reconciliation, and enter into negotiations to establish a process to achieve this purpose and to ensure adequate protection of the rights of Indigenous peoples (recommendation 5); and
- The federal Parliament enact legislation to put into place a process for resolving unfinished business and to commence a treaty or agreement process (a draft *Reconciliation Bill* was appended to the report as a draft for this purpose)(recommendation 6).[63]

The Government has made clear that it does not accept these proposals by the Council for Aboriginal Reconciliation. It immediately responded to the inclusion of self-determination in the *Australian Declaration Towards Reconciliation* by releasing its own, alternative version in May 2000. The text of the Council's Declaration reads:

> We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.
>
> And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.[64]

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62 *ibid*.
63 Council for Aboriginal Reconciliation, Reconciliation – *Australia's challenge*, Council for Aboriginal Reconciliation, Canberra 2000, www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm.
64 Council for Aboriginal Reconciliation, *Australian Declaration Towards Reconciliation*, *op cit*.

The Government's version, which has no formal status, reads in the alternative:

> We desire a future where all Australians *enjoy equal rights, live under the same laws and share opportunities and responsibilities according to their aspirations*.
>
> And so, we pledge ourselves to stop injustice, overcome disadvantage, and *respect the right of Aboriginal and Torres Strait Islander peoples, along with all Australians, to determine their own destiny*. (Changes highlighted in italics).[65]

The changes to the Council's text make clear that the acceptance of rights and recognition of culture will not extend to any differential treatment, particularly where this is entrenched in law. They also remove the term self-determination and replace it with the right of Indigenous peoples (in common with all other Australians) 'to determine their own destiny'.

As noted in the progress report on reconciliation in the *Social Justice Report 2001*, the Government did not otherwise provide reasons for disagreeing with areas of the Council's proposals once the Council's strategies and final report had been released. Their comments indicated that they did not support the concept of a treaty and that they did not accept the rights strategy. On these matters of disagreement, however, they provided no detail as to what in particular they did not accept or why.

Instead, the Government stated in the most general of terms that they acknowledge that there are many areas of agreement between the Government, the community and the Council for achieving reconciliation and noted that there is no one approach to achieving reconciliation. They have then sought to focus attention on those areas where they see substantial agreement, rather than the issues that divide us. This they have done through the catchcry of 'practical reconciliation'.

It was not until September 2002, more than two years after the release of the Council's strategies and 21 months after the Council released its final report, that the Government formally responded to the Council's documents. The response is insubstantial at a mere 23 pages, yet it provides the most extensive engagement by this Government on the issue of self-determination and human rights to date.

In the response, the Government restates that it cannot accept the Council's Declaration and again offers the above alternative formulation on self-determination. On these areas of difference to the Council's Declaration the Government's response states:

> The areas of difference between the revised Declaration and the Council's Declaration relate to areas where there remain clear differences of view in the community. For example, the Government is unable to endorse the approach to customary law in the Council's Declaration as the Government believes all Australians are equally subject to a common set of laws. Neither can the Government endorse the term 'self-determination' (which implies the possibility of a separate indigenous state or states) although it unequivocally supports the principle of

65 Howard, J, *Reconciliation documents*, media release, 11 May 2000.

> Indigenous people having opportunities to exercise control over aspects of their affairs (as reflected in the establishment and operation of ATSIC for example)…[66]

The Government also notes that while it cannot commit to the Declaration for these reasons, it is prepared to reaffirm its support for reconciliation as expressed through its *Motion of Reconciliation* passed by both Houses of Federal Parliament on 26 August 1999. They state that the principles 'expressed in the Motion remain entirely relevant to the Government's continuing commitment to the cause of reconciliation'.[67] The closest the motion gets to anything approaching a commitment to self-determination (or indeed to partnership or consultation with Indigenous peoples on matters that affect them) is a commitment 'to work together to strengthen the bonds that unite us, to respect and appreciate our differences and to build a fair and prosperous future in which we can all share'.[68]

Specifically on the issue of self-determination, the Government's response to the Council's documents states:

> The Government supports the principle that Indigenous people should have meaningful opportunities to exercise control over their own affairs… However, the Government is concerned that self-determination is defined by some as representing the right to unilaterally challenge national sovereignty. It carries the implication of a separate Indigenous state or states… The Government prefers the terms self-management or self-empowerment, believing that these terms are consistent with a situation in which Indigenous people exercise meaningful control over aspects of their own affairs in active partnership and consultation with government.
>
> It is the responsibility of government to ensure that all Australians have equality of opportunity and access to services. The Government is concerned that self-determination implies that a government must in some way relinquish responsibility for and control over those aspects of well-being over which it rightly has jurisdiction in common with its responsibility to all Australian citizens... Very importantly, the Government is committed to ensuring that in the process of meeting its obligations to Indigenous people, they are engaged to the maximum extent possible as partners in the design and delivery of services.[69]

In other parts of its response to the Council's documents the Government indicates that while it is prepared to accept that Indigenous culture is diverse and different, it is not willing to recognise that any distinct cultural rights flow as a consequence of such acknowledgement. On this point the Government states:

> The Government agrees that all Australians have the right to enjoy in daily life, a fundamental equality of rights, opportunities and acceptance of responsibilities. The Government agrees that the unique status and identities of the Aboriginal and Torres Strait Islander people as the first

66 Minister for Aboriginal and Torres Strait Islander Affairs, *Response to the Council for Aboriginal Reconciliation Final report – Reconciliation: Australia's challenge*, Commonwealth Government, Canberra, 2002, p10.

67 *ibid*.

68 *ibid*.

69 *ibid*, pp19-20. Emphasis added.

> people of Australia must achieve recognition, respect and understanding in the wider community… The Government recognises that the cultures of Indigenous people are essential to our distinctive character as a nation…
>
> The Government is committed to common rights for all Australians. The Government recognises that many Aboriginal and Torres Strait Islander people have not had the opportunity to enjoy such equal rights in the past because of events that have had a profound impact on Indigenous people. The Government supports additional measures to ensure equality of opportunity where such measures are necessary to overcome specific disadvantages experienced by Indigenous people. Neither the Government nor the general community, however, is prepared to support any action which would entrench additional, specific or different rights for one part of the community.[70]

It is a combination of this point (no special treatment) with the one in the previous quote (concerning the responsibility of Government and control of services) that is the key to understanding the Government's opposition to self-determination. They indicate that the Government sees it as unacceptable that self-determination and the recognition of Indigenous cultural rights could legitimise or create a transfer of power to Indigenous communities. Conceived of in this way, self-determination is cast as an adversary and an opponent to the Government's service delivery role and to the Government's 'practical' reconciliation approach. Framed in this way, the concept of self-determination – and the central role that it seeks to ensure for Indigenous peoples – poses a significant challenge to and could even be seen as the antithesis of the philosophical underpinnings of the Government's approach.

This is also demonstrated by examining Indigenous aspirations in the context of the Government's broader policy framework. In November 2002 the Prime Minister released an important document identifying the long term strategic goals and approach of the Government. Titled *Strategic leadership for Australia – policy directions in a complex world*, the document identifies what the Government sees as the key strategic issues facing Australia. Indigenous issues are not mentioned at all in this framework. Before identifying what the key strategic directions facing Australia are, however, the document outlines the philosophical underpinnings of the Government's approach to all policy making as follows:

> I think all governments need a clear understanding of the values that are important to Australians. And I think governments must identify national priorities so that they can develop coherent, long-term programmes based on these values. I think Australians want from their governments and believe in relation to themselves four important things. *Australians do believe in self-reliance*. We largely want to be self-reliant individuals with an equal measure of rights and responsibilities. We believe very much in what we call in our own colloquial way a fair go for all Australians. *We do want to ensure a equality of opportunity and equality of treatment for all Australians* and whatever our starting point, each one of us deserves an equal chance to succeed and a leg up when we hit

70 *ibid*, p17.

> troubles. *We believe in pulling together as a community.* And this willingness to unite and help others is ingrained in the Australian culture. And as a government we have a partnership between the Government and the community through the social coalition at the heart of many of our policy decisions. *And fourthly we believe in having a go*. Australians do rise to the occasion on the sports field, in the boardrooms, overseas, indeed everywhere. And calculated risk taking, creativity and having the courage of your convictions is very much part of the Australian psyche. We do seek a strong, fair and decent Australia based on these values.[71]

These values emphasise sameness, unity or 'one-ness'. They do so at an individual level. There is no obvious place for recognising cultural difference or for maintaining cultural practices in a way that differentiates a group from the rest of society.

b) Domestic policy debates about the rights agenda, treaty and governance reform

Details of the Government's approach to self-determination, including this focus on sameness and on the individual, can also be seen from other documents or statements by the Government on Indigenous policy released during the year. In particular, it can be seen from speeches at the ATSIC National Policy Conference, the ATSIC National Treaty Conference and in the Government's views on governance and capacity building in Indigenous communities.

The first is the speech at the ATSIC National Policy Conference by the Minister for Aboriginal and Torres Strait Islander Affairs in March 2002. On the Indigenous 'rights agenda' in general he makes the Government's common assertion about self-determination, namely that:

> I know that when some talk about the rights agenda they are talking about a separate nation within a nation...[72]

The Minister then outlines the Government's understanding of self-determination:

> Some people use words like self-determination loosely. I am all for individuals being able to determine their own destiny.[73]

It is notable that this description defines self-determination as applying to the individual. The Minister then returns to the 'threat' of recognising collective rights and of establishing formal structures for implementing such rights:

> [I]n terms of the Australian community, I am not about separateness, I am about inclusiveness. Inclusiveness that respects, supports and encourages indigenous cultures and recognises the special place that indigenous people occupy in this country as the first Australians.

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71 Howard, J, 'Strategic leadership for Australia – policy directions in a complex world', Speech, Committee for Economic Development of Australia, Sydney, 20 November 2002, www.pmc.gov.au/leadership/strategicleadership1.cfm, p1, italics added.

72 Ruddock, P, 'Changing direction', Speech, ATSIC National Policy Conference – Setting the Agenda, *op cit.*

73 *ibid*.

> When some people talk about rights, they talk about structures, they talk about bureaucracy, they talk about separate entitlements. That's all well and good. But it is the debate of the past – modern commentators are challenging those paradigms.[74]

And he makes clear that the Government's policy framework is one that starts and ends with basic citizenship entitlements:

> When I visit indigenous communities people tell me that the important rights for them are:-
>
> - The right to good education;
> - Decent health;
> - A reasonable standard of living in a house that they own;
> - A safe and secure environment for their families;
> - The right to a job.
>
> And the right to:-
>
> - Protect, develop and celebrate indigenous culture;
> - Own land for cultural, social and economic purposes;
> - Contribute to the preservation of the environment.
>
> At this conference, when we are considering future directions for indigenous policy, we must start with a frank and honest assessment about how we are performing in delivering those basic rights to Indigenous Australians.[75]

The Minister then put forward a 'five point plan' for Indigenous policy. In brief, the five points are:

- shifting the emphasis of policy towards individuals and families;
- focusing on replacing welfare dependency with economic independence;
- recognising the need for shared responsibility and partnership between Government and Indigenous people;
- addressing substance abuse as a central aspect of improving Indigenous health; and
- ensuring that mainstream funding caters to Indigenous needs to enable better targeting of Indigenous specific resources.[76]

I consider this in chapter 3 of this Report. At this stage, I note that the Government has presented these five points as an alternative, and indeed even in opposition, to self-determination and a rights agenda. Yet it is difficult to comprehend why exactly these points are perceived by the Government as inconsistent with self-determination.

The Minister's five point plan was heavily criticised by Indigenous people during the course of 2002. In particular, a number of people suggested that it heralded a return to assimilationist ideology. As a consequence of this, the Minister sought

74 *ibid*.

75 *ibid*. Note my comments later in this chapter which relate to the results of the NSW basic needs survey of 1983 on these issues.

76 *ibid*.

to clarify the Government's approach at the National Treaty Conference in October 2002. He explained the Government's views as follows:

> Australia can only claim to be a truly inclusive society when Indigenous Australians have the freedom to make their own choices and to achieve the same sorts of opportunities and outcomes as other Australians.
>
> When I have used the term inclusiveness before, some commentators have confused this with the old assimilation policies of the past. That is not what I am saying at all.
>
> The Government recognises the special place that Indigenous people occupy in this country as the "first Australians".
>
> We believe that Indigenous Australians must be able to enjoy the same rights and responsibilities as other Australians.
>
> Indigenous Australians should have the opportunity to enjoy their own culture and to share the benefits and responsibilities that this country offers to all citizens.
>
> By inclusiveness I mean embracing and celebrating difference because it is those differences that determine what we are as a nation…[77]

The Minister then stated the Government's opposition to the concept of a treaty with Indigenous people by arguing it 'distracts everybody… from the main game'.[78] He argues:

> We should not allow ourselves to be distracted by intellectual pursuits or a wish list of things under the banner of a treaty. I'm talking about reserved Indigenous seats in parliament, self-government, dedicated shares of tax revenue, and a financial settlement for colonisation and 200 years of disadvantage. Widespread support for these concepts from the broad Australian community is very unlikely.[79]

Specifically on the issue of self-government, the Minister then states:

> The new Canadian territory of Nunavut is sometimes cited as a possible model for Indigenous self-government in Australia. I have been to Nunavut and it is worth noting that Nunavut is not an ethnically-based government. All residents, both Inuit and non-Inuit, are entitled to vote.[80]

Instead of a treaty and issues like self-government, the Minister states the Government's preference for and role in 'fostering a new culture of agreement-making with Indigenous people that is giving them real influence and control in the affairs of state that matter to them'.[81]

Agreement-making is the Government's process for implementing 'shared responsibility and partnership' with Indigenous peoples. The Minister explained the Government's approach to agreement-making at the National Treaty Conference as follows:

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77 Ruddock, P, *Agreement making and sharing common* ground, Speech, ATSIC National Treaty Conference, 29 August 2002, www.minister.immi.gov.au/atsia/media/transcripts02/treaty_conf_0802.htm.

78 *ibid*.

79 *ibid*.

80 *ibid*.

81 *ibid*.

> Agreement-making, if it is to succeed, should be guided by the following principles:
>
> - Involvement of the local Indigenous community in decision-making and determining priorities for action;
> - Shared responsibility of parties to the agreement. Without all parties making undertakings, results can not be ensured;
> - Flexibility to meet local circumstances;
> - Focus on outcomes with clear benchmarks to measure progress.
>
> We need agreements that are a two-way undertaking that change the relationship from one of passive welfare dependency to a much more equal relationship. Yes – I am talking about empowerment.[82]

Describing agreement-making as 'the emerging revolution in Indigenous affairs', the Minister describes Indigenous peoples' attitude to it as follows:

> Empowered by clearer recognition of their basic citizenship rights and seasoned by a generation of advocacy, Indigenous Australians are marking out new territory in their efforts to realise their ambition of self-management and self-reliance.[83]

Notable about this description is the confinement of Indigenous peoples' aspirations to individual attributes of self-reliance and self-management, and to the achievement of citizenship rights.

While no one would disagree with the Government's commitment to working in partnership with Indigenous people and focusing on agreement-making, the question that remains is to determine exactly where the parameters of this process are. In other words, over what are they prepared to enter into partnership with Indigenous people and on what terms?

We particularly need to ask these questions given that we know that the Government are opposed to negotiating a treaty or framework agreement and are opposed to recognising self-determination to underpin the relationship with Indigenous people. Indeed, the answer to this question determines to a large extent whether their language of empowerment and partnership is merely rhetorical or has substance.

As I have reported in my annual *Native Title Report* for the past few years, the language of agreement-making has been adopted in the native title arena as a camouflage for decision-making within a framework that disempowers Indigenous people. Negotiations take place against the backdrop of a discriminatory native title regime and with unequal funding for participants in the system to be represented. This provides an illustration of why we must look behind the words to see whether the action supports the rhetoric.

There are some signs that the Government's rhetoric on agreement-making and partnership is not being matched by action. In their latest annual report to Parliament ATSIC suggest as such. In the Chairman's report, Geoff Clark notes:

> What the Minister for Indigenous Affairs calls a 'new direction' is in fact a repackaging of directions that have been pointed out by our community

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82 *ibid*.
83 *ibid*.

> and in a multitude of reports stretching back many years. There is evidence, moreover, that government rhetoric is outpacing its ability to deliver. The first report of progress under the COAG Reconciliation Framework, received in April 2002, was not encouraging.[84]

The conclusion that I have drawn by examining available materials is that the Government is reluctant to enter into any relationships or agreement making that will in any way transform the power relationship with Indigenous people, reduce the level of government control or result in significant institutional change.

In responding to a number of reports the Government has indicated that it views issues of partnership with Indigenous people as a matter of consultation or participation, and nothing more. As I quoted earlier, in its response to the reconciliation documents the Government stated that it is 'concerned that self-determination implies that a government must in some way relinquish responsibility for and control over those aspects of well-being over which it rightly has jurisdiction in common with its responsibility to all Australian citizens'.

The implication of this is that the Government places boundaries around what is negotiable through partnerships and agreement-making. It is unacceptable for these processes to result in any perceived relinquishment of power by government. In responding to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into the needs of urban dwelling Indigenous people, the Government also noted that while it agrees with the principle that it is essential to work with local communities to find solutions to local problems, it has:

> reservations about the Committee's [suggestion] that communities and individuals are generally better able to develop services to meet the needs of their communities than governments, or more likely than governments to find the best solutions to local problems and challenges. There are circumstances where this is true, but there are also circumstances where it is not. The level of community capacity is a key influencing factor.[85]

This approach replicates this concern about Indigenous people taking 'control' of Government processes. It is a strange view that sets Indigenous people up as competitors to the Government – where any accommodation of Indigenous aspirations is seen as giving something up. This is an extremely limited and disrespectful view of partnership. Both these statements above are of concern as they imply that the Government may not in fact be prepared to facilitate institutional change by refocusing service delivery back to communities.

This can also be seen by examining what the Government *did not* respond to in the Commonwealth Grants Commission's report on Indigenous funding need. The report proposes a wide range of processes for developing Indigenous community capacity and creating a role for Indigenous communities in controlling service delivery processes. These conclusions and associated recommendations

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84 Aboriginal and Torres Strait Islander Commission, *Annual Report 2001*-2002, ATSIC Canberra 2002, p31.

85 Minister for Aboriginal and Torres Strait Islander Affairs, *Government response to 'We can do it! The needs of urban dwelling Aboriginal and Torres Strait Islander peoples'*, Commonwealth Government, Canberra, 2002, p6.

are not responded to by the Government, which simply notes at the outset of its response that 'the CGC report includes findings and makes observations that go beyond the terms of reference for the inquiry. [The Government's] response… is limited to those matters that are within the terms of reference'.[86]

The limitations of the Government's approach can also be seen from their submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) inquiry into capacity building in Indigenous communities. The inquiry, and the Government's submission to it, comes in the wake of significant debate about Indigenous governance and the importance of building the capacity of communities to be able to exercise greater control over their own affairs and to be self-governing.[87]

The term capacity building, and the related term governance, have become slogans in Indigenous policy over the past year. In its submission to the House of Representatives Committee, however, the Government has already begun to co-opt the language of 'governance' and 'community capacity' to reinforce its current approach and to set boundaries around the type of partnerships that are acceptable to it. This is illustrated by its description of the Harvard Project on American Indian Development in North America.

The Harvard Project examines self-government in Indian communities and tries to identify what it is that makes communities successful in overcoming welfare dependency and poverty. The Project's basic conclusion is that 'genuine self-rule appears to be a necessary (but not sufficient) condition for economic success on indigenous lands'.[88] As Stephen Cornell explains:

> We have yet to find a case of sustained, positive… economic performance where someone other than the Indian nation is making the major decisions about governmental design, resource allocations, development strategy, and related matters. In case after case, we have seen development begin to take hold when Indian nations move outsiders from decision-making to resource roles and become primary decision-makers in their own affairs.[89]

The project suggests that there are five main determinants of good governance in communities: real self-determination or sovereignty; the building of effective governing institutions; the existence of a cultural match between these institutions and Indigenous traditions; long-term strategic thinking; and leadership from individuals or groups, in the community's interest.

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86 Department of Immigration and Multicultural and Indigenous Affairs, *Government's response to the Commonwealth Grants Commission Report on Indigenous Funding 2001*, DIMIA, Canberra, 2002, p5.

87 See *Social Justice Report 2000*, Chapter 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, HREOC, Sydney, 2001, Chapters 2 and 3 (herein 'Social Justice Report 2001'); Reconciliation Australia, Indigenous Governance Conference, www.reconciliationaustralia.org/graphics/info/publications/governance/speeches.html.

88 Cornell, S, 'The importance and power of Indigenous self-governance: Evidence from the United States', Speech, Indigenous Governance Conference, 3 April 2002, p1, Online at: www.reconciliationaustralia.org/docs/speeches/governance2002/02_stephen_cornell.doc.

89 *ibid*, p2.

The Government acknowledges the importance of building Indigenous community capacity in its submission to the House of Representatives inquiry. It quotes the Harvard Project on the five determinants of good governance. Interestingly though it *alters* the description of the first of these determinants to fit within its alternative view of what the process should be. Hence, they describe the first determinant – real self-determination or sovereignty – as:

> *Real decision-making power* over things such as governmental organisation, development strategy, dispute resolution, civil affairs etc (in other words, genuine self-management)…[90]

By contrast, the authors of the Harvard Project offer the following explanation of this very point:

> The key feature of self-government is decision-making power. What we mean by self-government is self-rule or—in the United States, at least—what is commonly referred to as 'tribal sovereignty': indigenous control over indigenous affairs, including everything from membership to governmental design to resource use to regulatory functions to dispute resolution to law-making and law-enforcement.
>
> One can think of this in very practical terms: Who is deciding how the housing money will be spent? Who is deciding whether or not to allow development on Native land and what the regulatory provisions will be? … If the answer to such questions is that the indigenous nation is making these decisions, then we have self-governance. If some other governing body is making these decisions, we do not have self-governance.
>
> Put slightly differently: does the indigenous nation have to ask permission to do what it wants to do, from changing its governing institutions to managing its resources to changing the law regarding sacred sites on indigenous lands? Self-governance is absent when and where the answer is yes. Self-governance is in place when and where the answer is no…
>
> What does 'self-governance' mean? It is a variable term. In Canada,… the federal government at times seems to view self-governance as little more than administrative control: the freedom of indigenous nations to take over day-to-day management of programs designed and funded by Ottawa or the provinces. Our meaning is different…
>
> Self-government may be wide or narrow in scope. As the above discussion of decision-making power suggests, indigenous nations may be self-governing in some policy domains but not in others… The relevant question is: What governmental functions do the relevant indigenous nations control? Self-governance increases as the scope of indigenous decision-making power widens. As the scope narrows, self-governance declines.
>
> Self-governing powers can be shared. Self-governing power is not an all-or-nothing business, nor does tribal sovereignty mean secession.[91]

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90 Department of Immigration and Multicultural and Indigenous Affairs, *Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into capacity building in Indigenous communities*, DIMIA, Canberra, 2002, p15.

91 Cornell, S, *op cit*, pp2-3.

ATSIC Chairman Geoff Clark correctly identifies the key differences between these conditions and the way that the Government has approached the issue of capacity building in Australia:

> [T]here is evidence that the Government is using all of these discussions opportunistically rather than engaging with their substance. Governance becomes 'capacity building'. Though there is talk of injecting more Indigenous decision-making into programs, does this genuinely mean passing control to Indigenous groups? Does it involve the acknowledgement of our jurisdictions in this country? At first glance some Government policies appear contradictory and these contradictions can be resolved only by assuming that the Government has different policies for different groups of Indigenous people – though it has not really spelt this out.[92]

He also notes:

> Current discussions on governance are a challenge for us and a challenge for governments. It is now widely recognised that Indigenous programs have perpetuated dependence, not development. Our communities have had to face arbitrary, complex, inconsistent and inflexible demands from program providers. The version of self-determination implemented in Australia has been a very limited one. These critiques are not new. Overseas experience and research, principally through the Harvard Project on American Indian Economic Development in the USA, suggests that there are five determinants of good governance…
>
> These are political factors but they produce economic and other positive consequences. The Harvard research suggests that they are of greater significance than more obvious considerations such as education, access to resources and capital or location. There are, however, dangers for us in saying these things in the current political climate in Australia. HORSCATSIA is already quoting the Harvard research to the effect that 'access to natural resources (including land) and finance is less important… than effective governance'. This may be true, but this is a government operating out of an ideological straightjacket, which makes a totem of its annual Budget figure for Indigenous programs and which takes a very incremental approach to increasing that budget. The legal situation of Native Americans is also very different to that of Indigenous peoples in Australia. In the USA the people are recognised as constituting 'domestic dependent nations'… The invading Europeans in this part of the world did not extend that status to us. Many of the current Government's limitations in Indigenous policy stem from its refusal to acknowledge our history and status. Good governance also requires self-determination, but we have a government that is uncomfortable even using the word.[93]

Ultimately, Stephen Cornell suggests that the implications of the Harvard Project's research for Governments at the federal and state levels are as follows:

> What does indigenous self-governance mean to these governments? Will it be limited to operational administration? Will it mean non-

92 ATSIC, *Annual Report 2001-2002, op cit*, p34.
93 *ibid*, p33.

> indigenous governments calling most of the shots, especially on the "big issues"? Or will it embrace genuine control over resources; freedom in the development of appropriate and effective governing institutions; significant and consequential dispute resolution powers and mechanisms; funding via block grants instead of program funds (which moves substantive decision-making power into indigenous hands) until indigenous nations can support themselves; a partnership – not consultation but a partnership – in major decisions wherever indigenous interests are at stake; and genuine jurisdictional power? If we are serious about self-government, then we have to include these things, and we have to invest in building the institutional capacity of indigenous nations to back up their power with capable and effective governing systems that operate under their own control.[94]

This is the true test of the extent to which the Government is prepared to enter into meaningful partnership with Indigenous people. There is nothing to suggest that the Government's view of agreement-making and partnership is prepared to tackle these issues or those raised by Geoff Clark above. It suggests that its commitment to self-empowerment, partnership and agreement-making processes is indeed something less than a commitment to self-determination, genuine participation and transfer of decision-making and control to Indigenous communities. The difference is indeed substantive, and not merely rhetorical.

c) International debates on self-determination

The Government has also opposed Indigenous self-determination through international negotiations that have taken place in the inter-sessional, open-ended working group of the Commission on Human Rights on the Draft Declaration on the Rights of Indigenous Peoples.[95] Australia's opposition in debate on self-determination and related concepts is consistent with the arguments that it relies upon domestically.

This opposition has been particularly notable due to the leading role that Australia had previously taken on Indigenous issues in the United Nations. For example, the Government's support for self-determination in the Working Group on Indigenous Populations in the early 1990s was a turning point in opening up debate and governmental support on this issue. In early sessions of the working group on the Draft Declaration the Government had also provided its support for the recognition of collective rights of Indigenous peoples. The current Government's position, and the fierceness of its advocacy, is rightly seen as an abrupt about-face. Ironically, it is viewed this way at a time when more countries are engaging constructively and in a supportive manner in the UN debates.

Since 1999, Australia has been categorised by Indigenous participants at the working group as one of the most active nations participating in the debates. It is also categorised as one of a group of only four nations – along with the United States of America, United Kingdom and Japan – that 'challenge fundamental principles underlying the Declaration, in particular, the concept of

94 Cornell, S, *op cit*, p9.
95 See chapter 6 for discussion of the Working Group and the Draft Declaration.

self-determination, language of indigenous peoples and/or the recognition of collective rights'.[96]

The Australian intervention on self-determination at the 1999 session of the working group, for example, was described as 'the most uncompromising of all State interventions on self-determination'.[97] In the intervention, Australia reaffirmed its inability to accept the inclusion of the term self-determination in the Declaration because for many people it implied the establishment of separate nations and laws.

A further illustration of the hardness and inflexibility of this approach was demonstrated with the repetition of this argument by the Government in each session of the working group since 1999. During the course of the 1999 session, the Chairperson of the working group had proposed that future debate on self-determination should be based on a number of premises which included recognition that the concerns expressed by some States in relation to secession had been responded to by assurances by some Indigenous delegations that they did not want to secede; as well as looking to ensure conformity between the formulation of the right to self-determination in the Declaration and the principles which guide the UN such as the UN Charter.[98] As noted in the previous section, declarations such as the Friendly Relations Declaration provide a guarantee of territorial integrity if the State remains representative.

Australia has persisted in opposing self-determination on the basis of fears of secession when the Chair of the Working Group has indicated that to do so would be unhelpful and that the issue had been addressed by Indigenous people. Indigenous participants, including ATSIC, have condemned the Australian Government's approach for this inflexibility and lack of good faith in its negotiating position.[99]

The Government's position also lends its support to attempts by other countries to limit the scope of any right of Indigenous people to self-determination. Most countries participating in the debates on the Draft Declaration have sought to amend the text of the Draft Declaration to guarantee their territorial integrity. Countries such as the United States of America and Canada, for example, have led government initiatives to limit the application of self-determination for Indigenous peoples to what is termed 'internal' dimensions, as opposed to 'external' dimensions. While the Government's position is to oppose recognition

96 International Work Group for Indigenous Affairs (IWGIA), 'Report on the 6th session of the Commission on Human Rights Working Group on the Declaration on the Rights of Indigenous Peoples' in *The Indigenous World 2000-2001*, IWGIA, Copenhagen, 2001, p444. See also Pritchard, S, 'The Draft Declaration on the Rights of Indigenous Peoples remains on its troubled path through the UN' in International Work Group for Indigenous Affairs (IWGIA), *The Indigenous World 1999-2000*, IWGIA, Copenhagen, 2000, p402.

97 Pritchard, S, *Setting international standards – An analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples and the first six sessions of the Commission on Human Rights Working Group*, 3rd Edition, ATSIC, Canberra, 2001, p79.

98 Chavez, L, *Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32*, UN Doc: E/CN.4/2000/84, 6 December 1999, para 85.

99 International Work Group for Indigenous Affairs (IWGIA), 'Report on the 6th session of the Commission on Human Rights Working Group on the Declaration on the Rights of Indigenous Peoples', *op cit*, p424.

of self-determination as well as to oppose language such as 'Indigenous peoples' – which might invite recognition of a collective status for Indigenous peoples – its advocacy also gives credence and support to attempts to limit any recognition of self-determination to so-called 'internal' dimensions.

d) Summary – the Government's position on self-determination

In summary, through domestic policy debates as well as international negotiations we can identify the following factors which are of relevance to the Government's position on self-determination.

1. The Government acknowledges that Indigenous peoples are the first people of Australia with a unique status and identities.
2. The Government acknowledges that Indigenous peoples have not always been provided with equal opportunities in the past and that there is a need for special measures to overcome any consequent disadvantage that has resulted.
3. The Government opposes recognising a right of Indigenous peoples to self-determination in domestic policy formulation as well as in international instruments.
4. Self-determination is presented as representing the right to *unilaterally* challenge national sovereignty (note though that the Government states that this is how it is 'defined by some' – by whom exactly is never made clear and this view of 'some' is clearly co-opted to present the Government's view).
5. Self-determination is presented as implying the possibility of the establishment of a separate Indigenous state or states within Australia.
6. Self-determination along with a treaty are seen as promoting division or separateness rather than inclusiveness (which is defined as 'sameness' and 'the freedom (for Indigenous peoples) to make their own choices and to achieve the same sorts of opportunities and outcomes as other Australians').
7. It is implied that self-determination or recognition of cultural group rights runs counter to the belief that all Australians should be equally subject to a common set of laws with no special treatment.
8. While the Government does not support self-determination it does support Indigenous peoples having meaningful opportunities to exercise control over *aspects* of their own affairs and be engaged to the maximum extent possible as partners in the design and delivery of services.
9. The opportunity to exercise control, however, is clearly confined within the context of citizenship entitlements and the 'same' benefits (or common rights) that all other Australians are entitled to.
10. The extent of such control is never specified, though ATSIC is used as an example of the type of control that is acceptable, and self-government is rejected as a 'distraction' (note however, the bizarre description of self-government in Nunavut which raises – solely for the purpose of rejecting it – a potential view of self-government as an ethnically-based government which excludes non-Indigenous people from decision-making processes, including voting – i.e., leaving the necessary implication that Indigenous self-government could restrict the exercise of the rights of other citizens).

11. The right of Indigenous peoples' to exercise control over aspects of their lives is contrasted with the unacceptable contention that self-determination implies that a government must in some way relinquish responsibility for and control over those aspects of well-being over which it 'rightly has jurisdiction'.
12. Agreement-making is seen as the 'new' way to achieving the acceptable goal of 'active partnership and consultation with government'.
13. Capacity building of communities to be self-managing is also identified as an essential component to this 'new' partnership approach.
14. The boundaries on what is acceptable to negotiate through agreements as well as the purpose of capacity building is unclear, but it appears to not extend to recognition of Indigenous sovereignty and the transfer of institutional control to Indigenous communities.
15. The Government's prefers concepts of self-empowerment and responsibility, defined as individuals being able to 'determine their own destiny'.
16. These values emphasise sameness, unity or 'one-ness' and do so at an individual level.
17. While not accepting that there is a right to self-determination, the Government's position provides support in international negotiations to attempts by other countries to limit the recognition of self-determination to 'internal' as opposed to 'external' applications.

Implementing Indigenous self-determination in Australia

There are a range of significant differences between the Government's approach to self-determination and the understanding of it that has developed internationally. Many of these are masked by subtle uses of language such as commitments to partnership and Indigenous participation which are made without any real ability for Indigenous communities to exercise control or to determine priorities in a meaningful way; preferences for agreement-making rather than treaty; self-empowerment or self-management rather than self-determination; only conceiving of self-determination as existing at an individual level and as a right to exercise control over *aspects* of Indigenous livelihood; and so on.

Ultimately, however, when we scratch beneath the surface of the Government's rhetoric their approach is exposed as a reductive, minimalist one that is not prepared to accommodate Indigenous aspirations or recognise any distinct status of Indigenous people in any meaningful way. The implications of this approach are significant and cannot be rejected simply as rhetorical or as representing a preference for a particular type of language.

There are five main concerns that I have about the Government's approach, when compared to the fuller understanding of self-determination provided earlier in this chapter.

The first is the Government's reliance upon inflammatory, provocative untruths to reject Indigenous self-determination. This is shown by the suggestion, mysteriously made 'by some' but clearly endorsed by the Government's uncritical recitation of it, that self-determination may amount to a *unilateral* right to secede from Australia.

As already noted, there are very strict provisions in international law which guarantee the territorial integrity of States in all but extreme circumstances. There is no historical precedent or basis in international law for the suggestion that a state could be dismembered unilaterally. It is in fact such an absurd suggestion that the only conclusion that can be drawn from the Government's reliance upon it is that it is a deliberate untruth aimed at raising fear and opposition from non-Indigenous people.

The Government has relied on this particular untruth in responding to the Council for Aboriginal Reconciliation's report. It has not relied upon it in international negotiations. In such negotiations, as well as through other domestic processes, it has instead raised the fear of secession (but not achieved unilaterally). I noted above that the suggestion that Indigenous peoples in Australia might secede if accorded a right to self-determination is a-historical and again does not accord with international provisions relating to self-determination or guaranteeing territorial integrity. Reliance upon this assertion, as a way of opposing recognition of Indigenous self-determination outright, is again a sign of bad faith and constitutes a very simple way of not engaging with the real issues at stake.

A similar untruth is the representation of Indigenous aspirations for self-government. As quoted earlier, the Minister stated that it is 'worth noting' that the Canadian territory of Nunavut, as a model of self-government, is not an 'ethnically-based' government in which non-Indigenous people can't even vote. Why does the Minister consider this worth noting? No Indigenous people in Australia have ever made the suggestion that what they desire is an ethnically-based government in which no other people may exercise their basic rights. Again, it is an absurdity which is deliberately placed on the agenda in order to prevent serious aspirations to be discussed in a calm, reasonable manner.

Each of these examples are smokescreens which are quite deliberate in their intent – that is, at shutting down debate. They indicate that the Government is not prepared to discuss issues with Indigenous peoples in good faith.

The second main concern I have about the Government's approach is an overarching one. It is the failure, or perhaps refusal, of the Government to accept that any consequences flow from recognising the unique, distinct status of Indigenous peoples in this country. They state, in their response to the CAR documents, that the Government 'agrees that the unique status and identities of the Aboriginal and Torres Strait Islander people as the first people of Australia must achieve recognition, respect and understanding in the wider community' and that Indigenous culture is 'essential to our distinctive character as a nation'. But they reject that this should be reflected through 'additional, specific or different rights for one part of the community'.

The Government therefore seeks to limit the recognition of Indigenous peoples' status as if they were an undifferentiated minority group whose needs can be addressed under the umbrella of say multiculturalism and by guaranteeing sameness of treatment or opportunities for the same level of development. Indigenous peoples' circumstances, however, do not fit comfortably under such a banner. Native title, land rights and measures such as the Indigenous Land Corporation which are intended to address the consequences of Indigenous dispossession, are perfect illustrations of this.

It is a reality of 21st century Australia that Indigenous peoples *are* different, and that the expression of their cultures does involve unique forms of protection that do not apply to other Australians. A more wide-ranging definition of equality, which focuses on outcomes (such as in terms of equality of protection of culture) rather than on inputs (such as by purely guaranteeing equality of opportunities, as if there were a level playing field) is needed.

An ungrudging, full recognition of the unique status of Indigenous peoples in Australia would also create the capacity for a new foundation for the relationship between Indigenous peoples and the rest of the Australian community. At present, the relationship with Indigenous people is defined according to little more than the benevolent intentions of Government to improve the life conditions of a grossly disadvantaged people group. Such intentions are easily twisted into resentment and frustration at the amount of money spent when the desired improvements are not forthcoming. Defining a peoples' status and rights purely through their experiences of disadvantage is a dominating and disempowering approach. It is not a respectful basis for a relationship.

The alternative would be to acknowledge that Indigenous peoples are the first peoples of this land, that they maintain distinct cultures and that their survival is dependent upon protecting those cultures so that they may freely choose the manner and extent to which they participate in the mainstream society. The alternative would be to acknowledge that Indigenous peoples can live in accordance with their culture as a matter of entitlement and of right, not as a matter of courtesy or tolerance. This was of course the great potential of native title, as recognised in the *Mabo* decision. It made it a legal right, a matter of entitlement, for Indigenous peoples to live according to their cultures and traditions. And the alternative would be to recognise that Indigenous peoples have an integral role in determining and negotiating the priorities for their communities, and in occupying a central role in decision-making and processes that impact on their communities.

A third concern with the Government's approach is a consequence of this lack of recognition of Indigenous peoples' unique status. It has meant that there is no underlying basis, no guiding principles, for relations between governments and Indigenous peoples.

Indigenous people have on several occasions identified principles that should underpin negotiations between themselves and government, so that sufficient attention is paid to their distinct cultural characteristics and unique status in this country. The Social Justice Package proposal by ATSIC, for example, formulated *Principles for Indigenous social justice and the development of relations between the Commonwealth Government and Aboriginal and Torres Strait Islander Peoples*, which it saw as an essential commitment from government if it was to recognise the status of Indigenous peoples in this country.[100] I recommended in the *Social Justice Report 2000*, that these principles be adopted as the framework 'for negotiations about service delivery

100 ATSIC, *Recognition, rights and reform*, 'ATSIC Canberra 1995', pp9-10; See also *Social Justice Report 2000*, *op cit*, pp 126-128. See also Corporate responsibility principles for development on Indigenous land, developed at a forum hosted by the Social Justice Commissioner in 2002: www.humanrights.gov.au/social_justice/corporateresponsibility/development.html.

arrangements, regional governance and unfinished business'. The current approach, which has no such underpinning, leaves Indigenous policy formulation to develop without a consistent focus as to its purpose and without appropriate recognition of the status of Indigenous peoples.

A fourth and related concern is that the Government's current framework is oppositional in its approach and sets up Indigenous people as competitors of government. There is a fear in the Government's approach that Indigenous people are going to usurp control and power over matters which they believe more appropriately belong as responsibilities of government. It is a strange, indeed almost paranoid, view of partnership. It is also, in my view, an unrealistic one that does not accurately reflect Indigenous aspirations nor reflect historical reality.

The past thirty years, for example, has seen the development of an extensive 'Indigenous organisational sector' of community controlled organisations as well as national, regional and local based representation (of which ATSIC is the latest version). As Will Sanders notes, debates about the relative roles of different forms of organisation within this sector have:

> been somewhat futile and unproductive. It has been based on a false premise that the categories 'government' and 'Indigenous' organisation are mutually exclusive, and that the process of demonstrating who best represents Indigenous interests is one of showing that a particular organisation owes nothing to non-Indigenous governments, and everything to Indigenous people… If government is thought of more as a process than as a structure, then there is no need to categorise organisations as either internal or external to government, or indeed as either internal or external to the Indigenous community…
>
> The role of the Indigenous sector in the processes of Australian Government can be seen, in rather corporatist fashion, as providing some order and stability to the articulation of Indigenous interests. It can also be seen… as giving some practical shape to the broad policy idea of self-determination… One way or the other, the Indigenous sector has now emerged and now exists as an integral element of the processes of Australian Government. It is difficult to imagine this development being reversed in the foreseeable future.[101]

Put differently, Indigenous peoples' aspirations for appropriate forms of representation and participation in decision-making that integrally affects their lives is not essentially about separation or the acquisition of power and control. It is about:

> 'interrelationships... [where the] goal is relations and connections… [T]he aspirations of indigenous peoples relate to the… need for governing institutions to exist in such a way as to allow the people to live freely and determine their own destiny. The determination of Indigenous peoples to change the situation under which they live today derives from the experience that the institutions under which they have been forced to live since they were colonised were established illegitimately and suppress their ability to live freely and determine their own destiny'.[102]

101 Sanders, W, *op cit*, pp8-9.
102 van Walt van Praag, *op cit*, p30.

Underlying the Government's concern about Indigenous control is a notion of loss of accountability. This is undoubtedly an extremely difficult issue. Issues of accountability, however, run two ways – accountability to the funding agency and government, and accountability to the community who are intended to benefit from the programme or policy intervention that is made. At present, there is a real imbalance with limited accountability back to Indigenous communities (and to the community as a whole).

As I have previously argued, the current approach to reconciliation lacks adequate benchmarks and performance monitoring mechanisms. The Government proudly notes it record level of expenditure as if that were the ends rather than the means. There is no focus on outcomes and achievements, except in a generalised and uncoordinated way. I have previously critiqued this in terms of Australia's obligations to progressively realise economic, social and cultural rights. The rejection of self-determination contributes to the lack of recognition by the Government of the need for a serious level of engagement of Indigenous people in policy formulation. It contributes to a lack of government accountability for its progress and for its expenditure.

At the same time, however, I do not advocate that the only form of accountability should be to the Indigenous community. Central to the principle of self-determination is a notion of responsibility. Indigenous communities must be accountable for their decision-making and expenditure. While the focus of this chapter has necessarily been on government's approach to self-determination, this is not intended to be at the expense of acknowledging the responsibilities and duties of self-determining communities. Ultimately, however, concern about ensuring adequate lines of accountability is not a reason for not engaging in a substantial process of involving Indigenous people in decision-making and programme design and management. It is a reason to do so on an agreed basis, with a clear understanding as to accountability and monitoring requirements.

The fifth main concern that I have is that there is no general acceptance by the Government of the legitimacy of Indigenous peoples being the primary decision makers on matters that affect their daily lives, and for efforts to build the capacity of Indigenous communities being directed at this aim.

I have been particularly fascinated by the Government's focus on 'real' issues as opposed to symbolic issues, and on their emphasis of providing basic citizenship entitlements. Earlier in this chapter I quoted the Minister stating that when he visits Indigenous communities people tell him that the important rights for them are the right to good education; decent health; a reasonable standard of living in a house that they own; a safe and secure environment for their families; the right to a job; and the right to protect, develop and celebrate indigenous culture; own land for cultural, social and economic purposes; and contribute to the preservation of the environment.

In 1983, fellow geographer Mary Hall and I, completed a report titled *Aboriginal basic needs, New South Wales, 1983 – an action benchmark survey*. This report was based on interviews with a random sample of heads of Aboriginal households across New South Wales. The purpose was to conduct a benchmark survey of Aboriginal peoples' basic needs, as a baseline from which any gains

in their economic and social quality of life attributable to the then forthcoming introduction of land rights legislation could be measured.

Throughout this process, the heads of Aboriginal households across New South Wales identified similar needs as those suggested by the Minister. Only they did so *twenty years ago*.[103] Not much has changed. At the time we noted that 'poverty and its social consequences for poor people are not personal attributes, they arise out of the organisation of society. Victim-bashing is an easier, more comfortable attitude to adopt than hard-headed analysis of endemic injustice'.[104]

Our working hypotheses for the survey were:

a) that Aborigines are experts in the everyday reality of their own situation;

b) that they could articulate and prioritise their needs, possibly identifying solutions as well as problems; and

c) that their perceptions of their needs would result in quantifiable patterns which could form useful bases for policy making.[105]

Ultimately, the survey sought to offer benchmarks and touchstones for the question: 'In whose interests are the decision makers operating?'[106] These assumptions remain valid today and this question remains the fundamental one for governments.[107]

As ATSIC has previously stated, for all policies and programmes 'the values and aspirations that are meaningful to, and express priorities of, Australia's Indigenous peoples must be the basis for the policy approaches being taken'. Accordingly, the question that should be asked in relation to each proposed programme or policy is, 'will this activity enhance Indigenous peoples' capacity to achieve what is important to them and, in its development and implementation, contribute to the empowerment of Indigenous peoples and the achievement of *their* objectives and priorities?'[108]

Geoff Clark and Stephen Cornell were quoted earlier in this chapter as identifying some of the relevant questions to identify a genuine commitment of governments to Indigenous self-determination through developing Indigenous governance. They asked:

- When there is talk of injecting more Indigenous decision-making into programs, does this genuinely mean passing control to Indigenous groups?
- Does it involve the acknowledgement of our jurisdictions in this country?
- Will indigenous involvement be limited to operational administration?

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103 See for example: Hall, M, and Jonas, W, *Almost out of sight, almost out of mind – Aboriginal reports of Aboriginal basic needs, New South Wales 1983*, University of Newcastle, Newcastle Australia 1985, Appendix 3 – Perceived needs, pp382-396.

104 *ibid*, p357.

105 *ibid*, p7.

106 *ibid*, p361.

107 It is notable that in response to one of the survey's questions of 'who is responsible for meeting your needs?' the top ranking response in all areas of the state was seeing Aborigines and the Government together as responsible: *ibid*, p330.

108 ATSIC, *Directions for change*, ATSIC, Canberra, 2001, p1.

- Will it mean non-indigenous governments calling most of the shots, especially on the 'big issues'?
- Will it embrace genuine control over resources; freedom in the development of appropriate and effective governing institutions; significant and consequential dispute resolution powers and mechanisms; funding via block grants instead of program funds; a partnership in major decisions wherever indigenous interests are at stake; and genuine jurisdictional power?

The Government's approach does not reveal a commitment to developing Indigenous capacity in accordance with these issues.

Overall, the concerns identified here point to major differences between a rights based approach to reconciliation and Indigenous policy formulation, and the approach currently favoured by the Government. There are two broad consequences that flow from this.

First, a number of the concerns and contentions that are raised by the Government about self-determination in both the domestic and international arenas are unjustified. Some are not supported by developments in international law; others simply lack reality. Consequently, they have no place as the basis of Indigenous policy formulation by the Government. In my view, these limitations and gaps in the Government's approach militate against effective policy and programme design in Australia. The rejection of self-determination as the basis of Indigenous policy formulation has very real consequences.

Second, the differences reveal how the current approach of the Government to Indigenous policy formulation is introverted and myopic. It is unwilling to build on international developments or to accept that at core we are dealing with problems in relation to Indigenous peoples that are being faced globally. Comparing the underlying basis of the Government's approach to indigenous policy with international debates about the appropriate standards for addressing Indigenous issues reveals that the current Australian approach is at the most conservative end of the spectrum, and lacks imagination and vision.

Conclusion – Reclaiming self-determination

This chapter has argued that the Government's opposition to self-determination is not merely rhetorical. It has consequences and places limitations on the breadth of enjoyment of rights by Indigenous peoples and on their ability to participate meaningfully in processes that affect their lives. It is a disheartening position for two main reasons – first, simply for how minimal and reductive an approach it is; and second, because of the way that the philosophical underpinnings of this approach go less challenged than they should.

This Report fulfils the important function of monitoring government performance on the recognition of Indigenous human rights. It necessarily focuses on the adequacy of the approach of Governments, principally the federal Government. This can, however, obscure other important aims of Indigenous policy. For while government plays a crucial role in the lives of Indigenous peoples, and has significant ability to stifle and control Indigenous aspirations, they do not have the central role in determining Indigenous peoples' destinies. Indigenous peoples possess that role.

Despite the Government's current approach, I remain heartened due to the fact that Indigenous peoples have not sat by while this framework has been implemented or been passive in their response to it. Developments such as the Lingiari Foundation, the Lumbu Foundation, the Australian Indigenous Leadership Centre at the Australian Institute of Aboriginal and Torres Strait Islander Studies and the National Indigenous Youth Movement of Australia fulfil a vital role in developing the leadership capacity for communities to be self-determining.

Similarly, communities all over the country continue to work away at the realisation of their aspirations and goals with the often limited tools that they have at their disposal. At the Indigenous governance conference hosted by Reconciliation Australia, ATSIC and the Department of Multiculturalism, Immigration and Indigenous Affairs in April 2002 there were numerous examples of communities working towards achieving the level of control and say over decision-making that they desire as communities.

Some of these initiatives seek to utilise existing processes – such as the Murdi Paaki regional autonomy push utilising the Murdi Paaki ATSIC regional zone as its basis. Others seek to build from existing structures – such as the Torres Strait Regional Authority's push for regional governance. Others still have sought to coordinate the disparate, often inconsistent approaches of different governments through a centralised community focus – such as the Katherine region coordinated health care trial. And further communities have simply decided that existing arrangements do not meet their needs and have sought to re-impose traditionally based structures on the community – such as the Ali Curung justice approach or the Cape York Partnerships.

These initiatives indicate the fact that the Government does not support self-determination or put into place processes for its realisation is not the end of the matter. Reduced to their basics, these processes identify flaws or problems in the existing system and community led ways forward for addressing them. By focusing on the capacity of the community to resolve and own these issues, they place the community in a more powerful and central role to take control of their destinies.

A central factor to the success of these processes, however, is the level of government engagement and support for them. When we look to these initiatives within a framework of self-determination, we can see the inconsistencies and ad hoc nature of the Government's intervention. For example, why should the desires and aspirations of the communities of Cape York receive the level of support that they do from state and federal Governments, including through stated commitments to streamlining service delivery arrangements and changing the law to better suit the aspirations of the community, while the Mutitjulu community, an equally imaginative and determined community to address the social ills of welfare dependency, languishes in a federal Government process for a community participation agreement[109] (and languishes principally because the Government refuses to provide the type of institutional support it is providing

109 The problems of the community participation agreement process are discussed in chapter 3 on reconciliation.

in Cape York)? This question does not get asked because policy is formulated within a reductive, individualised framework where comparison and consistency is not emphasised.

In my view, there has been an illegitimate and quite wrongful assumption made by the Government that it has the prime role in defining what Indigenous self-determination is. This is the wrong starting point and it is the primary problem with the way in which self-determination has been defined over the past thirty years. It has been accompanied by a reliance of Indigenous communities on government to implement self-determination.

True self-determination, though, requires communities to marginalise the role of government in the functioning of their communities. It is a perversion that governments continue to exercise almost total control over many Indigenous communities. It is not a normal functioning of those communities or of government.

We must continue to challenge the narrowness of the approach of the Government. Communities must also not be discouraged from seeking their own resolutions to the problems that they face as communities. We must continue to reclaim self-determination from the Government.

Chapter 3

National progress towards reconciliation in 2002 – an equitable partnership?

In launching the *Social Justice Report 2001* in May 2002, I asked the question 'whatever happened to reconciliation?' The findings of the Report were endorsed by Indigenous leaders at a series of regional launches across Australia who expressed concern at the lack of progress towards reconciliation.[1] The lack of any formal response by the federal Government (or in fact by any state or territory government) to the documents of reconciliation produced by the Council for Aboriginal Reconciliation (the Council or CAR) and to the recommendations of the *Social Justice Report 2000* on implementing a human rights approach to reconciliation were noted as outstanding issues.

Since those launches there have been some significant developments in relation to reconciliation. The concerns expressed in the *Social Justice Report 2001* were acted upon by the Senate which established a Legal and Constitutional References Committee inquiry into national progress towards reconciliation in August 2002. The Committee will hold public hearings in the first quarter of 2003 and release its report at the end of March 2003. Since the establishment of this inquiry, the Government has provided a formal response to the Council for Aboriginal Reconciliation's documents. It continues, however, to maintain that it has no obligation or intention of responding to the recommendations of the *Social Justice Report 2001*.

The Government outlined its approach to Indigenous affairs through a range of documents – principally, speeches at national conferences by the Minister for Aboriginal and Torres Strait Islander Affairs; responses to the CAR documents and the Commonwealth Grants Commission's *Report on Indigenous Funding*; and through the agreement of actions to be undertaken by the Council of Australian Governments, particularly a commitment to undertaking ten whole-of-government community trials and the establishment of an indicative framework for measuring Indigenous disadvantage. In November 2002, HREOC convened

1 A selection of speeches from the launches are available online at: www.humanrights.gov.au/social_justice/.

a workshop on benchmarking reconciliation and human rights to consider the implications of these developments.

As noted in the previous chapter, despite suggestions from the Government to the contrary, the year 2002 has been one of 'business as usual' with a continuation, and indeed refinement, of its 'practical reconciliation' agenda. This chapter discusses the limiting parameters set by the Government for Indigenous policy development and identifies how these fit within the Government's overall policy approach. It also considers how their approach undermines the equitable participation of Indigenous peoples in pursuing their own development and empowerment. This is advanced through the Government's continuing minimalist response to the symbolic dimension of reconciliation, its affirmation of basic citizenship rights to the exclusion of inherent Indigenous rights, the misrepresentation of Indigenous self-determination as divisive, and a disingenuous emphasis on perceived areas of agreement at the expense of continuing debate on other outstanding issues.

Chapter 4 then looks specifically at the framework currently being developed under the auspices of the Council of Australian Governments to measure progress in addressing Indigenous disadvantage. The importance of this framework, being developed by the Steering Committee for the Review of Commonwealth / State Service Provision, cannot be underestimated. A range of concerns about the process were identified, however, at the workshop on benchmarking reconciliation and human rights which are discussed in chapter 4.

An overview of progress in partnerships and agreement-making across the states and territories is then provided in Appendix 1 of this Report.

Indigenous policy within the broader context of strategic leadership for Australia

In November 2002 the Prime Minister released an important document identifying the long term strategic goals and approach of the Government. Titled *Strategic leadership for Australia – policy directions in a complex world*, the document identifies what the Government sees as the key strategic issues facing Australia. Surprisingly, the document does not make a single reference to Indigenous peoples.

While reconciliation had been identified by the Prime Minister as one of the Government's key priorities during its second term of office, it is no longer identified as a key priority or strategic direction for the Government. It is a very telling omission.

The document identifies the philosophical underpinning of the Government's approach to all policy making as: self-reliance, equality of opportunity and equality of treatment for all Australians, pulling together and having a go.[2]

2 Howard, J, 'Address to the Committee for Economic Development of Australia: Strategic Leadership for Australia: Policy Directions in a Complex World', Sydney, 20 November 2002, p1. Italics added. Available online at: www.pm.gov.au/news/speeches/2002/speech1996.htm.

It must be noted that Indigenous peoples are not opposed to these four ideals. They share them equally with the rest of society. They do so, however, as distinct peoples with their own systems of law, culture and responsibilities. But applied in an a-historical way, without acknowledging the systemic entrenched marginalisation of Indigenous peoples, these values have the potential to ferment intolerance towards the situation of Indigenous peoples.

This blind spot in the Government's vision of an all-inclusive civil society has far-reaching implications for Indigenous peoples. There is a very real danger that the Government's strategic focus is moving towards issues which are of marginal relevance to Indigenous peoples' circumstances, at the expense of a more sustained focus on the distinct problems faced, perhaps uniquely, by Indigenous communities.

A matter of grave concern in this regard is the emphasis that the Government strategy places on dealing with the consequences of an ageing population. It states:

> The dramatic changes in the structure and the composition of our population present many challenges as well as opportunities for our country. The Intergenerational Report, released by Peter Costello with the last Budget, was a very important step in recognising and preparing for population ageing issues. The report revealed that although Australia was relatively well placed compared with other OECD countries we must act to ensure we maintain this advantage.[3]

The fundamental importance of dealing with an ageing population is indisputable. However, the lack of attention to the implications of the most marginalised and disadvantaged group in Australia facing a population explosion in young age groups is a damning absence in this shift of focus to dealing with the consequences of an ageing population.

This is a well-documented, emerging crisis facing Indigenous policy design. The uniqueness and size of the problem is demonstrated by considering the following information. Since 1981, the number of deaths for the Australian population has increased by an average of 1% per year, reflecting both the ageing and the increasing size of the population.[4] In 2001, the median age at death was 76 years for males and 82 years for females, an increase of 6 and 5 years respectively on the 1981 rates.

This compares with the median age at death for Indigenous males of 52 years and 58 years for females (i.e., 24 years less than their non-Indigenous counterparts).[5] In addition not only is the Indigenous population growing at a faster rate (2.3 per cent compared to 1.2 per cent annually), but its median age is younger (20 years compared to 35 years) and nearly twice as many Indigenous

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3 *ibid*, p5.

4 Evans, C, 'Indigenous Australians hospitalised at twice the average but funded at half the rate', media release, 11 December 2002.

5 Australian Bureau of Statistics, 'Aboriginals and Torres Strait Islander Health Report', media release, 20 November 2002; 'Australians live longer: mortality indicators improve', media release, 10 December 2002.

compared to non-Indigenous people are under 15 years of age (almost 40 per cent compared to just over 20 per cent). Similarly, only 2.8 per cent of the Indigenous population are aged over 65 compared to 12.5 per cent of the non-Indigenous population.[6]

This demographic profile will make it difficult to maintain the current status quo of inequality experienced by Indigenous people, yet alone prevent it from deteriorating even further.

The lack of focus on these issues is a disappointing and substantial omission from the Government's strategic directions into the longer term. It is a matter of great concern that a framework that focuses on individual empowerment, basic citizenship rights and inclusiveness can so swiftly occlude the differences and inequities experienced by the most disadvantaged group in Australia from the broader policy making lens.

Implementing 'practical reconciliation'

The tone for government policy on reconciliation over the past year was set when the Minister for Aboriginal and Torres Strait Islander Affairs announced at the ATSIC National Policy Conference in March 2002 that the Government was 'changing direction' on Indigenous policy and proposed a '5-point plan' to underpin Indigenous policy formulation.[7]

As noted in the previous chapter, some of the key aspects outlined in this new agenda include:

- a rejection of self-determination as the appropriate basis for Indigenous policy development;
- an emphasis on 'inclusiveness', which is defined as 'sameness' and 'the freedom (for Indigenous peoples) to make their own choices and to achieve the same sorts of opportunities and outcomes as other Australians';
- support for Indigenous peoples to have meaningful opportunities to exercise control over *aspects* of their own affairs and to be engaged to the maximum extent possible as partners in the design and delivery of services; and
- the confinement of such control within the context of citizenship entitlements and the 'same' benefits (or common rights) that all other Australians are entitled to, and as not extending to anything that would result in any perceived relinquishment of responsibility for and control over those aspects of well-being over which the Government 'rightly has jurisdiction'.[8]

It is ironic that while promoting this agenda the Government has continually emphasised its commitment to developing partnerships and to agreement-making with Indigenous peoples. There is little evidence to suggest that the Government is prepared to implement any measures to ensure equity of

6 Clark, G, 'Chairman's report', A*TSIC Annual Report 2001-2002*, Canberra, ATSIC, p35.
7 Ruddock, P, 'Changing Direction', ATSIC National Policy Conference – Setting the Agenda, Canberra, 26 March 2002.
8 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, Sydney, 2002, pp46-47.

treatment for Indigenous people as partners in these processes. Indeed, one of the distinguishing features of the Government's policy approach over the past year has been the clear lack of substantiated research and thorough consultation with Indigenous people with negotiated outcomes.

The Government's position on reconciliation can be identified from the following six main processes and documents.

1) 'Changing Direction', the 5-point plan

The 5-point plan outlined by Minister for Aboriginal and Torres Strait Islander Affairs reinforces the Government's minimalist policy agenda on practical reconciliation. It is notable that the 'new' agenda announced in the speech was not based on any consultation or negotiation with Indigenous people, apart from the Minister's report of his own ad hoc discussions with Indigenous communities. While the Minister claims he is putting forward his policy perspective in 'a spirit of frank and honest debate, not a pre-determined prescription',[9] he severely proscribes the parameters for discussion to basic citizenship entitlements as they relate to the individual.

The Minister asserts that the emphasis of the new agenda for Indigenous rights must be on the achievement of individual citizenship rights in the domain of education, health, housing, employment and a safe environment for families. The rights to culture, to own land for cultural, economic and social purposes and to contribute to environmental preservation are mentioned secondarily to these. There is no acceptance of the importance of recognising inherent rights such as native title and self-determination as the foundation for protection of Indigenous property rights, culture and society. The focus is effectively narrowed to delivery of outcomes in the context of citizenship rights:

> We must aim for a future in which Indigenous people can share equitably in the social and economic opportunities of the nation. But to make better gains we need a far stronger focus on encouraging and supporting families to:-
>
> - Become self-reliant;
> - Take responsibility for themselves and their families;
> - Contribute constructively to their communities and the wider society.[10]

As discussed in the previous chapter, self-determination as it occurs within the Minister's model of an 'inclusive society'[11] is defined in terms of individual rather than collective rights – that is, 'individuals being able to determine their own destiny'.[12]

This approach admits little difference between the exercise of rights promoted for Indigenous and non-Indigenous Australians. The rights available to Indigenous Australians are inflected with the same values that drive the Government's agenda of policy reform across all sectors – those of self-reliance,

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9 Ruddock, *op cit*, p7.
10 *ibid*, p5.
11 *ibid.*
12 *ibid*, p2.

equality of opportunity and treatment, pulling together as a community, and having a go.[13] Essentially these values permit an approach to Indigenous policy development based on formal equality with only limited recognition of cultural difference.[14]

This emphasis on individual self-reliance and citizenship rights is clear in the Minister's 5-point plan. The five points are:

- A need to shift the Indigenous policy focus to individuals and families;
- Replacement of welfare dependency with economic independence;
- A need to recognise a partnership of shared responsibility between governments and Indigenous people;
- An emphasis on substance abuse; and
- Targeting of Indigenous-specific programme resources to areas of greatest need.[15]

Thus the Minister explains that the goal of replacing welfare disadvantage with economic independence is 'to liberate the individual from poverty and disadvantage'.[16] Problems of corporate governance within Indigenous community organisations become the rationale for a shift to individual and family rights. This emphasis on the individual is pivotal to the Government's mutual obligation approach to welfare reform, which also emphasises self-reliance and the individual's relationship to the State as a locus for change and is a-historical in its approach, giving little attention to the underlying causes and socio-economic context of Indigenous disadvantage.[17]

The individualist emphasis of practical reconciliation lays the foundation for the dilution of anything that is particularly distinctive about Indigenous culture within the context of capacity-building and governance. While family is integral to Indigenous culture, and is a more appropriate focus than that of the individual and in some respects, the community,[18] there are little grounds for confidence that the Government's policy approach to Indigenous affairs, as embodied in this speech and elsewhere will take the specific family structures of Indigenous societies into account. The Minister claims to endorse the Five Rights which form the basis of the ATSIC Board's Indigenous policy and advocacy approach. These are headed by the right of Indigenous peoples in Australia 'to maintain their distinct identities as Aboriginal and Torres Strait Islander peoples'.[19] But the Government's individualist agenda does not indicate any basis for sustaining these identities or for participation in terms other than those set by the western liberal democratic state.

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13 Howard, *op cit*.
14 For discussion of this policy approach, see *Social Justice Report 2001*, pp205-207.
15 Ruddock, *op cit*, pp7-8.
16 *ibid*, p7.
17 *Social Justice Report 2001*, *op cit*, pp52-53.
18 Cf. *ibid*, pp61-64; Martin, D, 'Community development in the context of welfare dependence', in Morphy, F and Sanders, W, (eds), *The Indigenous welfare economy and the CDEP Scheme*, CAEPR Research Monograph No.20, CAEPR, Canberra, 2000, pp31-38.
19 Ruddock, *op cit*, p3.

This is evident in the Minister's discussion of capacity-building and governance. Difficulties with governance in Indigenous communities are related to the effects of cultural disruption, alcohol and welfare dependency. Implementing change requires:

> Community partners with sound local leadership and effective community management for the reality to match the rhetoric. Today there are many Indigenous communities where that capacity just isn't there. Tragically, all too often, community capacity has been misappropriated in the pursuit of personal power and advantage. Meeting these challenges is broadly defined as building community capacity.[20]

This approach to building community capacity presents a negative and reductive view of Indigenous people which defines their communities and social organisation in terms of poor management. The antidote put forward is an Indigenous leadership involved 'not simply in terms of advocacy for their people, but just as importantly as advocates to their people' who 'have recognised the importance of acting on and emphasising personal responsibility'.[21]

Once again the mandate is for individuals to be self-determining. There is no space permitted for anything specifically Indigenous as the grounds for capacity-building such as inherent rights to land, political status and the pursuit of economic, social and cultural development. While good governance is integral to any form of political, social or economic organisation, Indigenous or non-Indigenous, corporate governance is not the only aspect of Indigenous governance that needs to be taken into account. Corporate governance must be accompanied by political, community and cultural factors. The respect for individual autonomy at the expense of cultural autonomy in the Minister's speech erodes the basis for Indigenous self-government in self-determination. The place for the recognition and protection of Indigenous social and cultural structures and the capacity for Indigenous people to determine their own forms of governance is immediately sidelined. The Government's policy position on Indigenous affairs remains one of assimilation into the mainstream population.

This approach is underscored by a skeptical allusion to the potential for the rights agenda to support Indigenous self-government. The Minister states: 'When some people talk about rights, they talk about structures, they talk about bureaucracy, they talk about separate entitlements'.[22] As I discuss below in regard to the Government's Response to the CGC Report, fiscal responsibility is essential to Indigenous self-determination and self-government – and for that matter, to any serious agenda of self-management and empowerment. The rights agenda presented by the Minister's speech effectively strips away the right of Indigenous Australians to define their own destiny, governance and culture as autonomous peoples and promotes their absorption within rather than their co-existence with the Government's neo-rationalist conception of society as an 'aggregation of individuals'.[23]

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20 *ibid*, p6.
21 *ibid.*
22 *ibid*, p4.
23 Martin, D, *op cit*, p36.

2) 'Agreement making and sharing common ground'

In his speech at the ATSIC National Treaty Conference in August 2002, titled 'Agreement making and sharing common ground', the Minister refuted claims that the Government's approach to Indigenous policy was underpinned by notions of assimilation. He argued instead that his agenda was sourced in the ideal of an inclusive society:

> Australia can only claim to be a truly inclusive society when Indigenous Australians have the freedom to make their own choices and to achieve the same sorts of opportunities and outcomes as other Australians. When I have used the term inclusiveness before, some commentators have confused this with the old assimilation policies of the past. That is not what I am saying at all. The Government recognises the special place that Indigenous people occupy in this country as the 'first Australians'. We believe that Indigenous Australians must be able to enjoy the same rights and responsibilities as other Australians. Indigenous Australians should have the opportunity to enjoy their own culture and to share the benefits and responsibilities that this country offers to all citizens. By inclusiveness I mean embracing and celebrating differences because it is those differences that determine what we are as a nation.[24]

While this argument emphasises the citizenship rights available to Indigenous Australians it does not elaborate what recognition of the special place that Indigenous peoples occupy as the 'first Australians' or recognition of Indigenous culture might entail. Indigenous Australians are permitted to enjoy and celebrate their culture but there is no clear indication that their culture will be recognised as a source of legitimate rights that can provide the basis for the recognition and protection of Indigenous land and heritage, Indigenous use of resources, Indigenous art and intellectual production.

The offer of inclusiveness to Indigenous Australians without consideration of the rights and values inherent within Indigenous cultures sounds all too much like invitation to conform to mainstream Australian society without extending a reciprocal invitation to non-Indigenous Australia to examine its relationship to the Indigenous population. Inclusiveness as defined in the Minister's speech is potentially a form of neo-assimilation. Essentially, the Government is not prepared to validate Indigenous culture by creating a space for Indigenous peoples to define culture and society in their own terms.

The Council for Aboriginal Reconciliation's documents of reconciliation and proposed reconciliation framework legislation provided processes for the Government to consider for the recognition and protection of Indigenous rights. The rejection of these by Government, most recently in its response to the CAR's final report, will be discussed in further detail below.

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24 Ruddock, P, 'Agreement making and sharing common ground', National Treaty Conference, Canberra, 19 August 2002, p1. Available online at: www.minister.immi.gov.au/atsia/media/transcripts02/treaty/treaty_conf_0802.htm.

3) Expenditure on Indigenous-specific programmes

A major component of the Government's approach to reconciliation is its reference to the record high levels of expenditure on Indigenous affairs. In the 2002-03 Budget this record expenditure reached $2.5 billion on Indigenous-specific programmes. Most of the increase on previous years was a flow-on from the $327 million of initiatives over 4 years announced in the 2001-02 Budget.

As I noted last year in regard to Budget 2001 this injection of additional funding still falls a long way short of the necessary funds projected to meet outstanding deficits across a range of key areas. For example, in the area of housing $75 million has been provided over 4 years to address an estimated deficit of $3 billion. In health, $4 million is provided over 4 years against an estimated required minimum of $245 million per annum. Native title representative bodies receive $17.4 million of the $86 million for native title funding, regardless of the economic disparities between Indigenous and other parties in the native title process and despite the fact that Indigenous participants in the system are the only ones who are required to use an outcome-based criteria for funding: 'other (non-Indigenous) parties receive funding to engage in mediation or negotiation without regard to outcomes'.[25]

The Budget also did not provide any increase in the Government's existing allocation of $11 million funding for Indigenous-specific family violence projects over a four-year period, despite the intense media attention given to this subject over the past year and the Government's use of this issue to reinforce its call for a practical reconciliation. Instead the Senate Estimates process revealed that the Government underspent $4.3 million under the Office for the Status of Women's program for domestic violence. ATSIC spent $4.9 million on Indigenous family violence issues and claimed that they could easily have spent the extra $4.3 million on programs to improve community safety for Indigenous women and children.[26]

While violence in Indigenous communities was a high profile issue in 2001, the amount of public policy attention given to this issue is beginning to wane. Of note are the findings of *Putting the picture together,* the Western Australian Government's Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities (the Gordon Report) which indicated that:

- Indigenous women account for as much as 50 per cent of all domestic violence incidents even though they account for less than 3 per cent of the population;
- Indigenous women are 45 times more likely to be victims of violence than non-Aboriginal women and 10 times more likely to die as a result; and
- The level of substantiated child abuse is over seven times the rate of non-Indigenous communities.[27]

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25 *Social Justice Report 2001*, pp208-10; Clark, *op cit*, p29.
26 Lawrence, C, House of Representatives, *Hansard*, 17 June 2002, p3092-3.
27 Clark, *op cit*, p41.

Similarly, while the *Cape York Justice Study* found a strong interrelationship between the incidence of violence and alcohol and substance abuse, it also found that the operation of the justice system only intensified these problems and did not allow for the communities themselves to address justice issues.

Reconciliation Australia stated in their *Reconciliation Report Card 2002* that progress had been slow in addressing family and community violence, despite COAG's commitment to leadership in preventing violence in November 2000. Progress in responding to Reconciliation Australia's call for an audit of services, capacity-building and identification of best practice models for addressing violence has been particularly slow. Co-Chair Jackie Huggins commented that: 'it is 15 months since Reconciliation Australia made this call – and was widely supported for doing so – but agreeing on what should be done, and how, has become "mired in process"'.[28]

4) The Council of Australian Government's reconciliation framework

There have been three main developments at the inter-government level in the past year. These are the submission of COAG's progress report for 2001; the commissioning of the Steering Committee for the Review of Commonwealth/ State Service Provision to produce a regular report against key indicators of Indigenous disadvantage; and the establishment of a trial of a whole-of-governments cooperative approach in up to 10 Indigenous communities or regions.

The *COAG Reconciliation Framework: Report on Progress in 2001* (Progress Report) was released subsequent to the COAG communiqué of 5 April 2002. The report gives details of the progress made by governments in addressing the COAG priorities of leadership, reviewing and re-engineering programmes to assist Indigenous families and promoting Indigenous economic independence.

While there is evidence of much good will in the Report, there is yet to be substantial progress made in addressing Indigenous disadvantage. Much of the Progress Report is devoted to detailing initiatives that are already in train and which consequently, have not necessarily been driven by COAG's priorities or commitments. These initiatives include the Cape York Justice Strategy, the Mutitjulu Community Participation Agreement, and the Victorian Aboriginal Justice Agreement.

Of particular concern are the developments (or lack of them) in regard to reporting Indigenous data and the establishment of action plans by each of the Ministerial Councils under COAG. This is in keeping with the Government's repeated tardiness in developing adequate forms of monitoring for reporting

28 Reconciliation Australia, *Words, symbols and actions: Reconciliation Report Card 2002 – A Report from Reconciliation Australia to the Australian People*, Canberra, Reconciliation Australia, 2002, p12.

on Indigenous data and progress in overcoming disadvantage.[29] As ATSIC Chairman Geoff Clark observes, the COAG Reconciliation Framework progress report 2002 is 'evidence, moreover, that government rhetoric is outpacing its ability to deliver'.[30] The next progress report is to be submitted by the end of 2003.

The April 2002 COAG meeting agreed to commission the Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP) to develop a framework for reporting on key indicators of Indigenous disadvantage. This responsibility had originally resided with the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA) prior to being transferred to the Steering Committee. I have been critical of the lack of capacity of MCATSIA to provide an appropriate, effective monitoring mechanism for progress on Indigenous issues (such as responding to *Bringing them home*) and so welcome the transfer of responsibility to the independent Steering Committee.

The Steering Committee will publish a *Framework for reporting on Indigenous disadvantage* in August/September 2003, which will be included in the COAG report on reconciliation in December 2003. It is intended that the framework will provide a regular focal point for the assessment of progress on reconciliation in relation to eight strategic areas for action. It is holistic in its intent and does not seek to provide indicators which relate purely to one issue or department's activities. It is anticipated that the reporting under the framework will facilitate debate about the adequacy and appropriateness of policies and programs in functional areas. The details of the proposed model are discussed more fully in chapter 4.

At this stage, the proposed framework provides – in addition to the *Social Justice Reports* and Reconciliation Australia's annual report cards – the only evaluative mechanism on the Government's progress towards practical reconciliation. While the framework is an important development, it is of great concern that it is not accompanied by other processes which ensure sufficient and appropriate Indigenous participation in setting priorities and qualitative monitoring processes. As a result, the framework as a stand alone mechanism has the potential to reinforce practical reconciliation and marginalise further issues of significance to Indigenous peoples.

The implication of the framework in its present form is that issues of governance and capacity-building, for example, are to be defined, as in the '5-point plan', in myopic and culturally-reductive terms of individual citizenship rights and the western nuclear family structure. Other concerns include fears that that the framework may be too sterile or generic and requires qualitative contextual discussion. A comment made on the framework at HREOC's Benchmarking

29 See Jonas, Dr W, 'Government approach to reconciliation lacks direction and accountability' states Social Justice Commissioner', media release, 27 September 2002, http://www.humanrights.gov.au/media_releases/2002/66_02.html. Note also Ridgeway, A: 'The Government says it is spending more than $2 billion on Indigenous programs this financial year, but Senator Ridgeway has rejected the Government's claim it has not the data to set measurable benchmarks for the improvement of Indigenous disadvantage.' ABC news release, 'Govt's response to reconciliation report comes under fire', http://www.abc.net.au, 27 Sept 02.

30 Clark, *op cit*, p31.

Reconciliation workshop was that the framework does not seem to grapple with the issue of culturally appropriate service delivery mechanisms, with the danger that it could reinforce the status quo rather than challenge institutions to change.

The framework also needs to negotiate the continuing problems with data availability and statistical collection, differentiation between population groups, and linkage with other reporting processes. In the case of the latter, it has been suggested that there should be a third tier that is tied to service delivery, although this could also be appropriately covered under the Ministerial action plans process. The role of the private sector in responding to Indigenous disadvantage and how this can be reported on also needs consideration.

Another concern expressed at HREOC's workshop was that this framework, with its emphasis on reporting lacks and deficits in regard to policy and program areas impacting on Indigenous disadvantage may in time become an 'annual misery index'. It was noted that the decision-making process for the framework is non-Indigenous at all stages, and proposed that Indigenous participation be ensured in negotiating the framework. These issues are considered further in chapter 4 of this Report.

A third initiative announced by COAG during the year was a trial of a 'whole-of-government' approach to service delivery in ten Indigenous communities. This initiative involves cooperation across government agencies under the leadership of a taskforce directed by a group of Commonwealth departmental secretaries, also includes ATSIC representation.

Communities are selected as a result of consultation between state and federal governments, local governments and the communities themselves. This process includes establishing the focus of joint action within the particular jurisdiction. It is driven by the concept of shared responsibility and aims to evaluate whether a focused and coordinated approach can make a difference to specific communities or areas. The departments involved have pooled funding for the task force's administration of the project. Development of an evaluation framework for the trials is currently in progress.[31]

The first trial has commenced in the Cape York region under a partnership between the Commonwealth and state governments and the local communities, and a second has begun in the Wadeye community in the Northern Territory under the direction of the Department of Family and Community Services. It is understood that the third trial will be in the Murdi Paaki ATSIC region in Western New South Wales.

This is a significant and commendable initiative. However, the impact of duplication and poor coordination services at an interagency level on service delivery to Indigenous communities have been observed for some time in regard to increasing levels of Indigenous disadvantage.[32] ATSIC Chairman Geoff Clark comments in the *ATSIC Annual Report 2001-2002*:

31 Senate Estimates Committee, Legal and Constitutional, Federal Parliament, Canberra, 20 November 2002, p24.

32 For discussion, see *Social Justice Report 2000*, pp104-7.

> ATSIC has consistently advocated the need for whole-of-government coordination and the primacy of Indigenous decision-making within programs. What the Minister for Indigenous Affairs calls a 'new direction' is in fact a repackaging of directions that have been pointed out by our community and in a multitude of reports stretching back many years.[33]

In fact a range of approaches, including partnerships, agreements and governance arrangements, have been proposed with the aim of improving the service delivery environment for Indigenous Australians, most recently the Community Participation Agreements (CPA) being trialled by ATSIC as part of the Budget 2001 welfare reform package.[34] The Mutitjulu CPA, which was discussed in the chapter on governance and capacity-building in last year's *Social Justice Report*, has since been discontinued. This is no small part due to inflexibility and unwillingness to change current service delivery approaches at the federal level.

ATSIC are currently involved in the early stages of consultation and implementation with a further fifteen to seventeen communities nationally for CPAs. They are considering similar arrangements for five communities in the Tjarabalan region in Western Australia and for three communities at Cape York. There are plans to establish up to twenty CPAs by the end of 2002-03.

In order to avoid replication of past problems it is crucial that the fundamental issues concerning Indigenous service delivery be addressed and factored into the trial's processes and evaluation framework.[35]

In the context of the whole-of-government community trials, it is essential that the rights and autonomy of Indigenous partners must be respected to ensure effective participation. This means establishing Indigenous ownership of processes and structures involved in modelling, and the relationship of Indigenous kinship and authority to these. As the *Social Justice Report 2001* commented in regard to the CPA modelling:

> … it is important that some of the more fundamental issues concerning the respective roles and authority of Indigenous, government and other partners are re-visited, or in time these new models may run the risk of becoming yet another case of a failed Indigenous policy initiative and a further source of 'blaming the victim'.[36]

The other side of the partnership requires clarity, consistency and continuity of commitment on the behalf of participating government agencies. Diane Smith made the following observations about interagency involvement in the context of the Mutitjulu CPA:

> Departmental coordination has been an oft-stated government policy objective that has worn thin from overuse and under-implementation. One has to question whether it is a real possibility, or whether is it merely serves as a convenient placebo for lack of capacity to deliver on the part of government and its departments. These agreements will

33 ATSIC, *op cit*, p31.
34 For discussion see *Social Justice Report 2000*, pp104-23.
35 *Social Justice Report 2001,* pp79-91.
36 *ibid*, p84.

> constitute a challenge to the capacity of ATSIC, DFACS, Centrelink and DEWRSB, in particular, to formulate the coherent enabling policy and consolidated program platform that are needed.[37]

Smith's comments are relevant to arrangements such as CPAs and the whole-of-government community trials where departmental coordination is pivotal. The Government and other commentators have been eager to impress the need for Indigenous communities to take responsibility in overcoming disadvantage and its related problems. Equal emphasis needs to be given to the responsibility of governments and government departments and agencies in improving their performance in regard to Indigenous communities.

One of the observations made at HREOC's workshop on benchmarking reconciliation was that if a whole-of-government approach is to be implemented properly through these kind of initiatives, agencies need to overcome a 'silo effect' in terms of their communication and negotiation with Indigenous communities and with each other. Another important aspect of interagency involvement is the maintenance of continuity of corporate knowledge in this area, including awareness of the specific needs and cultural issues relevant to Indigenous communities. The development of partnerships, agreements and other capacity building and governance arrangements also needs considerable time investment, including commitments to meeting assessable goals and objectives over a set time-frame.

A further issue that models such as the CPA initiative and the whole-of-government community trials highlight is the need for a longer term commitment such as a five to ten year funding period to make any inroads on current disadvantage. Long-term funding commitments would further require support across successive terms of governments such as bi-partisan agreements for improving Indigenous capacity-building and governance.[38] Modelling processes should also be flexible enough to accommodate investigation of new funding and governance arrangements, and make recommendations for legislative reform to support these where necessary.

In addition, the need to establish protocols and principles for negotiation with Indigenous communities is vital in ensuring equity in processes of consultation and negotiation. Some examples of principles for negotiation with Indigenous peoples are those put forward to Government by ATSIC, CAR and HREOC as part of the social justice package proposals in 1995 and the use of human rights principles for negotiating framework agreements for native title in the *Native Title Report 2001*.[39] Ultimately trials and models such as the COAG whole-of-government initiative and the ATSIC CPAs may further require recognition that extensive participation by Indigenous peoples and partnership with government in regard to governance and capacity-building cannot be countenanced without consideration of the dimension of self-determination and self-government.

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37 See discussion in relation to CPAs in Smith, D, 'Community Participation Agreements: A model for welfare reform from community-based research', CAEPR discussion paper No. 223/2001, CAEPR, Canberra, 2001, p38.

38 *ibid*, p67. *Social Justice Report 2001*, pp89-90.

39 See ATSIC*, Recognition, rights and reform: Report to Government on native title social justice measures,* Canberra, ATSIC, 1995, pp9-10; *Native Title Report 2001*, Chapter 3.

5) The Government's Response to the Commonwealth Grants Commission's *Report on Indigenous Funding*

The Commonwealth Grants Commission's (CGC) inquiry into Indigenous funding and subsequent report have been of enormous value in identifying the limitations and problems of Indigenous service delivery and inter-governmental relations.

The Government responded to the CGC's report in June 2002. It welcomed the Commission's Report as:

> … a watershed moment in documenting and analysing the available information on the supply of and demand for programs and services for Indigenous people. The Government also sees the report as providing a valuable basis for the further development of evidence-based policy in Indigenous affairs.[40]

The Government noted that its response to the CGC Report built on the Government's commitment to address the underlying and contemporary causes of Indigenous disadvantage, not just its symptoms.[41] That commitment is founded on a partnership with Indigenous people and follows a number of key themes, including taking a whole-of-government approach by involving all relevant portfolio Ministers and the States and Territories, working within the reconciliation framework set down by the Council of Australian Governments (COAG).

The Government observed that the Report provided a valuable basis for development of evidence-based policy in Indigenous affairs. It contains a number of important undertakings and commitments, which are made in the context of 'principles for equitable provision of services to Indigenous people'. These principles build on the understandings developed through the work of the CGC and others in identifying the basic requirements and parameters for effective and equitable approaches to addressing Indigenous disadvantage. As such, the Principles set an agenda that provides an accountability framework for Government. The issue, as has been the case in the past, will be whether the rhetoric will be matched by action and by the level of priority accorded to these matters. The Principles are set out below:

Principles for equitable provision of services to Indigenous people

1. The design and delivery of services to meet Indigenous needs should be flexible and undertaken on the basis of partnerships and shared responsibilities with Indigenous people in a culturally and locationally appropriate way.
2. The development of a long term perspective in the funding, design and implementation of programs and services to provide a secure context for setting goals.

40 Federal government, *Government response to the Commonwealth Grants Commission Report on Indigenous funding*, Canberra, DIMIA, June 2002, p3. (Herein 'Government Response (GCG)'). Available online at: www.atsia.gov.au/atsia/media/reports02/index02.htm.

41 The Minister for Immigration and Multicultural and Indigenous Affairs, Phillip Ruddock, *Government to Focus on Indigenous Need,* Media Release and associated documents, 27 June 2002. See in particular the Government's detailed *Government Response (CGC)*.

3. Access to services will be provided on the basis of need and equity to all Australians, including Indigenous Australians, with a clear focus on achieving measurable outcomes.
4. Mainstream programs and services have the same responsibility to assist Indigenous Australians as other Australians.
5. The resources needed to address the specific disadvantages faced by Indigenous clients, whether delivered through the mainstream or Indigenous-specific services, can be greater than for other clients, especially in rural and remote locations.
6. Where mainstream services are unable to effectively meet the needs of Indigenous people (whether due to geographic limits to availability or other barriers to access) additional Indigenous-specific services are required.
7. Overall capacity to achieve outcomes is an important factor when considering whether Indigenous-specific programs and services should be established to meet identified need or whether to enhance mainstream programs.
8. Coordination of service delivery within and between governments.
9. Improving community capacity is a key factor in achieving sustainable outcomes for Indigenous communities.
10. Data collection systems require continuous improvement to ensure performance reporting on key Indigenous outcomes is of a high standard and enables resource allocation to be better aligned with identified need, including by geography.[42]

A concern about the Government Response to the CGC is that it is confined to issues that fall within the 'practical reconciliation' agenda. The Government response states at the outset that 'the CGC report includes findings and makes observations that go beyond the terms of reference for the inquiry. [The Government's] response… is limited to those matters that are within the terms of reference'.[43]

The terms of reference for the Inquiry were limited to 'determining relative need on the basis of geography and constructing distributional funding models'.[44] The Commission had noted that:

> The issue of absolute needs was raised in all our consultations, no matter who they involved. The general theme was that given the high absolute needs, redistribution of existing levels of funding on the basis of relative Indigenous needs was of limited relevance.[45]

However, a focus on relative need:

> … limits the Commission's ability to report on an inequality perspective and hampers the usefulness of the inquiry's outcomes for developing and improving national benchmarks. It also has the potential to skew the findings of the report in favour of addressing needs in rural and remote regions, despite the fact that the majority of Indigenous Australians reside in urban areas.[46]

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42 *Government Response (CGC),* pp21-22.
43 *ibid*, p5.
44 *ibid*, p5.
45 Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Canberra, Commonwealth of Australia, 2001, pxii.
46 *Social Justice Report 2000*, pp101-102.

The report had proposed a wide range of processes for developing Indigenous community capacity and creating a role for Indigenous communities in controlling service delivery processes. These conclusions and associated recommendations by the CGC are not responded to by the Government.

The continued narrowing of the Government's focus on Indigenous funding to consideration solely of relative need means that some important issues highlighted by the CGC Report are largely disregarded.

The CGC Report found that there were both practical and conceptual difficulties with the notion of applying a formula-based approach to allocation of Indigenous funding using indexes of relative need. Significant factors here include the lack of comprehensive, comparable and up-to-date data necessary in order to construct suitable regional indexes of relative needs. The notion that resources can be redistributed on the basis of relative need presupposes that there is 'a reasonably proportional relationship between the relative needs of the regions and their relative requirements for funds… [when] the requirement for funds are complex and are unlikely to be proportional'.[47]

The Report notes that: 'A question arises as to whether a needs based allocation of resources should be aimed at assisting the region where, on average, people are more disadvantaged; or the region with most disadvantage, even if the individuals in that region are relatively better off'.[48]

It highlights the complex interplay of the following issues:

> (i) Needs are met by mainstream and Indigenous-specific programs are funded by the Commonwealth, the States, local governments and non-government organisations. Modelling allocations of Commonwealth funds, therefore, requires assumptions about the co-ordination, level and distribution of the funds from the other sources.
>
> (ii) Local cost, efficiency and effectiveness factors influence the types of services and the service delivery processes that best meet needs in each region.
>
> (iii) Needs in each function are affected by activities, or the lack of them, in other functions.
>
> (iv) The links between the funds made available to meet needs and the resulting changes in outcomes are not measurable.[49]

The Commission found that Indigenous Australians did not access mainstream services at the same rate as the non-Indigenous population. The lack of coordination of the mix of Commonwealth and State mainstream and Indigenous-specific programs creates further problems for the development of an equitable formula based on relative need. This is exacerbated by economic, demographic and geographic differences between regions.

In noting the inevitable use of value judgments in decision-making about funding priorities, the CGC Report observes that the Indigenous perspective may differ

47 *Government Response (CGC),* p33.
48 *ibid*, p29.
49 *ibid*, p41.

from that of non-Indigenous people: 'For example, an Indigenous perspective of health status is broader than physical health status and includes emotional, social, spiritual and cultural wellbeing. In addition, Indigenous people in metropolitan areas may have different views from those in remote areas'.[50]

The historically-entrenched poverty and socio-economic marginalisation faced by Indigenous peoples also has significant ramifications for their relationship to government programs and services in contrast to other societal groups: their reliance on government service provision will necessarily be greater until they reach a higher degree of economic and financial self-sufficiency.

All of these factors point to the need to extend the scope of the Inquiry beyond the focus on relative needs in the original terms of reference. Thus the CGC Report observes that the extent to which redistribution is beneficial is questionable:

> Large redistributions risk losing the benefit of investments made over a number of years, including those in developing organisational capacity and people. That is, real costs of such redistribution may be high. In these cases it might be more appropriate to maintain the existing distribution of current resources and apply new distribution approaches to new and expanded funds if and when they are made available.[51]

The Government Response to the CGC does however acknowledge the difficulty in constructing regional indexes of relative needs because of the absence of adequate data. It accepts:

> … the CGC's approach of defining need in terms of outcomes and notes that it is difficult to develop purely mathematical measures of need, primarily because of the absence of adequate and reliable data. The Government is committed to improving data quality and availability in order to improve the policy base and services.[52]

With the exception of some programs in the housing and infrastructure area, many Commonwealth and state government programs do not allocate funds on a needs basis. Allocation mechanisms include direct response to demand, history, submissions and formulae that may reflect population, needs, costs of service delivery or capacity to benefit.[53]

In committing to a focus on outcomes, the Government Response to the CGC Report agrees that 'in targeting resources to achieve identified outcomes, judgements need to be made about which aspects of those outcomes are more important and more relevant to Indigenous people'.[54] However, a clear basis needs to be established for ensuring effective participation by Indigenous peoples:

> A final critical dimension that also affects the resource allocation decision is the question of the role and responsibility of the Indigenous community as a partner in this process. The absence of a simple relationship

50 *ibid*, p13.
51 *ibid*, p51.
52 *ibid*, p7.
53 *ibid*, p29.
54 *ibid*, p8.

> between need and resource allocation means that the Government and its agencies must make judgements when they appropriate resources for Indigenous-specific programs and when they distribute those resources on a regional basis.[55]

The Government's response notes the need to use evidence-based decision-making, for decisions not to 'be unduly influenced by historical practice' and for decision-making to be 'not just in terms of sectoral specific geographic allocative issues, but also in terms of funding allocation across sectors'.[56] Despite the difficulties surrounding the relationship between need and resource allocation it is important that the Government not repeat the mistakes of past policy makers and that in seeking to make mainstream services genuinely more responsive to Indigenous peoples, it builds a partnership that is grounded in standards of equity, effective participation and self-determination.

The Government Response states that where mainstream services are available, Indigenous Australians 'should enjoy the same needs-based level of access to mainstream services as other Australians. This is a basic citizenship right'.[57] Beyond this principle the response looks to maximising outcomes from the Indigenous-specific expenditure available.

Commenting on the CGC Report's observation that it is simplistic to expect that mainstream services be the primary providers for Indigenous peoples in urban areas and Indigenous-specific programs for remote areas, the Government Response suggests that:

> the key consideration is the extent to which services are routinely available to the general population. Where those services are generally available in a remote area, access issues should be addressed by adjustments to mainstream services... Need should be addressed through an appropriate mix of mainstream and Indigenous–specific services determined by careful consideration of the causes of disadvantage and barriers to access to services.[58]

This observation fails to engage with the CGC Report's findings about the limitations that a focus on relative need sets on equitable redistribution of funds in overcoming Indigenous disadvantage, especially in regard to the needs of the non-Indigenous population.

ATSIC Chairman Geoff Clark comments that:

> ATSIC has consistently advocated for increased funding to Indigenous programs given the extent of the need. Nevertheless, the CGC was pointedly asked not to examine absolute Indigenous need, but to compare the needs of different groups of Indigenous people. Tony Fitzgerald was tasked with making recommendations for change on Cape York based on 'the smarter use of existing State resources'. However, both these examinations ultimately had no choice but to acknowledge an absolute inadequacy of resources.[59]

55 *ibid*, p10.
56 *ibid*, p10-11.
57 *ibid*, p14.
58 *ibid.*
59 ATSIC, *op cit*, p31.

From a human rights perspective, the Government Response exemplifies the problem with a focus on basic citizenship rights. In determining outcomes that are sensitive over the long-term to meeting the specific needs of Indigenous peoples and to addressing underlying disadvantage and discrimination, it is insufficient to set accessibility of services to the general population as the benchmark.

A framework for benchmarking progress in overcoming Indigenous disadvantage could more profitably be modelled on that proposed in the *Social Justice Report 2000*,[60] which uses an inequality perspective to measure the disparity between different social groups and whether these disparities have increased or decreased over time. This would of necessity involve not only assessment of any inefficiencies in Indigenous-specific expenditure, but re-evaluation of the parameters set for Indigenous-specific funding.

The principles for equitable provision of services to Indigenous peoples put forward by the Government Response to the CGC could also be aligned more strongly with a human rights framework that sets benchmarks for progressive realisation of rights in addressing poverty and disadvantage. Such a framework could, for example, assist in clarifying the outcomes to be achieved by a policy approach for addressing Indigenous disadvantage and provide benchmarks for measuring progress in addressing inequality within a long-term perspective. As the principles currently stand it is difficult to see how they can ultimately be effective in addressing Indigenous disadvantage.

For example, while the principles support a long-term perspective on Indigenous service delivery needs and 'access to services … on the basis of need and equity to all Australians, including Indigenous Australians, with a clear focus on achieving measurable outcomes', there are difficulties in achieving either without an equality perspective that takes into account absolute need.[61] Without proper Indigenous participation in setting outcomes and benchmarking against the needs experienced by the non-Indigenous population, it is unclear how long-term change can be effected. Ultimately such an approach will have ramifications not only for service delivery but for sustainable capacity-building in Indigenous communities. The CGC Report cautions that:

> Indigenous people in all regions have high needs relative to the non-Indigenous population. An important question is whether new methods of distribution should be applied to existing programs and funds. Any change in methods of distributing existing resources means that some regions would lose funding and others would gain. Large redistributions risk losing the benefits of investments made over long periods of time, including those in developing organisational capacity and people. The reals costs of redistribution may be high.[62]

60 *Social Justice Report 2000*, Chapter 4.
61 *Government Response (CGC),* p21.
62 Commonwealth Grants Commission, *op cit*, pxvii.

6) The Government's Response to the Council for Aboriginal Reconciliation's Final Report – *Reconciliation: Australia's Challenge*

When the Government Response to CAR's Final Report was released, the accompanying media release suggested that the Government's position on reconciliation is congruent with that of CAR's: it was titled 'Reconciliation Council's Report highlights practical approach'.[63] However, the Government's Response to CAR's Final Report is certainly not representative of the content of CAR's recommendations. In fact it responds to only one of the Council's six final recommendations, and it outright rejects one of its four, integrated national strategies.

It states the Government's position on reconciliation as follows:

> The Government believes that the key to continuing progress is a commitment by all Australians to achieving reconciliation through addressing disadvantage and by improving community attitudes and understanding. All Australians have a responsibility in this regard and the Government gladly adopts a driving role. The Government will maintain its commitment to the implementation of practical and symbolic measures which have a positive effect on the everyday lives of Indigenous Australians…
>
> The Government maintains that the things that unite Australians are infinitely greater and more enduring than the things that divide. And so it is in relation to reconciliation.[64]

Significantly, Reconciliation Australia's Co-Chairs and Senator Aden Ridgeway, a member of the Council for Aboriginal Reconciliation, have openly criticised the Government's response to the Report's recommendations and found them lacking in substance.

Senator Ridgeway states that: 'If you look at it from the six key recommendations that came from the final report, they'd be lucky even to say half of any one of those has been achieved'.[65] Reconciliation Australia's *Reconciliation Report Card 2002* notes that:

> The Government's belated response (almost two years after it received them) only adopted wholeheartedly *one* of the Council's six recommendations – number 1... It is disappointing that the Government rejected others, including number 6 which called for a statutory process to recognise Indigenous rights and to progress towards an agreement or treaty. Limiting the response to 'practical reconciliation' while neglecting or rejecting other issues means that the 'unfinished business' of reconciliation remains on the table.[66]

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63 ABC news release, *op cit.*

64 Federal government, *Commonwealth Government Response (CAR) to the Final Report of the Council for Aboriginal Reconciliation*, Commonwealth of Australia, Canberra, 2002, http://www.minister.immi.gov.au/atsia/media/reports02/index02.htm, p3. (Herein 'Government Response (GCG)').

65 ABC news release, *op cit.*

66 Reconciliation Australia, *op cit,* pp5-6.

As in the Government's response at the time of the CAR Report's tabling, the material released by Government this year on reconciliation indicates a tendency to emphasise the responsibility of the broader community to progress reconciliation in a way that obviates the role of national leadership:

> It is important to appreciate that the Council's proposals, especially the Roadmap and accompanying strategies, were not solely addressed to the Commonwealth Government. They were addressed to all governments and to the community as a whole. It is up to each to respond in its own way to the Council's proposals. The response of the Commonwealth Government is but one piece, albeit an important one, in that mosaic.[67]

While it is undoubtedly true that all levels of government and all members of the community have a responsibility toward achieving reconciliation with Australia's Indigenous peoples, the Government is not only an important piece in the mosaic: it is an integral one. It is after all the role of federal Government to drive policy and enact legislation at a national level. A lack of effective coordination or participation at a national level can mean that opportunities to make a change at state and local levels can be stymied or even lost.

The following 'practical reconciliation' themes are commonly reiterated in the Government's Response to the CAR documents:

- A minimalist response to the symbolic issues raised in the reconciliation documents;
- A perception that self-determination is divisive;
- An emphasis on perceived areas of agreement at the expense of continuing debate on other areas; and
- A misrepresentation of progress towards meeting the goals of practical reconciliation.

a) A minimalist response to symbolic issues

The recommendations concerning 'symbolic' issues, including those often publicly identified with a rights agenda such as the enactment of legislation for a treaty process or constitutional recognition of Indigenous Australian's rights, receive scant treatment in the Government's Response to CAR's final report.

While the Government's support for processes to acknowledge the special place of Indigenous peoples in the life and history of Australia in Commonwealth ceremonies and for a referendum to repeal section 25 of the Constitution are welcome initiatives, the Government Response to CAR lacks commitment and direction to making reconciliation a reality into the future.

These elements are evident in the Government's refusal to pursue legislation that would enshrine the principles in the CAR documents (Recommendation 2); to affirm the Australian Declaration Towards Reconciliation (Recommendation 4); and to enact legislation to support a treaty or agreement process to address the unresolved issues of reconciliation (Recommendation 6). The Government's alternative approach is as follows:

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67 *Government Response (CAR)*, p3.

> The Government believes that a continuing dialogue on the unfinished business of reconciliation allowing for negotiated outcomes on matters such as rights, self-determination within the life of the nation and constitutional reform should be achieved outside the confines of a legislated process. The Council's draft legislation would impose a potentially divisive, protracted (at least 12 years) and inconclusive process on the nation… ATSIC's treaty consultation process identifies similar objectives…
>
> Whatever community support there may be for a written declaration of goals and values, the Council's own public opinion research disclosed community opposition to the idea of a treaty as a legally enforceable instrument such as is made between sovereign states. A number of Aboriginal leaders have also recently voiced concerns about the concept, its relevance and relative importance. The Government is deeply concerned that rather than offering closure, pursuit of a treaty would be a recipe for ongoing disputation and litigation as has happened in North America and elsewhere.
>
> There are areas in this debate which evidence widespread disagreement between the aspirations of some Indigenous people and the wider community. The Government is committed to a process which fosters an open, honest and ongoing dialogue on reconciliation. This process must respect the rights and differing views of all interested parties while also fostering ongoing and increased support for reconciliation based on the principle of equal and common rights for all Australians.[68]

Anxiety about the potential divisiveness of the concept of a treaty is expressed more pointedly in the Minister for Aboriginal and Torres Strait Islander Affairs's speech at the National Treaty Conference. The speech summarises the Government's reservations about a treaty as follows:

> a treaty raises a range of contentious issues that do not have wide public support and could actually threaten to undermine support for reconciliation. The focus on a treaty distracts everybody – government, Indigenous people and the wider public – from the main game, which is fixing the appalling circumstances in which many Aboriginal people live. And, when you strip away all the rhetoric, we are ready to share much common ground...
>
> The Government has been fostering a new culture of agreement-making with Indigenous people that is giving them real influence and control in the affairs of state that matter to them. And like many here, the Government wants to take that further.[69]

Acknowledgement of the common ground that exists between Indigenous and non-Indigenous Australians is welcome. But without a set time-frame for resolution of unfinished business, including principles and protocols for negotiation, it is questionable as to whether the Government's proposal of a continuing free-floating policy debate or its promotion of a 'culture of agreement making' are likely to reach a satisfactory and non-divisive closure or merely perpetuate dissension, given the lack of clearly discernible goals and objectives.

68 *ibid*, pp18-19.
69 Ruddock, 'Agreement making and sharing common ground', *op cit*, p2.

The Minister for Aboriginal and Torres Strait Islander Affairs' National Treaty Conference speech challenges Indigenous requests for a treaty by arguing that it does not enjoy widespread community support:

> Now I know that some opinion polls … suggest that some segments of the population are attracted to the idea of a treaty. But I would remind people of what the Council for Aboriginal Reconciliation found when it probed community attitudes, that apparent community support collapses quickly as soon as the concept of legal enforceability is introduced.[70]

However public opinion is not the sole determining factor in the liberal democratic process: the development of principles both within the Australian common law and international human rights law pertinent to Indigenous Australians should receive acknowledgement and protection within Australian law. Nor should these developments be portrayed as occurring outside the process of reconciliation and the code of ethics being formed to underlie the relationship between Indigenous and non-Indigenous peoples.

The negotiation and agreement process put forward by the Reconciliation Bill includes such safeguards as protocols for negotiation and tri-annual reporting, and the CAR documents support an ongoing process of education on reconciliation issues such as the distinct rights of Indigenous peoples and constitutional protection of rights.

The Reconciliation Bill's negotiation and agreement process also provides an opportunity for the use of human rights norms as a process for rebuilding this relationship which is so fundamental to the nation. This process which the Bill sets out assumes that reconciliation is an ongoing process in which unresolved issues are squarely raised and processes put in place for their resolution based on the informed consent of both sides. The application of these principles must be negotiated and agreed upon by both parties before a new relationship can emerge.

In this way the agreement process is consistent with the human rights principle of self-determination that recognises Indigenous peoples as a separate and distinct people, capable of negotiating with nations on an equal footing. It confers on Indigenous peoples a genuine and autonomous basis for the 'real influence and control in the affairs of state': a dimension which a culture of agreement-making that does not specify the basic status and rights of Indigenous peoples, as well as the principles and protocols for agreement-making is less likely to deliver.

The Government's response to the Council's documents further observes that Australian governments have 'generally observed the principle of only enacting legislation once they are convinced that a legislative solution is superior to other policy instruments for achieving the stated objective'.[71] In doing so it begs the question of whether it is appropriate for matters concerning the human rights of Indigenous Australians to be resolved through public fora such as policy debate and referenda rather than legislative mechanisms.

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70 *ibid.*

71 Commonwealth Government, *op cit*, p19.

A Bill of Rights or express Constitutional provisions are not supported because the 'Government strongly believes that the best guarantee of fundamental human rights in this country is to have a vigorous and open political system, an incorruptible judicial system, and a free press'.[72] The Response also states that they are committed to the protection of 'the rights of all its citizens, and in particular its Indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms' through ratification of the ICERD, the ICESCR and the ICCPR and acceptance of the Universal Declaration of Human Rights.[73]

It also claims that the *Racial Discrimination Act* (RDA) provides sufficient protection for race rights without need for further reinforcement through constitutional change or the creation of a Bill of Rights.

But while the RDA embodies the principles for the elimination of race discrimination set out in the ICERD, it has been clear during recent years that it does not provide adequate protection within the Australian legal system for the exercise of Indigenous rights. For example since 1999 three separate international human rights committees have expressed concerns to the Australian Government about breaches of Indigenous peoples' human rights.[74] Nothing has changed. For example, native title is still governed by the exact same legal structure as that which, in 1998, caused the Committee for the Elimination of Racial Discrimination (the CERD Committee) to put Australia under its Urgent Action procedure and request an explanation for this extreme imposition of discriminatory policy.

The Government Response to CAR highlights the potential for negotiated outcomes and 'agreement-making' at a local level outside the legislative process and the Minister's National Treaty Conference speech emphasises an 'alternative step-by-step process [that] is already beginning to happen'.[75] While the use of agreement-making has strong Indigenous support, it is important to realise that these initiatives do not of themselves guarantee protection of Indigenous peoples' rights and interests. In the case of native title, the difficulty is in convincing developers, mining and resource companies, pastoralists, and local and state governments to enter into agreements which deliver real outcomes to Indigenous peoples when the legislation does not necessarily require this of them.[76]

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72 *ibid*, p21.

73 *ibid*, p18.

74 In 2000 the Committee on the Elimination of Racial Discrimination (the CERD Committee) the Human Rights Committee, and the Committee on Economic Social and Cultural Rights criticised Australia's native title legislation based on Australia's obligations under the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) respectively. For a full analysis of these decisions see http://www.humanrights.gov.au/social_justice/nt_issues/index.html.

75 *Government Response (CAR),* p3.

76 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, HREOC, Sydney, 2002, Chapter 3; proposes framework agreements that embody human rights principles as a guide to agreement-making on native title land.

There are periods in Australian history prior to the 1967 referendum when basic citizenship rights for Indigenous peoples may not have received widespread community support but this does mean that some of the dehumanising treatment experienced by Indigenous peoples or the failure of past governments to protect their basic rights was in any way supportable. The recognition of Indigenous inherent rights deserves national leadership within the reconciliation process including legal protection where appropriate.

b) The perceived divisiveness of self-determination

Related to the Government's continuing refusal to countenance recognition and protection of Indigenous peoples' inherent rights is its commitment to perpetuating the misconception that Indigenous self-determination will necessarily be divisive as it 'carries the implication of a separate Indigenous state or states'.[77] As explained in chapter 2, self-determination does not constitute such a threat to national unity as it does not amount to a right of secession.

While the Government Response to CAR prefers to promote self-management and self-empowerment for Indigenous peoples, it quickly becomes clear that without the fundamental recognition of Indigenous self-determination, even these will be circumscribed within the Government's own terms:

> It is the responsibility of government to ensure that all Australians have equality of opportunity and access to services. The Government is concerned that self-determination implies that a government must in some way relinquish responsibility for and control over those aspects of Indigenous well being over which it rightly has jurisdiction in common with its responsibilities to all Australian citizens. The Commonwealth Government remains accountable for outcomes in Indigenous affairs when making fiscal commitments.[78]

The limits of this approach are discussed in detail in chapter 2 of this Report.

Examples from other international contexts indicate that Indigenous self-determination and self-government can be grounded in a partnership of mutual fiscal responsibility between government and Aboriginal peoples. 'Supporting Strong Communities, People and Economies', the fourth strategy of *Gathering strength – Canada's aboriginal action plan,* covers issues of effective citizenship participation similar to those referred to in CAR's national strategies on overcoming disadvantage and achieving economic independence.[79] But it goes further than the CAR strategies, giving extensive treatment to the issues of improving both fiscal relations at the federal level and inter-governmental relations with Indigenous people.

The Harvard Project on American Indian Economic Development found that tribal-control of resource management and design of economic development strategies led to the exercise of effective sovereignty on American Indian reservations: 'When tribes make their own decisions about what approaches to

77 *Government Response (CAR),* p19.
78 *ibid.*
79 Minister of Indian Affairs and Northern Development, *Gathering Strength – Canada's aboriginal action plan*, Ottawa, 1997. Available online at: www.inac.gg.ca/strength/change.html.

take and what resources to develop, they consistently out-perform non-tribal decision-makers'.[80]

There is also evidence that the capacity to be self-determining can have positive implications for Indigenous peoples' health, well-being and sense of identity. Commenting on the gaps between Maori and Indigenous Australians' health status, and whether the treaty obligations that underpin Maori-State relations have contributed to improvements in Maori health over the past sixty years, Kate Ross and John Taylor observe that:

> The other side of the institutional arrangements that flow from treaties is the interpretation by individual Indigenous people of their own status. In the presence of legal rights and obligations, an effective bargaining base and explicit recognition by the non-Indigenous majority, it is arguable that psychosocial stress could be mitigated. A positive external ascription may have as its product a positive internal ascription, and a lessening of a sense of powerlessness or hopelessness.[81]

c) An emphasis on perceived areas of agreement

While the Government's response to CAR is quick to suggest that there is significant conflict between the Indigenous and non-Indigenous communities, it does not annotate or provide any comprehensive analysis of the polls it claims substantiate these areas of disagreement. By contrast, a poll conducted by Issues Deliberation Australia (IDA) – 'Australia Deliberates on Reconciliation' – on 16-18 February 2001 found significant changes in perceptions and increases in knowledge among non-Indigenous Australian participants as a result of this debate. IDA record that:

> Following deliberation, younger Australians, more educated Australians, and Australians living in capital cities, were more observant of Indigenous disadvantage. This intensified perception of the degree of Indigenous disadvantage correlated highly with the tendency to agree to an official government apology, a treaty, native title, an integrated legal system and payment to the 'stolen generation'. Prior to deliberations, Coalition and ALP supporters were starkly different. Comprehensive weighing of opposing arguments tended to negate that political divide, with post-deliberation opinions converging on key aspects of reconciliation.
>
> Regardless of these 'gaps', the informed voice of the general population of Australians was a far less divided and ambivalent voice than the pre-deliberation uninformed voice. In general, informed Representative Australians revised their perceptions of how important the issue of reconciliation is to the nation, and how disadvantaged Indigenous Australians are in comparison to their non-Indigenous counterparts…
>
> These changes in perceptions and increases in knowledge correlated highly with levels of support for a range of national initiatives:

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80 Harvard Project on American Indian Economic Development, Overview of the Harvard Project, http://www.ksg.harvard.edu/hpaied/overview.htm, 13 December 2002.

81 Ross, K and Taylor, J, 'Improving life expectancy and health status: A comparison of Indigenous Australians and New Zealand Maori', Joint Special Issue, *Journal of Population Research and NZ Population Review*, September 2002, p234.

- formal acknowledgement that Australia was occupied without consent of Indigenous Australians: 81%
- formal acknowledgement that Indigenous Australians were the original owners of the land and waters: around 81%
- an apology to the 'stolen generation': 68%.[82]

These results are indicative of the progress towards agreement between Indigenous and non-Indigenous Australians on the unfinished business of reconciliation that a structured framework for both education and debate on the relationship between Indigenous and non-Indigenous Australians could facilitate. IDA comment further that:

> All previous Deliberative Polls provide compelling evidence that people who have had the opportunity to be informed, to question competing experts and advocates and to discuss the issues with their peers, think fundamentally differently and draw different conclusions to those who have not had such opportunities. The conclusions of the 'representative citizens' following deliberation have *recommending force* for Governments, Government Agencies and other organisations, as they develop their strategies in this area.[83]

Such a process for debate and education could be facilitated and resourced through the mechanisms proposed by the Reconciliation Bill for resolving unfinished business, such as the National Reconciliation Conventions. While one of Reconciliation Australia's primary functions is to provide wider community education, the limited budget on which it operates is inadequate to support a comprehensive educative process of this nature. In the absence of support for the processes presented by the Reconciliation Bill and the failure to put forward an alternative, resourced framework for this purpose, it is hard to see that the Government is committed to sustaining a continuing dialogue on reconciliation.

The Government's emphasis on finding ground also supports a tendency to prioritise its own agendas at the expense of those of Indigenous people. For example, while acknowledging the 'robustness of the debate' on treaty promoted by Indigenous peoples in his speech at the National Treaty Conference the Minister claims that the 'focus on a treaty distracts everybody … from the main game, which is fixing the appalling circumstances in which many Aboriginal people live'.[84]

While overcoming Indigenous disadvantage is the only major point of agreement between the Government and Indigenous leaders in regard to reconciliation, it does not follow that there is common assent to a practical reconciliation approach. Once again this is a rhetorical sleight-of-hand on the Government's behalf which belies their capacity to consult adequately or to engage equitably with Indigenous peoples in setting the parameters for dialogue on reconciliation. This is a continuation of a pattern in the Government's 'take it or leave it approach' to reconciliation which implies that Indigenous peoples are dependent on the

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82 Issues Deliberation Australia, 'Australia deliberates: Reconciliation – where from here?', Executive summary of results, Canberra, 2001. Available online at: www.i-d-a.com.au/recon_report.htm.

83 Project description, *ibid.* www.i-d-a.com.au/recon_description.htm.

84 Ruddock, 'Agreement making and sharing common ground', *op cit*, p2.

benevolence of government rather than the establishment of an equal partnership in developing the terms of debate in regard to reconciliation and Indigenous policy.

d) Misrepresenting progress towards practical reconciliation

The Government's response to the CAR documents also list significant achievements of practical reconciliation across a range of socio-economic indicators.[85] This list of 'progress' does not admit to the continuing gravity of Indigenous disadvantage as indicated by recent Census data and a range of other reports. Close examination of the gains from reconciliation for Indigenous people listed in Government's response to CAR against these latest findings suggest that the Government is not providing a very clear delineation of outcomes for Indigenous peoples but a somewhat limited and even misleading view.

Statistics released by ABS from the Indigenous component of the 2001 National Health Survey indicate poor outcomes for the Indigenous population in comparison to the mainstream population for life expectancy, reported level of health, and health risk factors.[86] Even more damningly, the survey found that while Indigenous people are hospitalised at twice the rate of the general population, real spending on Indigenous health was half that of the non-Indigenous community.[87] ATSIC Chairman Geoff Clark observes: 'Considering the high rate of illness experienced by Indigenous communities, we would expect expenditure on health services for our people to be about three times the average'.[88]

Some of the gains in health that the Government's response to CAR notes pale in contrast to the big picture of Indigenous health issues. While it observes that Indigenous infant death rates have fallen over the past decade, Indigenous babies are still twice as likely to die at birth as those born to non-Indigenous mothers.[89] The response reports some declines in rates for respiratory illness and deaths from infectious and parasitic diseases but the rates remain at around 4 times the non-Indigenous average. Indigenous people still continue to experience higher rates of asthma, diabetes and hypertension than other Australians, as well as higher rates of hospitalisation and mortality for mental health and substance abuse related disorders.[90]

Likewise while there have been some improvements in regard to education, the recent *National Report to Parliament on Indigenous Education and Training* 2001 reveals significant gaps between Indigenous and non-Indigenous Australians.

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85 *Government Response (CAR),* pp5-7.
86 ABS, *op cit*.
87 Australian Bureau of Statistics, *National Health Survey: Aboriginal and Torres Strait Islander Results*, Australia, 2001, 4715.0. Available online at: www.abs.gov.au/Ausstats/; Australian Institute of Health and Welfare, *Expenditures on Health Services for Aboriginal and Torres Strait Islander People 1998-99,* cat. No. IHW7, Canberra, Australian Institute of Health and Welfare, 2001. http://www.aihw.gov.au/publications/index.cfm?type=detail&id=565.
88 Clark, *op cit*, p38.
89 ABS, 'Aboriginals and Torres Strait Islander Health Report', *op cit*; *Government Response (CAR)*, p6.
90 Clark, *op cit*.

For example, although retention rates to year 12 have increased, the rate is still half the rate for non-Indigenous students. The numeracy and literacy rates of year 3 students have improved but there is still a substantial gap between these rates and those of non-Indigenous students. The numbers of Indigenous students undertaking tertiary and post-secondary vocational education has increased but the rates at which Indigenous students progress through and complete their courses are not as high as those for non-Indigenous university students.[91]

As Senator Ridgeway observed, this first national report on education has come 35 years after the Commonwealth took responsibility for this area following the 1967 referendum. He comments as follows on the value of this report for monitoring disadvantage in regard to education:

> We cannot afford to sacrifice another generation of Indigenous people to the unemployment queues or the pathway to our detention centres and gaols… Given that the Minister for Aboriginal and Torres Strait Islander Affairs has excused the Government's lack of progress in Indigenous Affairs by saying there is no baseline data to measure progress – at least on the education front this kind of excuse cannot be wheeled out in future.[92]

The Australian Vice Chancellors' Committee (AVCC) said that the report highlighted the need for a review into the adequacy of current income support arrangements for Indigenous students and supported the package of measures for consideration put forward by the AVCC. The AVCC President, Professor Deryck Schreuder, stated that:

> The fact is, Indigenous Australians' access to, and completion of, higher education is too low and further assistance is needed to ensure universities are able to increase numbers of both students and staff…Whilst there are some encouraging signs with an increase in the number and proportion of Indigenous students enrolled in Bachelor's degree courses in higher education, from 3863 in 1997 (or 52 per cent) to 4630, (or 63 per cent) in 2001, clearly more must be done to achieve greater participation and completion of higher education.[93]

The Government Response (CAR) also reports improvements for Indigenous peoples since 1992 in the area of housing and infrastructure. It cites increases in the percentage of discrete Indigenous communities with access to electricity and higher level sewerage systems, and the proportion of dwellings in need of major repair, as well as a decline (of 2 per cent) in the proportion of residents living in temporary dwellings since 1996.

However, the overall picture for Indigenous access to housing and infrastructure is still one of disadvantage, with the majority of Indigenous peoples generally living in overcrowded and poor quality rental accommodation. The ABS

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91 Nelson, Dr B, 'Statement by the Honourable Dr Brendan Nelson, MP – Minister for Education, Science and Training: The national report to parliament on Indigenous Education and Training 2001', House of Representatives, *Hansard*, 14 November 2002, p8948.

92 Ridgeway, A, 'First National Indigenous Education Report – 35 Years Coming', media release, 12 November 2002.

93 AVCC, 'More must be done to help Indigenous students', media release, 15 November 2002.

Community Housing and Infrastructure Needs Survey (CHINS) funded by ATSIC in 2001 found that 19 per cent of Indigenous dwellings in urban and regional areas have a high need for repairs in contrast to 7 per cent for other households. There are also 3.4 people in Indigenous households compared to 2.6 in other households; and in 1996 7 per cent of Indigenous households consisted of 10 or more people in contrast to 0.1 per cent of Indigenous households.[94]

The statistics on law and justice presented in the Government's response to CAR are particularly disingenuous. It states that:

- Despite a rise in the total prison population since 1994, the rate of Indigenous incarceration has remained relatively stable in recent years
- On average, the rate of Indigenous deaths in custody has fallen since the Royal Commission, and Indigenous people are less likely to die in custody than non-Indigenous prisoners.[95]

A different and more honest way of presenting the facts on this issue would be to acknowledge that since the Royal Commission into Aboriginal Deaths in Custody incarceration rates and over-representation rates have risen significantly, and in recent years have not declined. It would also be to acknowledge that Indigenous people still constitute approximately 18% of all deaths in custody despite constituting 2% of the population. These figures cannot be construed as a positive outcome.

Again, the absence of a long term commitment to overcoming Indigenous disadvantage, with short, medium and long term targets, masks the distinct lack of progress in addressing Indigenous disadvantage within a practical reconciliation approach. There is a continual need for Indigenous organisations to unravel the statements of the Government so that it can be held accountable for the real lack of achievement.

Conclusion

The past twelve months have seen the Government reinforce its practical reconciliation approach to Indigenous issues. By continually reinforcing that its commitment is to addressing key issues of Indigenous disadvantage and nothing else, the Government has selectively engaged in debates about Indigenous policy formulation. It has developed a tunnel vision that renders it incapable of seeing anything that falls outside the boundaries that it has unilaterally, and artificially, established for relations with Indigenous peoples.

There are two features to this approach that are of particular concern. First, it has seen Indigenous peoples marginalised from having any role in setting the priorities or agenda for Indigenous affairs. This has been done, deceitfully, under the rubric of 'partnership and agreement-making'. Second, the efforts of the Government over the past twelve months have been directed towards the goal of cementing this reductive approach into place, including at the inter-governmental level. The consequence is that the limited processes for accountability are not directed to those issues which the Government does not agree with.

94 Clark, *op cit*, p40.
95 *Government Response (CGC),* p7.

Chapter 4

Measuring Indigenous disadvantage

On 28-29 November 2002 I convened a workshop on the topic of benchmarking reconciliation and human rights. The purpose of the workshop was to consider current developments in setting benchmarks, identifying performance indicators and developing monitoring and evaluation frameworks for addressing Indigenous disadvantage from a human rights perspective. In particular, the workshop considered the *Draft framework for reporting on Indigenous disadvantage* currently being developed by the Steering Committee for the Review of Commonwealth/State Service Provision under the auspices of the Council of Australian Governments (COAG), as well as a range of recent human rights and development initiatives at the international level.

This chapter reflects on the issues discussed during the benchmarking reconciliation workshop. The first part of the chapter provides an overview of issues relating to benchmarking Indigenous disadvantage from a human rights perspective, including an overview of international standards as well as recent research and practice in Australia. The second part then reports on the discussion of these issues at the benchmarking workshop.[1] How Indigenous organisations and ATSIC grapple with the Government's processes for monitoring practical reconciliation, such as the Steering Committee framework, will be of great importance into the future. I therefore conclude with some preliminary suggestions as to how to advance these issues over the coming year.

1 Note: The full version of the issues paper and all background materials prepared for the workshop, a list of participants and the full workshop report are available online. See www.humanrights.gov.au/social_justice/. I thank Greg Marks for writing and researching the issues paper and preparing the report of the workshop on which this chapter is based.

Part 1: Benchmarking Indigenous disadvantage from a human rights perspective

1. Background issues

a) Indigenous disadvantage

Aboriginals and Torres Strait Islanders are significantly disadvantaged in contemporary Australian society. This disadvantage represents a failure to provide in full measure the human rights to which Australian Indigenous peoples are entitled. Colonisation, and the consequent dispossession, disruption and dislocation have impacted heavily on the well-being of Indigenous individuals and communities.

The extent of Indigenous disadvantage in Australia is reflected in statistics showing significant health problems, high unemployment, low attainment in the formal education sector, unsatisfactory housing and infrastructure and high levels of arrest, incarceration and deaths in custody.[2] Indigenous despair and distress is exemplified by serious substance abuse, domestic violence, suicide and generally significant signs of social dysfunction. There are concerns that, in a number of key respects, the socio-economic circumstances of Indigenous peoples, particularly in remote areas, has not only not improved, but that it has in some respects actually worsened.[3]

Concern at the level of Indigenous disadvantage has been noted at an international level. In September 2000 the UN Committee on Economic Social and Cultural Rights (CESCR), in its Concluding Observations on Australia's third periodic report concerning its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), expressed its:

> deep concern that, despite the efforts and achievements of the State party, the indigenous populations of Australia continued to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education.[4]

However, there is a dearth of detailed and reliable information. In 1999 Boyd Hunter observed that:

> Indigenous Australians are the most disadvantaged and poorest sector of Australian society. Given these circumstances, the lack of information

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2 See, for example, Davidson, B and Jennett, C, *Addressing Disadvantage – A Greater Awareness of the Causes of Indigenous Australians' Disadvantage,* Council for Aboriginal Reconciliation (CAR); CAR and the Centre for Aboriginal Economic Policy Research (CAEPR), *Overview Paper,* prepared for the 'Towards a Benchmarking framework for service delivery to Indigenous Australians Workshop November 1998'; CAR, *Appendix 2 Statistics of social and economic well-being,* in *Overcoming Disadvantage,* CAR, Canberra, 2000.

3 See, for example, Pearson, N, *The Light on the Hill,* Ben Chifley Memorial Lecture 12 August 2000 at www.capeyorkpartnerships.com; Sutton, P, *The Politics of Suffering: Indigenous Policy Failure in Australia Since the Seventies,* March 2001. Revised version of the Inaugural Berndt Foundation Biennial Lecture September 2000; Trugden, R, *Why Warriors Lie Down and Die,* ARDS, Darwin, 2000.

4 Committee on Economic, Social and Cultural Rights: *Concluding Observations: Australia 01/09/2000,* UN Doc: E/C.12/1/add.50, 1 September 2000, paragraph 15.

> on what is a significant problem is surprising… [T]he fragmentary and incomplete nature of existing studies leaves policy makers without direction in attempting to deal with entrenched indigenous poverty.[5]

The significance of the extent of disadvantage suffered by Indigenous Australians was highlighted by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1991. A central finding of the final Report of the RCIADIC was that Aboriginal people in custody did not die at a greater rate than others.[6] Rather, the reason for the high number of Aboriginal deaths in custody was that the Aboriginal population was over-represented in custody: 'Too many Aboriginal people are in custody too often'.[7] Consequently, many of the recommendations of the Report addressed the underlying causes of this situation. The Report found that:

> The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally.[8]

The emphasis on the social, economic and cultural disadvantage underlying incarceration and deaths in custody was a defining characteristic of the Report. It linked the *symptoms* of Indigenous distress, such as the high rate of encounters with the criminal justice system, with the underlying *cause* of systemic disadvantage suffered by Indigenous Australians. The RCIADIC identified as fundamental the disempowerment and marginalisation of Indigenous peoples. Accordingly, it identified the necessity that:

> principles of self-determination should be applied to the design and implementation of all policies and programs affecting Aboriginal people, that there should be maximum devolution of power to Aboriginal communities and organisations to determine their own priorities for funding allocations, and that such organisations should, as a matter of preference be the vehicles through which programs are delivered.[9]

While the linkages between Indigenous distress, socio-economic disadvantage, and the need for self-determination, were clearly and authoritatively established in the 1991 RCIADIC Report, progress since then in dealing with these issues has been unsatisfactory. As ATSIC pointed out in its submission to ICESCR in 2000: 'attempts to remedy the over-all disadvantage of Indigenous Australians have been partial, inadequate and without clear objectives and targets'.[10]

In the context of the movement towards reconciliation, it has become increasingly evident that reconciliation entails more than acknowledgement of prior occupation and ownership, expressions of apology or regret, and the granting of (limited) native title and land rights, as important as these are. While ever the

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5 Hunter, B, 'Three nations, not one; Indigenous and other Australian poverty', CAEPR Working Paper No.1/1999, Canberra, 1999. Available on line at www.anu.edu.au/caepr.

6 Royal Commission into Aboriginal Deaths in Custody*, National Report*, AGPS, Canberra, 1991.

7 *ibid*, Volume 1 para 1.3.1-1.3.3

8 *ibid*, p15.

9 Quoted in Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Canberra, 2001, p89.

10 ATSIC, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations under the United Nations International Covenant on Economic, Social and Cultural Rights,* ATSIC, Canberra, 2000, p39.

social, cultural and economic circumstances of Indigenous Australians remain parlous and Indigenous peoples vulnerable, social justice is lacking and there is no firm basis for true equality, respect and co-existence. The RCIADIC identified the need for a process of reconciliation, and in doing so confirmed that the success of the reconciliation process would be integrally linked with addressing Indigenous disadvantage.

b) The recommendations of the Council for Aboriginal Reconciliation

On 7 December 2000, the Council for Aboriginal Reconciliation (CAR) presented to the Parliament its final report, *Australia's Challenge.*[11] The Report made six recommendations focusing on processes and accountability in the context of reconciliation. The first of these recommended that:

> The Council of Australian Governments to agree to implement and monitor a national framework for all governments and ATSIC to work to overcome indigenous disadvantage through setting benchmarks that are measurable, have timelines, are agreed with Indigenous peoples and are publicly reported.

This recommendation reflected CAR reconciliation documents released earlier in the year, namely the *Australian Declaration Toward Reconciliation* and the *Roadmap for Reconciliation.* The *Declaration* included the pledge to stop injustice and overcome disadvantage and the *Roadmap* contained four national strategies recommending ways to transform the commitment to reconciliation into actions. In the context of benchmarking reconciliation, of significance is the *National Strategy to Overcome Disadvantage*, focusing on education, employment, health, housing, law and justice. Guidelines for implementing this Strategy were published as *Overcoming Disadvantage – Ways to implement the National Strategy to Overcome Disadvantage, one of four National Strategies in the Roadmap for Reconciliation.*

Overcoming Disadvantage emphasised, as essential to holding governments accountable, the need for reliable information about the level of need, the money spent and the services delivered. It identified benchmarking as a means to do this. It stressed that accountability and benchmarking required not just accurate data, but also a measure of independence and honesty in data collection and analysis. It further urged that territory, state and federal Governments, and ATSIC, with respect to both mainstream and Indigenous specific programs, set national state, territory and regional outcomes and output benchmarks, where they do not currently exist, that are measurable, include time-lines and are agreed in partnership with Indigenous peoples and communities. Governments should publicly and annually present an outputs and outcomes report to their respective parliaments, on a whole-of-government basis, against these agreed outcomes.

The report identified the leadership role of the Council of Australian Governments (COAG), and the need for the Australian Bureau of Statistics (ABS) to continue to improve Indigenous data through the census and other surveys, and the need for data agencies such as the ABS, the Australian Institute of Health and Welfare, the Australian Institute of Criminology and the Steering Committee of

11 Council for Aboriginal Reconciliation, *Australia's Challenge,* CAR, Canberra, 2000.

the Review of Commonwealth/State Service Provision to extend their Indigenous data collections and reporting and provide more Indigenous/non-Indigenous comparative statistics and breakdowns at the regional and sub-regional levels.

The parameters of the project of benchmarking reconciliation are clearly set out in these CAR documents. CAR has come to the end of its life, and the focus of activity has tended to shift to agencies involved in the practical issues of implementing benchmarking programs to address Indigenous disadvantage. While the successor to CAR, Reconciliation Australia, will retain an active interest, other agencies and organisations have the task of following the roadmap set out by the CAR. The roles will range from advocacy and monitoring through to policy and planning and the technical issues of collecting and interpreting data. Indigenous organisations and communities will need to be effective partners in the process if it is to work and have meaning.

The Government's response to the Council's documents, and specifically recommendation 1, are discussed in detail in chapters 2 and 3 of the report. The initiatives undertaken by the Council of Australian Governments in accordance with the recommendations are discussed further below.

c) The *Social Justice Reports* for 2000 and 2001

The *Social Justice Report 2000* provided a rights-based approach to progressing reconciliation. Chapter 4 of the Report, 'Achieving meaningful reconciliation', provided a detailed analysis of the processes and mechanisms that enable reconciliation to be implemented within a human rights framework. In particular, five integrated requirements were identified that need to be met to integrate a human rights approach into redressing Indigenous disadvantage and to provide sufficient government accountability. These five requirements build on the CAR work, and provide a framework for addressing Indigenous disadvantage. They are as follows.

Five Requirements for Accountability and Human Rights in Reconciliation[12]

- Making an unqualified national commitment to redressing Indigenous disadvantage;
- Facilitating the collection of sufficient data to support decision-making and reporting, and developing appropriate mechanisms for the independent monitoring and evaluation of progress towards redressing Indigenous disadvantage;
- Adopting appropriate benchmarks to redress Indigenous disadvantage, negotiated with Indigenous peoples, state and territory governments and other service delivery agencies, with clear timeframes for achievement of both longer term and short-term goals;
- Providing national leadership to facilitate increased coordination between governments, reduced duplication and overlap between services; and
- ensuring the full participation of Indigenous organisations and communities in the design and delivery of services.

12 *Social Justice Report 2000*, p100.

Based on these five requirements, the Report contained fourteen detailed recommendations relating to:

- national commitments to overcome Indigenous disadvantage;
- improved data collection;
- monitoring and evaluation mechanisms;
- negotiating with Indigenous peoples; and
- protecting human rights.[13]

This comprehensive set of recommendations complement those of CAR and specify the central position of human rights for meaningful reconciliation. Together with the CAR recommendations they provide a series of actions as a checklist for determining progress in respect of advancing reconciliation. In respect of the requirement concerning negotiating with Indigenous peoples, this necessity has been identified for some time. In particular, this matter was spelt out in the social justice package proposals put to the Government in 1995 by ATSIC, CAR and the Social Justice Commissioner.[14]

The *Social Justice Report 2001* noted, notwithstanding COAG agreeing to a communiqué on reconciliation in 2000[15] which adopted the first recommendation of CAR (a national framework for overcoming Indigenous disadvantage through setting benchmarks), the slow progress and lack of specificity in responding to the Reconciliation documents. In the Government's response to the Social Justice Report of the previous year, there had been no mention of the fourteen recommendations in the Report and no response to any of them. Noting that the commitments the 1992 COAG *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders* and the 1997 National Ministerial Summit on Deaths in Custody for improved coordination of funding and service delivery and for negotiated national benchmarks and targets had been largely not implemented, the 2001 Report stated that: 'Government programs and inter-governmental coordination continue to lack sufficient accountability and transparency'.[16]

The Report noted some positive developments at state government level, in particular the conclusion of Justice Agreements. However, due to concerns about the lack of response to the CAR documents, as well as the inadequate response to the *Social Justice Report 2000,* the Social Justice Commissioner made a further recommendation, calling for a Senate inquiry into national progress towards reconciliation.[17]

On 27 August 2002, the Senate referred to its Legal and Constitutional References Committee an *Inquiry into the Progress Towards National Reconciliation*. The Social Justice Commissioner, in welcoming the Inquiry, noted that it directly responded to Recommendation 11 of the 2001 Social Justice Report. The Terms of Reference require the Committee to inquire into:

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13 *ibid*, pp 130-132.

14 See ATSIC, *Recognition, rights and reform: Report to Government on native title social justice measures,* Canberra, ATSIC, 1995, pp 9-10.

15 Howard, J, *Council of Australian Governments communiqué,* media release, 3 November 2000.

16 *Social Justice Report 2001*, p25.

17 *ibid*, pp 219-220.

- progress towards national reconciliation, including an examination of the adequacy and effectiveness of the Commonwealth Government's response to the reconciliation documents cited in the Social Justice Commissioner's 2001 recommendation; and
- the adequacy and effectiveness of any targets, benchmarks, monitoring and evaluation mechanisms that have been put in place…consistent with the reconciliation documents.[18]

2. The Human Rights Context

The *Social Justice Report 2000* sets out four basic human rights principles as the necessary basis the realisation of reconciliation. They are:

- *No discrimination,* that is, a guarantee of equal treatment and protection for all. Equal protection includes recognition of distinct cultural characteristics of particular racial groups (substantive equality), and can require temporary special measures of assistance to overcome inequalities;
- *Progressive realisation,* that is the commitment of sufficient resources through well targeted programs to ensure adequate progress in the realisation of rights over time;
- *Effective participation,* that is ensuring that individuals and communities are adequately involved in decisions that affect their well being, including the design and delivery of programs;
- *Effective remedies,* that is the provision of mechanisms for redress when human rights are violated.

These four principles are more than a statement of objectives or goals to be met as and when governments feel it is appropriate or practical to do so. Rather, they are a distillation of the human rights principles and norms which make up the international law of human rights. They are contained in various international instruments to which Australia is party and which consequently are binding on Australia. And while the particular application of these norms may take account of local circumstances and the constraints that may exist, there is no discretion as to whether these norms are to be applied to the fullest extent possible. This is an obligation of international law, and a nation fails to meet these obligations at the peril of its international reputation and standing. The process of reconciliation should be seen as part of the realisation of human rights. Thus, as the scope, content and meaning of these rights have to a large degree been elaborated in international forums, it is important to see reconciliation as having both domestic application and an international dimension.

Economic, social and cultural rights are as much a part of international human rights law as are civil and political rights, although they have only achieved full recognition in more recent times. They were originally asserted in the foundational instrument of human rights law, the 1948 Universal Declaration of Human Rights, which stated that freedom from fear and want can only be achieved if conditions are created where everyone may enjoy their economic, social and cultural rights,

18 Senate Legal and Constitutional Committee, *Inquiry into Progress Towards National Reconciliation* at www.aph.gov.au/senate/committee/legcon_ctte/reconciliation/index.htm.

as well as their civil and political rights. Provisions covering aspects of economic, social and cultural rights are contained in the International Covenant on Civil and Political Rights 1976 (ICCPR), including in particular Article 27 relating to minority rights, and the International Convention on the Elimination of All Forms of Racial Discrimination 1969 (ICERD), in particular Article 2(2) requiring states, when circumstances so warrant, to take special and concrete measures in the social, economic and cultural fields to ensure adequate development and protection of certain racial groups or individuals belonging to them. As well, the jurisprudence of the treaty body committees established to monitor the implementation of these instruments has added to the understanding of the meaning and scope of the relevant provisions.

The central instrument, however, in respect of matters affecting the health and well-being of Indigenous peoples and communities is the International Covenant on Economic, Social and Cultural Rights 1976 (ICESCR). The work of this Covenant's treaty body, the Committee on Economic, Social and Cultural Rights (CESCR), particularly through the interpretation of its provisions by way of General Comments, provides authoritative guidance to an appreciation of what is involved in the obligation to seek the progressive realisation of these rights.

Australia has ratified ICESCR and is consequently bound to implement its provisions as they apply to Australia. Article 2 (1) requires a State party to the Convention to undertake:

> to take steps…to the maximum of its available resources, with a view to achieving *progressively* the full realisation of the rights recognised in the present Covenant by all *appropriate* means... (emphasis added)

This provision is further elaborated by CESCR's General Comment 3.[19] It is controlling in respect of all the other provisions of the Covenant.[20] While the obligation 'to take steps' means that the full realisation of relevant rights may be achieved progressively, the taking of such steps cannot be delayed, and further, those steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.[21]

Significantly, while the periodic reports of States to the Committee should provide not only the measures that have been taken, but also the basis on which the State considers those steps to have been the most 'appropriate', nevertheless 'the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make'.[22]

That is to say, a State cannot purport to sit in judgment on its own performance. Additionally, although the Covenant foresees that rights will be realised over time, or in other words progressively, there is nevertheless an obligation to move as expeditiously and effectively as possible.[23] General Comment 3 also notes that a minimum core obligation is incumbent upon every State to ensure

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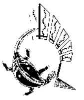
19 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment 3: The nature of States parties obligations*, Contained in UN Doc: E/1991/23, 14/12/90.

20 *ibid*, para 1.

21 *ibid*, para 2.

22 *ibid*, para 4.

23 *ibid*, para 9.



the satisfaction of, at the very least, minimum essential levels of each of the rights.[24] This obligation is immediate in its application.

A number of the provisions of this Covenant are directly relevant to the disadvantage suffered by the Indigenous peoples of Australia. These include Article 11, the right of everyone to an adequate standard of living for themselves and their family. This right is instructive in that it demonstrates both the obligatory nature of the rights contained in the Covenant and the cultural flexibility and relativity that is encapsulated in the ICESCR approach. An implication of the right to an adequate standard of living for Australian Indigenous peoples can be seen in respect of housing and infrastructure. In General Comment 4, the Committee has noted that:[25]

> The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.[26]

Noting that in particular, the enjoyment of this right must not be subject to any form of discrimination, the Committee nevertheless advised that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided merely by having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. The Committee states that:

> Adequate shelter means…adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.[27]

The relevance of this approach to the range of circumstances of Indigenous peoples in Australia, including encompassing cultural expectations of housing that may differ from the mainstream, is evident. In fact, the Committee specifically addresses what it terms 'Cultural adequacy'.

> The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activity geared towards development or modernisation in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.[28]

This discussion is clearly relevant to the provision of adequate and appropriate housing for Indigenous peoples in Australia, a major area of disadvantage of Indigenous Australians. For example, the CESCR formulation can provide a framework for the provision of housing on outstations which both meets equality objectives and recognises cultural diversity. Importantly, it shows that equality

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24 *ibid*, para 10.
25 CESCR, *General Comment 4: The Right to adequate housing*, Contained in UN Doc: E/1992/23, 13/12/91.
26 *ibid*, para 1.
27 *ibid*, para 7.
28 *ibid*, para 8(g).

goals should not be used to obstruct people's aspirations for outcomes which are not identical to those of the mainstream society.[29]

However, it should also be noted that there are real challenges here for the ways targets are constructed and indicators developed to respond to a diversity of cultural situations and aspirations. This is discussed below.

Article 12 provides for the right of everyone to the enjoyment of the highest attainable standards of physical and mental health. The Committee has elaborated the meaning, scope and implication of this Article in a recent detailed General Comment (no. 14).[30] Stating that '[H]ealth is a fundamental human right indispensable for the exercise of other human rights', the Committee noted that the right to health has been confirmed in a number of international instruments.[31] The Committee interprets the right to health, as contained in the Covenant, as:

> an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.[32]

Of particular note is the inclusion of a paragraph specifically relating this right to Indigenous peoples.[33] The paragraph emphasises the need for health services to be culturally appropriate and for full and effective participation by Indigenous peoples. The Committee notes that in Indigenous communities the health of the individual is often linked to the health of the society as a whole and has a collective dimension. As with other rights protected by the Covenant (including the right to education), there is an emphasis on the need to develop health strategies that should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor the State's obligations under Article 12. Having identified appropriate right to health indicators, states should set appropriate benchmarks to each indicator, for use in monitoring and reporting.

In summary, ICESCR provides a normative human rights framework for addressing Indigenous disadvantage. While the Covenant provides for a realistic

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29 Commenting on discussion about resourcing outstations on Cape York, David Martin (Centre for Aboriginal Economic Policy Research) has stated: 'It's not a matter of pouring vast extra sums of money into building suburban houses in remote locations. It's about providing the means for people to exercise initiative, move into situations where they can feel more in control of their lives and then building from that.' ABC News feature, *Homelands sweet home,* October 30 2002.

30 CESCR, *General Comment No. 14 (2000): The Right to the highest attainable standard of health*, UN Doc: E/C.12/2000/4, 11/08/2000.

31 For example, the Universal Declaration of Human Rights Article 25.1, ICERD, Article 5 (e) (iv), Convention on the Rights of the Child (CROC) Article 24.

32 CESCR, *General Comment No. 14 (2000): The Right to the highest attainable standard of health*, op cit, para 11.

33 *ibid*, para 27.

and flexible approach, it does not compromise on the obligation for States to achieve the progressive realisation of rights as effectively and expeditiously as possible. States are required to take steps that are deliberate, concrete and targeted. An integral part of the obligations assumed by States in ratifying the Covenant is to develop strategies, identify indicators and determine benchmarks.

This approach is now an integral feature of the international human rights regime, applying equally to economic, social and cultural rights as to other rights. But, going beyond the prescriptive framework of the Covenant and the other human rights treaties, the treaty bodies charged with monitoring their implementation have undertaken the task in a manner designed to cooperate with and assist States in achieving human rights. International instruments such as ICESCR now represent a considerable body of experience and expertise, built up over the last 30 years or so.

In approaching these issues in Australia, it is unhelpful to dispute or ignore this experience. The development of policies to address Indigenous disadvantage is best done in full cognizance of Australia's international human rights obligations, and within the framework for the realisation of those rights that has been developed within the UN. The integration of human rights principles into the design and delivery of programs and technical assistance for poverty eradication is the next generation of the development of human rights, and is presently under active development in the UN system.

3. Integrating Human Rights and Development: UN experience

Over the last five years a major goal of the UN has been to integrate human rights principles into the whole of the Organisation's work, including the overarching development goal of poverty eradication. These developments are reflected in:

- United Nations Development Program (UNDP) *Human Development Report 2000*;[34] and
- Office of UN High Commission on Human Rights (OHCHR)/UNDP *Draft Guidelines on Poverty Alleviation.*[35]

Representing current developments at the international level, these documents provide useful and relevant information and merit attention in the Australian context. The following information is intended to note some major features, but does not purport to provide a full summary of the documents given their detailed nature.

a) UNDP Human Development Report 2000

The Human Development Report 2000 had as its theme 'Human Rights and Human Development'. This landmark publication for the UN system emphasised the mutually reinforcing relationship between human rights and human development, and highlighted the need for innovative thinking, strategic planning

34 United Nations Development Programme (UNDP), *Human Development Report 2000 – Human rights and human development,* UNDP, New York, 2000. www.undp.org/hdro/HDR2000.html.

35 High Commissioner for Human Rights and UNDP, *Draft Guidelines on Poverty Alleviation*, OHCHR, Geneva, 2002.

and cultivating new partnerships in integrating human rights considerations into program formulation and implementation.

Chapter 5 of the Report, *Using indicators for human rights accountability,* examines the importance statistical indicators as powerful tools in the struggle for human rights. The Report argues that developing and using indicators has become a cutting-edge area of advocacy. In this context, the Report notes the importance of developing indicators for:

- Making better policies and monitoring progress;
- Identifying unintended impacts of laws, policies and practices;
- Identifying which actors are having an impact on the realisation of rights;
- Revealing whether the obligations of these actors are being met;
- Giving early warning of potential violations, prompting preventative action;
- Enhancing social consensus on difficult trade-offs to be made in the face of resource constraints; and
- Exposing issues that have been neglected or silenced.

While statistics alone cannot measure the full dimension of rights, they can 'open the questions behind the generalities and help reveal the broader social challenges'.[36] They can allow human rights to be more concretely relied upon in designing and evaluating policy. UNDP has provided a framework for what the statistics should measure so that they adequately assess progress in the realisation of human rights. UNDP suggests that statistics must address the following three perspectives, simultaneously:

- *An average perspective:* What is the overall progress in the country, and how has it changed over time?
- *A deprivation perspective:* Who are the most deprived groups in society, disaggregated by income; gender; region; rural or remote location; ethnic group; or education level. How have the most deprived groups progressed over time?
- *An inequality perspective:* Measuring the disparity between various groups in society, and whether these disparities have widened or narrowed over time.[37]

Benchmarking is a useful tool for measuring whether adequate progress is being made in realising rights. Targets may not all be achievable immediately – they may be subject to progressive realisation. States should identify appropriate indicators, in relation to which they should set ambitious but achievable benchmarks (i.e. intermediate targets) corresponding to each ultimate target, so that the rate of progress can be monitored and, if progress is slow, corrective action taken. Thus, indicators measure progress towards both intermediate and ultimate targets. Setting benchmarks enables government and other parties to reach agreement about what rate of progress would be adequate. The stronger is the basis of national dialogue, the more national commitment there will be to the benchmark. The need for debate and widely available public information is

36 UNDP, *World Development Report 2000, op cit,* p89.
37 *ibid,* p108.

clear. If benchmarks are to be a tool of accountability, not just the rhetoric of empty promises, they must be, according to UNDP:

- Specific, time bound and verifiable;
- Set with the participation of the people whose rights are affected, to agree on what is an adequate rate of progress and to prevent the target from being set too low;
- Reassessed independently at their target date, with accountability for performance.[38]

The UNDP Report provides some important qualifications on the use of statistical indicators, including benchmarks. Statistics come with strings attached. They provide great power for clarity, but also for distortion. When based on careful research and method, indicators help establish strong evidence, open dialogue and increase accountability. As the following box indicates, care needs to be taken:[39]

Statistical Indicators: 'Handle with care'

Statistical indicators need to be:

- ***Policy relevant:*** giving messages on issues that can be influenced, directly or indirectly, by policy action;
- ***Reliable:*** enabling different people to use them and get consistent results;
- ***Valid:*** based on identifiable criteria that measure what they are intended to measure;
- ***Consistently measurable over time:*** necessary if they are to show whether progress is being made and targets are being achieved;
- ***Possible to disaggregate:*** for focusing on social groups, minorities and individuals;
- ***Designed to separate the monitor and the monitored where possible:*** minimising the conflicts of interest that arise when an actor monitors its own performance.

The UNDP cautions that the powerful impact of statistics creates four caveats in their use:

- *Overuse:* Statistics alone cannot capture the full picture of rights and should not be the only focus of assessment. All statistical analysis needs to be embedded in an interpretation drawing on broader political, social and contextual analysis.
- *Underuse:* Data are rarely voluntarily collected on issues that are incriminating, embarrassing or simply ignored. Even when data are collected, they may not be made public for many years.
- *Misuse:* Data collection is often biased towards institutions and formalised reporting, towards events that occur, not events prevented or suppressed. But lack of data does not always mean fewer occurrences.

38 *ibid,* p49.
39 *ibid,* p90.

- *Political abuse*: Indicators can be manipulated for political purposes to discredit certain countries or actors.

b) UNDP and UHCHR Draft Guidelines on Poverty Alleviation

The most comprehensive documentation on developing a human rights approach to poverty alleviation to date are the draft guidelines developed jointly by the Office of the High Commissioner for Human Rights and UNDP. In 2001 the UN Committee on Economic, Social and Cultural Rights requested the High Commissioner 'to develop substantive guidelines for the integration of human rights in national poverty reduction strategies'.[40] The draft guidelines are the outcome of that request. The objective of the guidelines is to provide practitioners involved in the design and implementation of poverty reduction strategies with operational guidelines for the adoption of a human rights based approach. The purpose is to focus on providing guidelines for the use of States that are integrating human rights into their poverty reduction strategies. In this respect they can be of relevance to the situation in Australia.

The guidelines state that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in the international law of human rights, and that the human rights approach to poverty reduction is essentially about empowerment. The most fundamental way in which empowerment occurs is through the introduction of the concept of rights itself. Poverty reduction then becomes more than charity, more than a moral obligation – it becomes a legal obligation.

The guidelines note that:

> by introducing the dimension of an *international legal obligation,* the human rights perspective adds legitimacy to the demand for making poverty reduction the primary goal of policy making.[41]

The guidelines in effect synthesise, develop and sytematise the various approaches that have grown up in different agencies and in various reports and documents. In this context, the summary provided by the guidelines of the advantages of the human rights approach provides a useful encapsulation of the rationale of rights-based approaches to programs to reduce disadvantage, including Indigenous disadvantage. The guidelines state that, in sum, the human rights approach has the potential to advance the goals of poverty alleviation in a variety of ways:

a) By urging speedy adoption of a poverty reduction strategy, underpinned by human rights as a matter of legal obligation;
b) By broadening the scope of poverty reduction strategies so as to address the structures of discrimination that generate and sustain poverty;
c) By urging the expansion of civil and political rights, which can play a crucial instrumental role in advancing the cause of poverty reduction;

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40 High Commissioner for Human Rights and UNDP, *Draft Guidelines on Poverty Alleviation*, *op cit*, para 1.
41 *ibid,* para 18.

d) By confirming that economic, social and cultural rights are binding international human rights, not just programmatic aspirations;
e) By adding legitimacy to the demand for ensuring meaningful participation of the poor in decision-making processes;
f) By cautioning against retrogression and non-fulfilment of minimum core obligations in the name of making trade-offs; and
g) By creating and strengthening the institutions through which policy-makers can be held accountable for their actions.[42]

The guidelines provide a comprehensive document. They are divided into three sections. Section I sets out basic principles, Section II identifies, for each of the rights relevant to poverty reduction (health, housing, education etc), the major elements of a strategy for realising that right. Section III explains how the human rights approach can guide the monitoring and accountability aspects of poverty reduction strategies. Because of its special significance, accountability is singled out for discussion in a separate section.

Particular guidelines that spell out in detail issues of accountability and, while not always completely relevant to the Australian situation, do provide a good deal of potentially useful information, include:

- **Guideline 4:** Progressive Realisation of Human Rights: Indicators and Benchmarks;
- **Guideline 16:** Principles of Monitoring and Accountability; and
- **Guideline 17:** Monitoring and Accountability of States.

In summary, relevant international norms, the views of the treaty monitoring committees, and developments in UN bodies in integrating human rights and poverty alleviation, are crucial elements in addressing Indigenous disadvantage in Australia.[43]

4. Research relevant to benchmarking

In Australia, there have been significant developments in respect of developing indicators and benchmarks. This section examines some relevant research undertaken by the Centre for Aboriginal Economic Policy Research (CAEPR).

In 1998 CAEPR, in conjunction with CAR, in discussing a benchmarking framework for service delivery to Aboriginal Australians, noted that the historical reasons for Indigenous disadvantage could be summarised under the following headings:[44]

- *Dispossession*: Prior to British occupation, Aboriginal and Torres Strait Islander peoples ‘developed a mosaic of communities and groups

42 *ibid,* para 24.
43 These considerations are also directly relevant to the current redrafting by the Federal Government of Australia’s National Action Plan on Human Rights. National Action Plans are lodged with the UNHCHR as a statement to the international community of how a country is progressing in implementing human rights in a practical sense. The previous Australian Plan was drawn up in 1997.
44 Council for Aboriginal Reconciliation and Centre for Aboriginal Economic Policy Research, *Towards a benchmarking framework for service delivery to Indigenous Australians,* Commonwealth of Australia, Canberra, 1998, p4.

with rich and enduring cultures centred on an intimate relationship with the land and sea… Dispossession and dispersal have destroyed much of Aboriginal and Torres Strait Islander societies… [and] many Indigenous communities and individuals have little or no stake in the economic life of the nation other than what Governments may provide'.[45]

- *Exclusion from mainstream services*: Up until the late 1960's, many Indigenous Australians were excluded from mainstream services, creating 'a significant legacy of inequality in areas such as education, health, housing and infrastructure'.[46]
- *Recent inclusion*: In combination with exclusion from services such as education, access to welfare has 'unintentionally, and paradoxically, created poverty traps from which it is hard to escape'.[47]
- *Past and inter-generational poverty:* Low income has prevented the accumulation of capital and investment, leading to inter-generational poverty.
- *Location in rural and remote areas:* A higher proportion of the Indigenous population lives in rural and remote areas where there are few economic opportunities and service delivery is disproport-ionately expensive.
- *Demography:* The large and multi-generational nature of Indigenous households creates dependency ratios and a higher economic burden than in non-Indigenous families. Similarly, the Indigenous population's structure is more akin to that of a developing nation, with population growth outstripping that of the general Australian population, and with a young age structure.

Each of these factors has implications in developing policy and programs to address Indigenous disadvantage, and in identifying indicators, setting targets and providing benchmarks. Consequently, as the CAR/CAEPR paper noted, there are:

> problems of seeking statistical equity without recognising the deep-rooted structural causes of the low socio-economic status of Indigenous Australians and without basing targets on accurate demographic data… applying the principle of equality and setting statistical targets must be both geographically and culturally informed… Governments need to be realistic about what can be achieved, in light of the highly intractable nature of the problem, and careful in their use of statistics… There is a very real danger that perceptions of continued policy and program failure can do considerable harm to the argument for proactive government programs to address Indigenous needs.[48]

A further difficulty, illustrated by CAEPR research, is that of interpreting statistics relating to program outcomes while recognising, and allowing for, the effect on outcomes of Indigenous choice, where that choice may not be consistent with the stated equality objectives of a policy or program. The policy of self-determination is based on the possibility of choice, including in respect of lifestyles.

45 ATSIC, *op cit*, para 1.8.
46 *ibid.*
47 *ibid.*
48 *ibid,* p7.

Tim Rowse has argued that the duality of policy aims, 'equality' *and* 'choice', has made program indicators difficult to interpret.[49] That is to say, Indigenous peoples may make certain choices that lead to lower than possible outcomes in terms of, for example, employment and resultant income levels. Consequently, it may be difficult to interpret results in terms of the efficacy of programs in addressing the disadvantage caused by the effects of historical disadvantage, structural constraints, and ongoing discrimination. The possible conflict between self-determining choices and equity of outcomes, as well as creating difficulties in interpreting data, clearly has implications for policy formulation processes and establishing targets.

CAEPR evaluations of the Hawke Government's Aboriginal Employment Development Policy (AEDP), demonstrate some of these problems. For example, John Taylor, in a study of geographic location and Aboriginal economic status as reflected in the situation of outstations, concluded that, on the whole, remote location is reflected in lower economic status.[50] He noted a very high rate of 'unemployment' on outstations and also that outstation residents display far less tendency to have school-based skills. The dilemma in interpreting these outcomes is that outstations, rather than simply reflecting poorer outcomes, could instead be seen as a locational trade-off aimed at balancing a range of cultural, economic, social and political considerations. In respect of education, the question was whether policy was failing (in that outstation residents lacked schooling), or was succeeding in that people were enabled by land tenure and welfare polices to choose to live in outstations, even though at times these were far from jobs and schools.

A related dilemma was considered by Jon Altman and Diane Smith in respect of high unemployment in remote localities – in this instance they noted that the statistical exclusion from the ranks of the employed of people participating in subsistence activities, and the failure to count their production as income-in-kind, skewed employment and income results.[51] They further noted that, paradoxically, if welfare income at outstations was classified as CDEP wages, then residents would immediately be reclassified as employed. They noted a further paradox that if such a reclassification occurred, those now understood to be 'employed' would be limited to low incomes – the AEDP goal of non-Indigenous and Indigenous income equality would be forfeited. They concluded that:

> Such a reclassification could mean that the goal of income equality may not be appropriate in the outstation context if people make a conscious choice to reside in locations that are remote from mainstream economic opportunities.[52]

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49 See Rowse, T, *op cit*, p8.

50 Taylor, J, 'Geographic location and Aboriginal economic status: A Census-based analysis of outstations in Australia's Northern Territory', CAEPR Discussion Paper 8, CAEPR, Canberra, 1991, p27.

51 Altman, J C and Smith, D E, 'Estimating the Reliance of Aboriginal Australians on welfare: Some policy implications', CAEPR Discussion Paper 19, CAEPR, Canberra, 1992.

52 *ibid*, p20.

The issue of choice poses problems of appropriateness and interpretation. It may be that quantitative measures need to be supplemented by qualitative measures. This is in fact proposed, in the context of identifying the poor, in the OHCHR/UNDP Draft Guidelines on Poverty Alleviation (see above). In Guideline 1, it is noted that:

> Innovative mechanisms will have to be designed – probably using a combination of quantitative and qualitative methods – to elicit the necessary information in a cost-effective way.

The *Social Justice Report* 2000 also noted that 'the targets should be culturally appropriate'.[53] The Council for Aboriginal Reconciliation has made the point that there is concern that some of the targets and desired outcomes may be:

> Based on western assumptions about disadvantage and that they have limited cultural relevance to Indigenous peoples. Where this is the case, it may be unrealistic to expect full statistical equality to be achieved with the wider community, even in the long term. However, it would be wrong to describe as disadvantage those specific statistical differences that arise directly from cultural obligations and self-determination.[54]

The CAEPR body of research is large, and a great deal of it is relevant to the issue of benchmarking reconciliation. It is not possible to summarise this body of research here.[55] Instead, some of the specific issues concerning monitoring and evaluation that have emerged in the course of CAEPR research are noted. These are:

- *Disaggregation:* It has become clear in a number of contexts that national figures do not reveal sufficient information and the averages or rates calculated on a national basis may be misleading. Taylor has noted that the success or failure of policy should be measured 'in a manner that reflects…regional priorities, the variability of participation in formal and informal economies, and the restricted options in many remote locations'.[56] Policy evaluations demand attention to the particularities of regions and to evaluate employment outcomes the markets need to be differentiated.[57]

  Also noting the need for disaggregation in some circumstances, the OHCHR/UNDP Draft Guidelines on Poverty Alleviation note the need to specify groups by geographic location, gender, age etc 'so that the problem of poverty can be addressed at as disaggregated a level as possible'.[58]
- *Rates and size of the base population:* CAEPR researchers have pointed out that any consideration of the rates of employment, unemployment and labour force participation should take into account the size of the base population. Taylor and Altman projected the rapid

53 *Social Justice Report 2000*, p103.
54 CAR*, Overcoming disadvantage, op cit.*
55 Rowse, T, op cit, provides a critical overview of the work of CAEPR during its first decade.
56 Taylor, J, *Regional Change in the Economic Status of Indigenous Australians, 1986-9,* CAEPR Research Monograph 5, CAEPR, Canberra, 1993.
57 Rowse, T, *op cit,* pp32, 35.
58 High Commissioner for Human Rights and UNDP, *Draft Guidelines on Poverty Alleviation*, *op cit*, Guideline 1, para 50.

growth of the working age Indigenous population.[59] Against this expansion in the base, the task of achieving improvements in rates of employment, or even holding the line, could be seen to be great. Taylor and Hunter observed that it would be difficult in these circumstances to prevent Indigenous labour force status from slipping. Indeed, they noted that:

> to move beyond this, and attempt to close the gap between Indigenous and other Australians, will require an absolute and relative expansion in Indigenous employment that is without precedent.[60]

- *Definition of poverty:* Hunter has pointed out that the conceptual problems of measuring indigenous poverty include the role of non-market work (for example subsistence hunting and gathering), family size and composition, relative prices and the geographic distribution of the population. As well as income, people need access to adequate health care, housing and justice. He argues that it is inappropriate to focus solely on income as the measure of poverty, and that Indigenous poverty is in fact multi-faceted.[61]

  Hunter, Kennedy and Biddle note that an important issue is for researchers to ensure that the assumptions made in measuring poverty are transparent and can be evaluated by commentators contributing directly to the policy debate.[62] Their paper attempts to illustrate how the composition of the poor changes with small variations in seemingly innocuous assumptions. The only point of agreement in the poverty literature is that people who live in poverty must live in a state of deprivation, a state in which their standard of living falls below some minimum acceptable level. However, the way in which poverty has been defined and measured provokes a multitude of questions, for example, which is the best group among whom to assume income is shared—the nuclear family, the extended family or the household?

- *Relationship between variables:* education, employment and income: Anne Daly found that even when Aborigines were equal in education to non-Aborigines they were less likely to have a job.[63] Gray, Hunter and Schwab hypothesized that it is not absolute improvement in Indigenous educational attainment that matters, but relative improvement as against other Australians.[64]

  Schwab questioned whether 'equity' in participation and outcome (with non-Indigenous Australians) should be the aim of policy. Statistical equality was likely to remain elusive, and could obscure important differences of need.[65]

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59 Taylor, J and Altman, J, *The Job Ahead: Escalating Economic Costs of Indigenous Employment Disparity*, ATSIC, Canberra, 1997.

60 Taylor, J and Hunter, B, *The Job Still Ahead,* ATSIC, Canberra, 1998.

61 Hunter, B, 'Three nations, not one: Indigenous and other Australian poverty', *op cit*.

62 Hunter, B, Kennedy, S and Biddle, N, 'One size fits all? The effect of equivalence scales on Indigenous economic and other poverty' CAEPR Working Paper No. 19, CAEPR, Canberra, 2002.

63 Daly, A E, 'The participation of Aboriginal people in the Australian labour market', CAEPR Discussion Paper 6, CAEPR, Canberra, 1991.

64 Gray, M, Hunter, B and Schwab, R G, 'A critical survey of Indigenous education outcomes 1986-1996' CAEPR Discussion Paper 208, CAEPR, Canberra, 1998.

65 Schwab, R G, 'Having it "both ways": The continuing complexities of community-controlled Indigenous education' CAEPR Discussion paper 111, CAEPR, Canberra, 1996.

- *Problems of defining and enumerating the Indigenous population:* Without a defined Indigenous population it is not possible to evaluate the impact, over time, of government programs to address Indigenous disadvantage. Difficulties with Census data have been considered by CAEPR researchers including Gray,[66] and Taylor and Bell.[67] Based on observations in remote and fringe communities, Martin, Morphy and Taylor have made recommendations for changes in the special enumeration procedures for Indigenous Australians which are part of Census procedures.[68]

5. The Commonwealth Grants Commission *Report on Indigenous Funding*

In 1999 the Commonwealth Grants Commission (CGC) was set the task of developing methods of calculating the relative needs of Indigenous Australians in different regions for health, housing, infrastructure, education, training and employment services, to calculate indexes of need and compare the results with the actual distribution of expenditure on those functions. Thus the Terms of Reference were restricted to differences of need between groups of Indigenous people. The Report of the Inquiry was presented to the Government in March 2001.[69] However, many submissions to the Inquiry argued that addressing the large gap between Indigenous and non-Indigenous people was more important than redistributing existing funding.

The Report takes a wide view of the issues involved in addressing Indigenous disadvantage, and contains considerable information and analysis concerning Indigenous funding issues. As the *Social Justice Report 2000* noted:

> Despite the limitations imposed by the scope of the inquiry, the Commission's inquiry has been an important one, vividly demonstrating the value of an independent evaluative mechanism.[70]

The Report noted that, given the entrenched levels of disadvantage experienced by Indigenous peoples in all functional areas addressed by the Inquiry, it would have been expected that Indigenous use of mainstream services would be at levels greater than those of non-Indigenous Australians. However, this was found not to be the case. Indigenous Australians in all regions access mainstream services at very much lower rates than non-Indigenous people. The inequities resulting from the low level of access to mainstream programs are compounded by the high levels of disadvantage experienced by Indigenous peoples. This also meant that specific programs for Indigenous peoples were carrying an additional burden of compensating for the lack of access to mainstream programs.

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66 Gray, A, 'The explosion of Aboriginality: Components of Indigenous population growth 1991-96', CAEPR Discussion Paper 142, CAEPR, Canberra, 1997; 'Growth of the Aboriginal and Torres Strait Islander population, 1991-2001 and beyond', CAEPR Discussion Paper 150, CAEPR, Canberra, 1997.

67 Taylor, J and Bell, M, 'Estimating intercensal Indigenous employment change, 1991-96', CAEPR Discussion Paper 155, CAEPR, Canberra, 1998.

68 Martin, D F, Morphy F, Sanders W G and Taylor J, *Making Sense of the Census: Observations of the 2001 Enumeration in Remote Aboriginal Australia,* CAEPR Research Monograph No. 22, CAEPR, Canberra, 2002.

69 Commonwealth Grants Commission, *op cit*.

70 *Social Justice Report 2000*, p102.

The Report came to a number of conclusions and identified a range of suggestions to improve performance, including changes to existing Commonwealth-state arrangements by introducing and/or reinforcing additional conditions on Special Purpose Payments (SPPs) (see below), moving to insert regional needs-based allocation requirements into Indigenous specific SPPs; and seeking conditions on general SPPs to direct expenditure to aspects of services that are important to Indigenous peoples.

The Report identified a number of important principles and key areas for action that should guide efforts to promote a better alignment of funding with needs. These include:[71]

(i) the full and effective participation of Indigenous people in decisions affecting funding distribution and service delivery;

(ii) a focus on outcomes;

(iii) ensuring a long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals;

(iv) ensuring genuine collaborative processes with the involvement of government and non-government funders and service deliverers, to maximise opportunities for pooling of funds, as well as multi-jurisdictional and cross-functional approaches to service delivery;

(v) recognition of the critical importance of effective access to mainstream programs and services, and clear actions to identify and address barriers to access;

(vi) improving the collection and availability of data to support informed decision-making, monitoring of achievements and program evaluation; and

(vii) recognising the importance of capacity building within Indigenous communities.

Particularly relevant to the issue of benchmarking is the identification of the need to improve performance in respect of data matters ((vi) above). It was evident to the CGC that much of the required data for analysing service delivery was non existent, or partial, or unreliable, or not comparable either between regions or over time. As the Report says, access to comparable and reliable data is critical if objective measures of Indigenous need are to be better incorporated in decisions on the allocation of funds. The Report notes various data problems, including:

- concerns with Census data;[72]
- the difficulty of obtaining administrative data;[73]
- where it does exist, the lack of comparability;
- at times confidentiality constraints; and
- the fact that there are practically no data on what mainstream funds are spent by region, or by any specific group of people.

71 CGC, *op cit*, ppxviii-xix.
72 *ibid*, pp14-15.
73 For example, the Report notes that mortality data are not reliable at the ATSIC regional level and are only reliable at all in three States – WA, SA and the NT.

Noting that 'a much greater effort will need to be made by the Commonwealth, the States and other service providers to improve their comparability, reliability and availability', the Report recommended that priority must be given to collecting comparable regional data for many variables. The Report observed that to achieve good consistent data, the Commonwealth, state and other service providers needed to, as a matter of urgency:

- identify minimum data sets and define each data item using uniform methods so that the needs of Indigenous people in each functional area can be reliably measured;
- prepare measurable objectives so that defined performance outcomes can be measured and evaluated at a national, state and regional level;
- ensure data collection is effective, yet sensitive to the limited resources available in service delivery organisations to devote to data collection;
- negotiate agreements with community based service providers on the need to collect data, what data should be collected, who can use the data, the conditions on which the data will be provided to others and what they can use it for; and
- encourage all service providers to give a higher priority to the collection, evaluation and publication of data.

Finally, the Report confirmed that without these steps, data will never be adequate to support detailed needs-based resource allocation. The Report acknowledges that many of these principles are in fact being followed in work that is underway. However, it is observed that it is likely to be a long time before the benefits are obtained in the form of more complete and comparable data that can be used to measure needs as part of resource allocation processes. The Report surveyed some initiatives taken to improve data management. These included:

- *Whole-of-government commitments:* In 1997, the Prime Minister asked the *Steering Committee on the Review of Commonwealth-State Service Provision* to oversee the preparation and publication of data on services provided to Indigenous people. The November 2000 COAG meeting reaffirmed that requirement.
- *Initiatives by the Australian Bureau of Statistics:* The ABS has work underway to increase the range and quality of nationwide statistics on Indigenous people (see below).
- *Specific Purpose Payments arrangements*: Some of the recent agreements covering the Commonwealth's Specific Purpose Payments to the States should increase the availability of information because they require reporting against agreed indicators of outcomes or outputs. Such conditions are included in the Australian Health Care Agreements and the agreements under the *Indigenous Education (Targeted Assistance) Act, 2000*. There is a similar requirement covering the provision of service activity data in the Commonwealth's agreements for funding Aboriginal Community Controlled Health Services.
- *Funding and Service Delivery in Practice:* To date, much of the data on performance indicators, such as that provided under the previous agreements, have not been comparable across the States. The newer agreements attempt to obtain the greater comparability that is essential if the data are to be used for resource allocation purposes.

- *Initiatives in functional areas:* There has been activity to improve data quality and availability in areas such as health and housing. In 1996, Commonwealth and State Housing Ministers agreed to the establishment of a Commonwealth State Working Group on Indigenous Housing (CSWGIH), which has since developed an *Agreement on National Indigenous Housing Information.* The long term aim of CSWGIH is to develop means of obtaining housing administrative data that are consistent and compatible with related data collections. Work has begun on collecting a minimum data set and developing performance indicators. The work has emphasised the need for national standards, co-ordination and commitment to the collection of data, and for additional training and resources to help community housing organisations collect more reliable data.

A further significant development was the engagement by the inquiry of the Australian Bureau of Statistics (ABS) to prepare an experimental index of Indigenous socio-economic disadvantage. The experimental index does not provide any information about the absolute level of disadvantage. Having determined that it is feasible to construct the index, the ABS will examine the feasibility of sub-dividing the index according to broad functional lines as well as along geographical lines. ATSIC has provided detailed comments on this index.[74]

The Government's response to the CGC Report was discussed in detail in chapter 3.[75]

In brief, the Government observed that the Report provided a valuable basis for development of evidence-based policy in Indigenous affairs. The Government set out five actions that it had agreed to in response to the Report:

- First, the adoption of *Principles for equitable provision of services to Indigenous peoples*[76] to guide its approach to meeting the needs of Indigenous people;
- Second, continued action by the Government to reduce Indigenous disadvantage through improving access to mainstream programs and services and by better targeting Indigenous-specific programs to areas of greatest need, including remote locations;
- Third, where appropriate, the Government will seek to include clear Commonwealth objectives and associated reporting requirements in respect of inputs and regional outcomes for Indigenous Australians in renewed SPPs to States and Territories in the areas of health, housing, infrastructure and education;
- Fourth, where the Government provides additional funding through mainstream services for Indigenous clients, and/or provides supplementary funding through Indigenous specific programs, it is committed to working towards having the ABS standard Indigenous identifier in the major mainstream administrative data sets; and

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74 See ATSIC Response to the CGC Report at www.atsic.gov.au.

75 Ruddock, P, *Government to Focus on Indigenous Need,* Media Release and associated documents, 27 June 2002. See in particular the Government's detailed *Response to the Commonwealth Grants Commission 'Report on Indigenous Funding 2001'*.

76 *ibid*.

- Fifth, the Minister will report publicly in 2005-06 on the geographic distribution of Indigenous need, the alignment of mainstream and Indigenous-specific resources to meet that need and the progress in making mainstream services more accessible to Indigenous Australians.

6. Australian Bureau of Statistics

The Australian Bureau of Statistics continues to be one of the most important sources of statistical information about Indigenous people and the results are used extensively by Indigenous communities and organisations and by governments. The release of the 2001 Census increases the amount of information available with data being provided through publications, Community Profiles and on the Internet. Relevant ABS information includes the following:

- **Indigenous Profile:** The Indigenous Profile (IP) is part of the Census Community Profile series, and contains 29 tables of data on Indigenous people including comparisons with non-Indigenous people wherever possible. The Indigenous Profile is available for geographic areas including ATSIC regions. Data available through the profiles include age by Indigenous status by sex; type of educational institution attending by Indigenous status by sex; highest level of schooling by Indigenous status by sex; language spoken at home and proficiency in spoken English by sex; computer use by Indigenous status by age by sex etc.
- **The Population Distribution of Aboriginal and Torres Strait Islanders:** released in June 2002. This publication presents counts for Indigenous Australians from the 2001 Census, accompanied by information on data quality to help interpret the 2001 Census counts. Experimental resident population estimates of the Aboriginal and Torres Strait Islander population, based on the 2001 Census, are also included. Census counts of the Aboriginal and Torres Strait Islander population are also provided for small areas (Indigenous Areas and Locations) and Aboriginal and Torres Strait Islander Commission regions.
- The ABS also completed in 2001-02 the design and development of the first **Indigenous Social Survey** (ISS) since the 1994 National Aboriginal and Torres Strait Islander Survey (NATSIS). The ISS will survey 12,000 Indigenous Australians, including those living in discrete Indigenous communities in remote areas of Australia, and will go into the field in the second half of 2002.
- **National Health Survey: Aboriginal and Torres Strait Islander Results, Australia, 2001** is expected to be released late November 2002. It presents selected data from the 2001 National Health Survey about the health of Indigenous and non-Indigenous Australians. Topics include measures of health status, health actions taken, and lifestyle factors which may influence health.

In response to the need for Indigenous specific surveys, the planned ABS program for Indigenous statistics over the next eight years provides for the regular collection of survey data for a broad range of information requirements, and to respond to emerging issues, including the production of regional data. While the 2001 National Health Survey included an Indigenous supplement, from 2004, and six-yearly thereafter, the survey will include a bigger sample

and will provide national, state and territory estimates on some indicators of health status.

The 2002 Indigenous Social Survey (ISS), to be conducted every six years, will provide both national and state/territory estimates that are relevant across sectors, including health, housing, education, employment, communication, transport, and crime and justice. The ISS objectives are to collect data on Australia's Indigenous population in order to explore issues such as levels of and barriers to participation in society, the extent to which people face multiple social disadvantages and measuring changes over time in Indigenous well-being. The ISS will collect a large amount of information in common with the 1994 NATSIS so that comparisons in the circumstances of Indigenous Australians can be analysed over time.

The ABS will be releasing, as part of its Methodology Working Paper series, a Working Paper on the methodology behind the experimental index of Indigenous socio-economic disadvantage that was prepared under contract for the CGC (see above). Depending on feedback from that release, the ABS may consider updating the index using the results of the 2001 Census of Population and Housing, and consider incorporating additional data sets as they become available.

In addition to improving the quality of information generally held in administrative systems accessed by Indigenous Australians, there is also a need to improve the identification of Indigenous clients in those systems. The ABS has published a standard for the identification of Indigenous people in administrative collections and 'best practice' guidelines for its implementation, and is now working across jurisdictions to increase the extent of Indigenous identification and improve the quality of the resulting data. Initial priority has been given to vital statistics but other data priorities include hospital separations, community services, cancer registries, perinatal collections, schools and vocational education and training, housing, and law and justice. The Government has committed to introducing an Indigenous identifier to Medicare and the public and community housing program funded through the Commonwealth State Housing Agreement.

7. Initiatives at the inter-governmental level related to benchmarking

In September 2002 it was announced that the Commonwealth and Queensland Governments will work in partnership with the Cape York Indigenous communities to manage a 'whole-of-government' approach to federal and state Government services, as part of the 2002 COAG agreement to facilitate a co-ordinated approach in communities. The new arrangements will let a lead agency 'broker' the Commonwealth funding for each region, working closely with the community and state Government.

The Department for Employment and Workplace Relations will take the lead role on behalf of the Commonwealth in Cape York. On 19 November 2002 the Commonwealth and Northern Territory Governments announced agreement that the Wadeye community will be the second site for COAG's 'whole-of-government' approach to improving the way governments work with Indigenous communities. The Commonwealth Department of Family and Community Services and the NT Department of Chief Minister will take the lead roles in

coordinating government agencies and working with the Wadeye community. Other locations for the whole-of-government initiative will be determined by discussions between the Commonwealth, States and Territories and other Indigenous communities.

The Productivity Commission also recently released the seventh annual report on Government Services 2002. The report reflects the growing inclusion of Indigenous statistics in the Report, resulting from the request by the Prime Minister in 1997 for the Review to give particular attention to the performance of mainstream services, which was reinforced by the 2000 COAG. The Review reported on Indigenous-specific housing for the first time. The Review foreshadowed assistance in its task of reporting Indigenous statistics from work underway separately to develop indicators to assist in assessing progress towards meeting the objectives of the COAG Reconciliation Commitment. Of particular relevance to the Review will be a number of whole-of-government lead indicators of social and economic disadvantage with a focus on those issues requiring successful interventions spanning more than one ministerial council. These include indicators of:

- Family violence
- Law and justice
- Health, housing and community well-being
- Education

The Review also noted that its task is complicated by the administrative nature of many data collections that do not distinguish between Indigenous and non-Indigenous clients. The method and level of identification of Indigenous people appear to vary across jurisdictions. In this context, the Review cross referenced to work being undertaken by the ABS (see above).

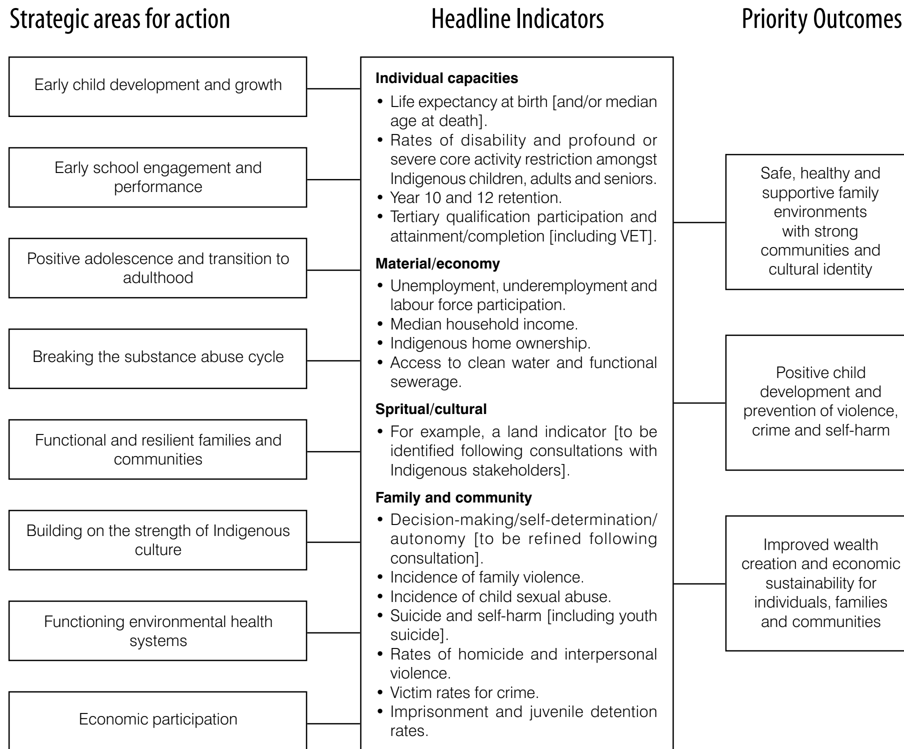
8. The Steering Committee framework for reporting on Indigenous disadvantage

In April 2002, COAG decided to commission the Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP) to produce a regular report against key indicators of Indigenous disadvantage. The key task of the report 'will be to identify indicators that are of relevance to all governments and Indigenous stakeholders and that can demonstrate the impact of program and policy interventions'.[77]

The Committee has now provided a draft framework for public comment. Following this, further consultations with Indigenous communities and other experts will occur to refine aspects of the framework. A diagram of the framework is shown in the box below. The framework has three logically related elements, working back from the priorities listed on the right side of the diagram.

77 Steering Committee for the Review of Commonwealth/State Service Provision, *Draft framework for reporting on Indigenous disadvantage,* at www.pc.au/gsp/indigenous framework/index.html.

Box 1: Draft framework for reporting on Indigenous disadvantage



Priority outcomes

The three priority outcomes (right column in above box) are based on COAG's 'priority areas for policy action' and provide the end focus of the Framework. They are:

- safe, healthy and supportive family environments with strong communities and cultural identity;
- positive child development and prevention of violence, crime and self harm; and
- improved wealth creation and economic sustainability for individuals, families and communities.[78]

The framework then has a two tier set of indicators. These encompass 'headline indicators' of the higher order outcomes, and a second tier or 'strategic areas for policy' action. These emphasise the possible need for joint action within and across governments.

The headline indicators (shown in the centre column of the Framework) are intended to provide a snapshot of the state of social and economic Indigenous disadvantage, given the overall priorities that have been identified. They sit within four areas of well-being:

78 *ibid*, p4.

- Individual capacities;
- Material/economy;
- Spiritual/cultural; and
- Family and community.[79]

These headline indicators are higher order outcomes that reflect the longer-term more targeted policy actions at the second tier. Collective improvements in the headline indicators should lead to benefits in the three priority outcomes. For example, an increase in life expectancy at birth and a decline in child sexual abuse would clearly contribute to the achievement of, for example, 'positive child development and prevention of violence, crime and self harm' (see Box below).

Eight strategic areas for action have been identified (see the left-hand column of the Framework). For each of these strategic areas, a few key indicators ('strategic change indicators') have been developed with their potential sensitivity to government policies and programs in mind. These strategic change indicators are not intended to be comprehensive – it is not possible to incorporate into the framework all of the factors that influence outcomes for Indigenous people. The strategic areas for action have been chosen on the evidence that action in these areas is likely to have a significant, lasting impact in reducing Indigenous disadvantage. The rationale for choosing the eight areas is briefly described below:

1. Early child development and growth (prenatal to age 3)

Early child development can have significant effects on physical and mental health in childhood and adulthood, growth, language development and later educational attainment.

2. Early school engagement and performance

Early school engagement is important for establishing a foundation for educational achievement, retention in secondary schooling, opportunities in employment and minimising contact with the justice system later in life.

3. Positive adolescence and transition to adulthood

Participation in school and vocational education; and community, cultural and recreational activities, encourages self-esteem and a more positive basis for employment. Such participation also assists in avoiding contact with the justice system.

4. Breaking the substance abuse cycle

Abuse of alcohol and other substances affects later physical and mental health, family and community relationships and contact with the justice system. Tobacco use is the greatest single contributor to poor health outcomes.

5. Functional and resilient families and communities

Functional and resilient families and communities influence the physical and mental health of adults and children and contact with the justice system.

79 *ibid*, p9.

Problems in families and communities can lead to breaks in schooling and education, disrupted social relationships and social alienation.

6. Building on the strength of Indigenous culture

A strong Indigenous culture provides a foundation for strong families and communities, economic development, self-determination and community resilience, reduced youth alienation and reduced self-harm and suicide.

7. Functioning environmental health systems

Clean water, adequate sewerage, housing and other essential infrastructure are important to physical well being and health, nutrition and physical development of children.

8. Economic participation

Having a job or being involved in a business activity not only leads to improved incomes for families and communities (which has a positive influence on health, education of children, etc) it also enhances self-esteem and reduces social alienation.

The lack of data, or inability to collect them, can explain why some otherwise desirable indicators are not included. However, where data are not currently (or only partly) available, but the indicator is important enough, an indicator may still be included as an incentive to improve data quality.

Box 2: Why not agency or program specific indicators?

While the indicators are sometimes associated with functional areas such as health or education, the indicators in this framework typically cover a number of sectors in terms of their impacts.

For example, in the 'strategic change area'of early school engagement and performance, improvements in the indicators – school attendance and year 3 literacy/numeracy – would require a range of intervention strategies across a number of government portfolios. For children to attend school regularly and achieve acceptable levels of literacy and numeracy, they will require good nutrition, for example, may involve the health, education and community services portfolios, to name a few.

The separate annual *Report on Government Services* looks at the efficiency and effectiveness of individual services, including for Indigenous people.

Once the Framework has been finalised it will be submitted to COAG for agreement. A questionnaire has been circulated for the initial consultation stage, scheduled to finish by 15 November 2002, on the scheme outlined above. The questionnaire canvassed a number of basic questions about the Framework.

9. Governance and capacity building

Governance and capacity building are receiving increased scrutiny as representing the foundation of reconciliation, self-determination and realisation of rights. Governance is the expression of Indigenous peoples' demand for autonomy and for the right to take responsibility for their own lives. All levels of government need to acknowledge that facilitating Indigenous peoples' efforts

to achieve such autonomy and improved Indigenous governance is vital to achieving improvements in Indigenous disadvantage and the recognition of Aboriginal and Torres Strait Islander rights. Government efforts need be focused on negotiating governance arrangements with Indigenous peoples, including through the provision of appropriate support (including technical support to build capacity, long term funding arrangements and legislative backing).

The Commonwealth Grants Commission in its *Report on Indigenous Funding*, ATSIC in the *Report on greater regional autonomy*, and the House of Representatives Standing Committee on Family and Community Affairs report into Indigenous health all flag the development of mechanisms and structures for self-governance and greater regional autonomy as the next stage and natural progression from facilitating greater Indigenous participation.

In this sense, governance has become central to the reconciliation agenda. The *Social Justice Report 2000* noted:

> The development of governance structures and regional autonomy provides the potential for a successful meeting place to integrate the various strands of reconciliation. In particular, it is able to tie together the aims of promoting recognition of Indigenous rights, with the related aims of overcoming disadvantage and achieving economic independence.[80]

The Report notes that, unfortunately, during the reconciliation debate so far, there has been insufficient acknowledgement of the inter-related nature of these processes, which has been demonstrated by the failure to identify the crucial nature of recognising and building Aboriginal and Torres Strait Islander governance capacity to achieving these goals.[81] For example, the Council for Aboriginal Reconciliation's strategy for achieving economic independence focuses on how governments and peak private sector organisations can apply affirmative action and culturally sensitive initiatives. The strategy is more directed towards channeling private sector support into the development of Indigenous economic independence, in some instances with the encouragement of government agencies, rather than developing more economically viable Indigenous governance structures.

A focus on governance and capacity building emphasises the need for greater coordination of services and the necessity for adopting a holistic approach to addressing Indigenous need. Importantly, it also allows for renewal of Indigenous societal structures which have been ignored, marginalised or rejected under protectionist and assimilationist policies. In April 2002 ATSIC Commissioner Alison Anderson reminded the Indigenous Governance Conference (sponsored by ATSIC and Reconciliation Australia) that:

> There is more than one system of law and governance in this land… it has been the continued and almost systematic attack upon our principles of governance which has caused so much damage to Aboriginal people.[82]

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80 *Social Justice Report 2000,* p107.
81 *ibid*.
82 ATSIC, *ATSIC News*, Spring 2002, p44.

In a similar vein Noel Pearson has emphasised the need to devolve Indigenous policy to the local level and away from the artificial constructs of 'communities':

> We need to devolve our emphasis from communities to families. We need to start at the basic building block of families, because Indigenous policy has been cast adrift in a community emphasis.[83]

Pearson posits a four-point plan for developing a real economy for Aboriginal society on Cape York Peninsula in place of the 'passive welfare' paradigm that has plagued Indigenous governance since the 1970s. The four components of this plan are: access to the enjoyment of traditional subsistence resources; changing the nature of welfare programs to reciprocity programs; developing community economies; and engaging in the real market economy.[84]

The plan bases the development of effective social partnerships in the creation of a regional governance structure (specifically in the context of the Cape York Peninsula) that re-engages Indigenous social structures and economic participation with the 'real economy'. Central to the plan is the notion of a 'partnership interface' between Aboriginal communities and organisations in Cape York Peninsula and Commonwealth and state governments, and ATSIC. Agreements would be made between government agencies and Indigenous representatives in regard to provision of resources (that is, all government 'inputs', such as funding, services and programs).

The new emphasis on governance issues was reflected in the proceedings of the April Indigenous Governance Conference. The Conference heard of international experience with Indigenous governance. In particular, a considerable amount of research into Indigenous governance has been undertaken through the Harvard Project on American Indian Economic Development. The Harvard Project was represented at the Conference by Professor Cornell and Dr Manley Begay Jr of the Navajo nation.

The aim of the Harvard Project was to discover the reasons why certain Indian nations had been able to break away from a century of poverty and powerlessness. The Conference paper reported on the critical role that self-governance has played in the changing fortunes of certain American Indian nations. Over the last quarter of a century, a number of American Indian nations have been unusually successful in building sustainable, self-determined economies. Perhaps the most striking aspect of The Harvard Project research results is the significance of self-governance in the accomplishments of these nations. Beginning in the 1970s, Indigenous nations in the United States have asserted increasing degrees of control over their own affairs, resources, development strategies, and governing structures. In the process, they have demonstrated the power of self-rule as a basis of community and economic development and as a vehicle for building societies that work.

Several factors have been particularly important in what they have done. First, they have claimed and asserted the right to govern themselves and, in effect, have taken over control of much of their own affairs. Second, they have built effective governing institutions – that is, they have found ways to exercise power

83 SBS Insight, *The Pearson View,* 22 March 2001.
84 Pearson, N, *Our Right to take Responsibility,* Noel Pearson and Associates, Cairns, 2000, pp42-43.

effectively in pursuit of their own objectives. In short, they govern well. Third, these governing institutions have paid attention to Indigenous political culture: to how their own peoples believe authority should be organised and exercised. And fourth, they have thought in strategic terms, moving away from crisis management and opportunism toward a set of long-term societal goals. These factors, taken together, constitute what the Project has come to call a nation-building process: putting in place the institutional foundations of effective self-governance.

Fred Chaney, co-chair of Reconciliation Australia, provided the following 14 point summary of the main outcomes of the Governance Conference:

1. Good governance requires communities which have genuine decision-making powers, as overwhelmingly confirmed by the evidence presented at the conference.
2. The compelling evidence presented to the conference from local experiences and by the overseas contributors shows that sustained and measurable improvements in the social and economic well-being of Indigenous peoples only occurs when real decision-making power is vested in their communities, when they build effective governing institutions, and when the decision-making processes of these institutions reflect the cultural values and beliefs of the people.
3. We need to avoid divisive and artificial arguments about terms such as sovereignty and focus on the underlying substance that people want real power to take real decisions and act on them.
4. The examples presented to the conference demonstrate the value and relevance of customary law in dealing with contemporary problems and issues.
5. It is clear that the primary push for good governance must come from the people themselves, using whatever tools and strategic opportunities are available. In other words, in the slogan much used at the conference, ‘Just do it’.
6. At the same time, it is crucial to develop skills and capacities in communities for people to effectively carry out the tasks of governance so that it delivers tangible benefits for communities and the people.
7. It is also clear that governments have a critical role at the national, state, territory and regional levels. They must exercise that role firstly by understanding that communities need to be given the necessary powers, secondly by developing good public policy around this understanding, and finally by providing the necessary support and resources – for example, through block funding as outlined at the conference by Jack Ah Kit in relation to the Katherine West Health Board.
8. Specifically, the recommendations of the Commonwealth Grants Commission’s *Report on Indigenous Funding 2001* need to be seriously considered and actively debated, not buried or cherry-picked. We need to understand and use the information revealed in this report to ensure more appropriate allocation of funds by

governments to compensate for Indigenous disadvantage. Although funding formulas take Indigenous disadvantage into account, they don't ensure that the resulting funds are directed to dealing with that disadvantage.

9. It is essential to celebrate our successes and share knowledge so that good governance becomes an essential part of our everyday conversation.
10. Another key element is transparent and accountable leadership committed to the welfare of the community rather than its own advancement.
11. This raises the critical issue of how to best ensure the development of future leaders – especially young leaders – with all the skills to make these things happen.
12. In developing Indigenous governance, we need to consider what our overseas participants have referred to as the separation of powers – distinguishing between a structure for setting goals and directions, one for carrying out the essential tasks, and yet another for settling disputes and ensuring that agreed rules are observed. For example, there might be a board or council which sets the policy, staff who implement the policy, and an independent body to resolve disputes through agreed procedures.
13. It is important to employ people with appropriate skills and application, and with integrity.
14. There is no single magic formula – no 'one size fits all' – in governance or economic development.

In respect of point 14, it is clear from a range of governance and autonomy arrangements that have significant achievements in terms of self determination and responsibility, that there is no single, 'one size fits all', model of governance for all situations. Examples of evolving governance models range from major regional arrangements, such as the Torres Strait Regional Authority, to local arrangements, such as the justice approach at Ali-Curung community in the Northern Territory, and a spread of situations in between. For example, Murdi Paaki in western NSW which has developed a model for regional planning underpinned with regional agreements to target better outcomes for service delivery, and the Katherine Health Care Trial has established a successful model of effective community participation and coordinated planning.

The *Social Justice Report 2000* argued that Governments should agree to negotiate mechanisms to facilitate greater regional autonomy through the design and delivery of programs and services. Negotiations should include matters such as:

- developing flexible funding arrangements with Indigenous organisations, including transfer of funding, block funding and arrangements for pooling funds across governments and on a regional basis; and
- Indigenous participation in developing service delivery priorities, setting benchmarks and targets on a regional basis, and in monitoring and evaluating progress.

Essential to the development of effective governance is capacity building, currently the subject of a Parliamentary Inquiry.[85]

10. Developments at State and Territory level

The implementation of the reconciliation agenda of addressing Indigenous disadvantage takes place essentially at the state or territory level, although the three tiers of government are necessarily involved. Various state and territory governments are in the formative stages of adopting more coordinated, long term, whole-of-government strategies to Indigenous policy development and service delivery.

As indicated above, whole-of-government approaches are now being implemented in Cape York and in the Wadeye community in the Northern Territory. A detailed range of state and territory initiatives currently in development is provided in Appendix 1 of this Report. Examples include:

- NSW Service Delivery Partnership Agreement between the NSW Government, ATSIC and the NSW Aboriginal Land Council, signed 1 November 2002;
- In July 2002 the Queensland Government and ATSIC signed a 'Commitment to Partnership';
- ATSIC and South Australia Government Partnering Agreement December 2001;
- ATSIC/SA State Government Bilateral Agreement for provision of essential services to Aboriginal communities – currently under negotiation;
- ATSIC and Western Australia Statement of Commitment October 2000; and
- Victorian Aboriginal Justice Agreement (2000) and ATSIC/Victorian Government Communiqué of June 2000.

In the case of Queensland, a number of steps have been undertaken to implement programs to address Indigenous disadvantage, consistent with COAG principles and in partnership with Indigenous communities. The *Queensland Aboriginal and Torres Strait Islander Justice Agreement* [86] signed in December 2000 is part of this approach. The objective of the Justice Agreement is to reduce Aboriginal and Torres Strait Islander over-representation in the criminal justice system. The Agreement originates in the 1997 National Ministerial Summit, where Indigenous community representatives met with Commonwealth and state Ministers for justice, police, corrective services and Aboriginal Affairs. In Queensland, the Justice Agreement is the result, fulfilling in part the resolution of the 1997 Summit.

The Justice Agreement in turn is part of the Ten Year Partnership which aims to improve living standards of Indigenous Queenslanders over the next 10 years. The Ten Year Partnership's objective is to see the Queensland Government

85 See House of Representatives Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into Capacity Building in Indigenous communities, www.aph.gov.au/house/committee/ats:2/indigenouscommunities/inqirde.htm.

86 www.indigenous.qld.gov.au

coordinate its activities more effectively and put in place new ways of measuring progress. This is intended to reduce duplication and confusion for Indigenous communities who have to deal with a range of different government departments.

The Cape York Partnerships[87] is an example of the types of partnerships that can be developed. Cape York Partnerships involves Indigenous organisations in Cape York, in conjunction with the Queensland Premier and Cabinet, in merging service providers into one interface, at a community level. This interface revolves around 'partnerships negotiation tables', so that individual communities can directly address senior government staff with the community's priorities and aspirations, and facilitate a direct line of responsibility from community level to senior government level. The Premier, Mr Beattie, places initiatives such as Cape York Partnerships clearly in the context of reconciliation. Of the partnership, he has said:

> Cape York Partnerships is about changing the way Government and communities work together. Cape York Partnerships does not rely on sweeping statements of good intentions or obvious need. This is no longer relevant. We want to concentrate on a range of immediate and practical strategies and commitments.[88]

The Ten Year Partnership has identified eight key areas for action and has proposed outcomes for each area. In terms of the area of justice, the outcome sought is a demonstrated continuing reduction in the number of Aboriginal and Torres Strait Islander peoples coming into contact with the Queensland criminal justice system, so that the rate of contact is reduced to at least the same rate as that of other Queenslanders. The 10 year objective (that is by 2011) is a 50 percent reduction in the rate of Indigenous Queenslanders incarcerated in prisons or youth detention centers. Outcome indicators are identified at the broad level (for which data is already available), and also at the more detailed level (where current data may be deficient). An annual report is to be prepared and there is to be an independent evaluation every three years. The Agreement acknowledges that significant gaps exist in relevant criminal justice data, and provides mechanisms for improved data collection.

The Queensland situation represents a series of initiatives, at regional and statewide level, in partnership with Indigenous organisations and in co-operation with ATSIC and the federal Government, to attempt to address Indigenous disadvantage as an integral part of the reconciliation agenda.

87 See www.capeyorkpartnerships.com/project/gov/index.htm.

88 Beattie, P, *An Open Letter from Premier Beattie to the Indigenous Peoples of Cape York,* at www.capeyorkpartnerships.com/project/gov/index.htm.

Part 2: Incorporating human rights into benchmarking reconciliation

The previous section has provided an outline of a significant range of measures that are relevant to benchmarking reconciliation in an international and domestic context. This material was the basis of discussion over two days at the workshop that I convened on 28-29 November 2002.

The workshop proceeded with an overview of the issues discussed in part one of this chapter, and particularly with an overview of the *Draft framework for reporting on Indigenous disadvantage* prepared by the Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP). The participants then considered the following issues over the course of the workshop:

- **Indigenous participation in benchmarking**. How to ensure adequate Indigenous participation in the setting and monitoring of benchmarks and indicators;
- **Australia's obligations to progressively realise economic, social and cultural rights.** How to ensure that Australia's human rights obligations to progressively realise the equal enjoyment of economic, social and cultural rights are reflected in monitoring frameworks and are being met.
- **Statistics**. How to ensure that statistical collection is adequate to support the measuring of Indigenous disadvantage and the monitoring of progress for its progressive realisation.
- **Building Indigenous community capacity and governance.** How to ensure that the objective of community capacity building and strengthening and supporting Indigenous governance is integrally linked to processes for addressing Indigenous disadvantage.
- **The draft indicative framework for measuring Indigenous disadvantage**, as prepared by the Steering Committee. In light of the previous discussion, an opportunity was provided to discuss the detail of the proposed indicative framework.

This section reports on the discussion of these issues at the benchmarking workshop. The discussions were wide-ranging and raise more questions than they answer. The broader implications of the workshop's discussions for benchmarking are then discussed in the concluding comments of this chapter.

1) Indigenous participation in benchmarking

The Workshop considered four key issues in respect of benchmarking reconciliation. The question posed for the session dealing with the first issue, Indigenous participation in benchmarking, was:

> How can it be ensured that Indigenous participation in setting priorities, identifying targets, developing benchmarks, monitoring performance and evaluating programs is effective, culturally appropriate and truly reflects Indigenous aspirations rather than those of the wider community?

It was noted that, other than through ATSIC, there appeared to be little knowledge in the Indigenous community of the current developments to establish indicators

to report on outcomes of government strategies and programs. To virtually exclude the Indigenous community from participation in the development of strategies and benchmarks runs the risk of further entrenching dependency and compounding the public policy failure of the last 30 years.

In considering Indigenous participation, reference was made to the concept of 'cultural match' adopted by the Harvard Project in the United States.[89] This Project identified the significance of self-governance in those Indian nations that had been successful and self-determining. In turn, successful Indigenous governing institutions were seen to have be those that had developed with close attention paid to Indigenous political culture, that is how their own people believe authority should be organised and exercised.

The tendency was noted for people to suggest that Indigenous peoples having a role in service delivery to meet their communities is interpreted as 'special rights'. It was suggested that a concept of equality that focuses not on equality in process but on whether there is equal protection is a more appropriate way of viewing the issues. The equality sought should lie in the equality of protection of rights rather than simple equality of outcomes.

There was considerable discussion on the distinction between merely consulting with Indigenous people, as opposed to negotiating and agreeing issues in partnership with them. It was widely accepted that there is a need for Indigenous involvement in setting performance frameworks at all stages – that is the beginning of the process as well as at the end. In this context questions were raised as to the extent that Indigenous peoples may be able to influence the decision-making process in respect of indicators and benchmarks. That is, are the parameters to be set by government, and are Indigenous people only being asked to respond or confirm in the restricted sense of 'consultation'. Is there to be a role for negotiation? The importance of there being some Indigenous control over decision-making, rather than merely providing a confirmation of an already made decision, was stressed. There is a need to determine if the process of consultation is one to simply 'capture' information, rather than a process aimed at facilitating participation and shared decision-making.

While one participant pointed to the large investment in resources and time that would be required for a proper consultation process, it was pointed out in response that national or peak Indigenous bodies exist for particular areas of concern and that they could be appropriate intermediate bodies for consultation and negotiation.

Further concerns about the consultation process were raised in terms of who can actually represent Indigenous views. It was pointed out that some structures that have been put in place to represent Indigenous views, such as community councils in Queensland, may not in fact be representative of Indigenous views.

Regarding Indigenous participation, the workshop identified the importance of having principles to underpin negotiation and consultation. Recommendation 12 of the Social Justice Report 2000 was noted, which proposed that the federal Government and COAG adopt the *Principles for Indigenous social justice and*

89 For an overview of the Harvard project see Chapter 2 of this Report or visit: www.ksg.harvard.edu/hpaied/overview.htm.

the development of relations between the Commonwealth Government and Aboriginal and Torres Strait Islander Peoples as proposed by ATSIC in *Recognition, rights and reform*, as forming the framework for negotiations about service delivery arrangements, regional governance and unfinished business.

A number of best practice models for consultation with Indigenous peoples were identified by participants. These included the longer term, open ended and localised approach of the Stronger Families package,[90] as well as the process engaged in by the Commonwealth Grants Commission for the Indigenous funding Inquiry.[91]

Generally though it was noted that current approaches to consultation are often inadequate, opaque and selective in their approach. In this context, concerns were raised that the Draft framework for reporting on Indigenous disadvantage does not reflect an Indigenous perspective. The decision-making process about the framework, as distinct from any consultations undertaken, is non-Indigenous at all stages. There needs to be some way of ensuring Indigenous peoples are at the table in negotiating the structure of the Draft framework. Otherwise, the process will be seen as a classic government approach – the agenda already decided, and no space for other ideas to be brought forward.

Given the concerns expressed about the adequacy of consultation and negotiation with Indigenous interests over the Draft framework, the question was asked: why are we having benchmarks and indicators? There is a fundamental consultation and negotiation problem here and the risk is of continuing cynicism and frustration on the part of Indigenous people. There needs to be an acknowledgement that as a result of the *Mabo* decision and native title, the framework for negotiation with Indigenous people has changed. Indigenous people should be at the negotiating table as of right.

2) Progressive realisation of economic, social and cultural rights

The question posed for this session of the workshop was, in the context of achieving progressive realisation of economic, social and cultural rights, how to ensure a long term perspective in the design and implementation of programs and services so that goals can be set with a degree of security. In respect of ensuring a long term perspective, the workshop was asked:

> How can this objective be achieved in a climate of short term and pilot projects, grant application driven programming, and outsourcing of government functions?

The difficulty of overcoming Indigenous disadvantage within short term timeframes was broadly agreed. It was noted that there is a need to develop longer term funding cycles and that long term objectives cannot run in parallel with an approach focused only on short term projects, trials etc. Short and medium term objectives should be consistent with and build towards long term objectives. Governmental perspectives need to be longer than the electoral

90 Department of Family and Community Services, *Stronger Families and Communities Strategy,* see www.facs.gov.au

91 CGC, *op cit*.

cycle. Many areas of disadvantage, for example education, are simply not susceptible to short term solutions.

Long term planning can in fact coexist with shorter term activities, where the long term planning (say 25 years) is broken up into shorter parts (projects and programs). That is, the human rights requirement or obligation is to take steps, in the context of progressive realisation. However, the steps must be targeted, and contribute to the longer term objectives.The objective of greater matching of funding with needs was also noted. Statewide housing agreements/block funding/comprehensive regional agreements were seen as attempts to move to longer term planning horizons.

A key matter identified was the outcomes of government programs and expenditure. Given the resources expended, outcomes to date have been disappointing. Indeed, concerns were expressed that the extent of unmet need may actually be growing in some areas.

The question of control over funding is important and concerns were expressed at current funding arrangements, and the lack of control by and involvement of Indigenous people in funding-related decision-making processes. This lack of control is exemplified by native title. Although native title is an entitlement, the approach to native title funding does not reflect this. Prescribed Bodies Corporate act in trust or as agent for native title holders following a determination of title. They are a legal requirement and are set up under the provisions of Native Title Act, yet they are not funded. Overall, it was felt that it is necessary to facilitate greater Indigenous involvement in funding decisions.

3) Statistics

As the development of benchmarks and indicators is based on the use, analysis and interpretation of statistics, a session was devoted to this topic. Discussion was wide-ranging.

Concern was expressed that Indigenous people have been 'over researched' and statistics have been misrepresented and used against them. This results in a degree of cynicism and mistrust and is a significant issue in respect of developing indicators and benchmarks. Indigenous people need to be confident that statistics are being used properly and in particular that appropriate benchmarks are being set. Indigenous people should participate in these matters.

There are difficulties with obtaining information to enable identification of Indigenous service users, including sensitivity and privacy. However, this identification provides key data for a number of indicators. Training is needed for staff of agencies and organisation in collecting this data. There is in general a need to educate, train and enable Indigenous people about the use of statistics so that statistics can be fully utilised in addressing Indigenous disadvantage, including by Indigenous organisations to support proposals and submissions for additional resources.

There are significant deficiencies in data collections, including the lack of consistent data over a sufficient time period to enable adequate comparison. These deficiencies need to be addressed as a matter of priority to ensure validity and credibility in the development and use of indicators. There is also a need to

get data as accurate as possible on a regional basis. National statistics do not reflect the wide variety of Indigenous circumstances. Statistics along a regional basis (perhaps based on ATSIC regions) can be more important.

Statistical benchmarks in respect of employment (for example, does the Community Development Employment Program – CDEP – measure employment or does it disguise unemployment?), and housing, where different use patterns may mean that definitions of what constitutes households may be at variance with mainstream understandings, are problematic in designing indicators and analysing data. Interpretation of statistics may be difficult across a number of indicators. There is a tendency for statistics to evaluate Indigenous well-being from a mainstream approach. Indicators may not adequately reflect issues such as participation in traditional economies. Meanings and values may differ between Indigenous and non-Indigenous populations rendering statistical analysis value-laden and potentially misleading. These matters need to be addressed in developing indicators.

In response to these concerns, the idea was raised of whether it is possible to build in to indicators and benchmarks a subjective element. How do Indigenous people perceive their disadvantage? For example, this could be done by surveying Indigenous people for their views on what they need as communities and families – such an approach would be constitutive of 'effective partnership'.

The type of statistics can be divided into classifications: census data; administrative data, and expenditure data. There are problems with interpretation of census data, including the issue of the growth of the Indigenous population according to the Census. Administrative data includes the extent to which Indigenous people use services – benchmarks are needed on the scope and quality of administrative data, which currently has many gaps and is inconsistent between jurisdictions. With expenditure data it is important to identify expenditure on Indigenous people.

It was suggested that ATSIC could strengthen its advocacy role by increasing its analysis and use of statistics. However, there is a problem with ATSIC getting access to relevant statistics (for example in the area of Aboriginal Health Services).

4) Building Indigenous governance and capacity building into benchmarking

The discussion of governance matters proved quite difficult, possibly reflecting the relative lack attention that has been given to such matters in developing the *Draft framework for reporting on Indigenous disadvantage* in a climate of 'practical reconciliation'. The discussion indicated that there is a degree of ambiguity as to what people mean by terms such as governance and capacity building.

The question posed to the Workshop was:

> How should governance arrangements take into account Indigenous culture and norms (or at least, that they are not hostile to Indigenous law and practice)?

Suggestions were made about the need to be able to match cultural requirements with management requirements, about the importance of communities developing the capacity to consult and conduct negotiations, and

about the need to develop the necessary infrastructure to support decision-making. The Harvard Project was noted as relevant to this issue because of its findings on the importance of effective Indigenous governance in achieving economic, social and cultural progress.

It was argued that the operation of the Aboriginal Councils and Associations Act is problematic in terms of delivering good Indigenous governance and it appeared to have led to a plethora of Aboriginal organisations. If so, was this wasteful of resources? It was argued that the problem of too many organisations is created in part by the grant application process, and the consequent need to be incorporated to get funding.

Reference was made to the summary made by Fred Chaney, co-chair of Reconciliation Australia, of the outcomes of the Indigenous Governance Conference held in April 2002. In particular, two paragraphs of the summary were noted:

> *Paragraph 5* noting that it is clear that the primary push for good governance must come from the people themselves, using whatever tools and strategic opportunities are available. In the words of the slogan much used at the conference, 'Just do it'.
>
> *Paragraph 6* noted that, at the same time, it is crucial to develop skills and capacities in communities for people to effectively carry out the tasks of governance so that it delivers tangible benefits for communities and people.

The point at issue accordingly becomes how does that critical link between the two aspects, governance and capacity, get made. It was suggested that an important factor, at this stage, may be for work to be done to identify 'presence and absence factors' – i.e., identifying what capacity is missing in communities as well as what is in place.

A key concern from the benchmarking reconciliation perspective was how governance and capacity building become integral to the strategic indicators framework.

5) Discussion of the Steering Committee's draft framework for reporting on Indigenous disadvantage

Following discussion of the issues referred to above, the workshop returned to its consideration of the Draft framework for reporting on Indigenous disadvantage developed by the Steering Committee under COAG.

The Chair of the Steering Committee noted that the framework seeks to avoid a 'silo' approach whereby issues are sorted into bureaucratic bundles. It is intended to be holistic in its intent. While the indicators are sometimes associated with functional areas such as health or education, the indicators in this framework typically cover a number of sectors in terms of their impacts.

It was also noted that the Steering Committee has formed an Indigenous Working Group for the process of developing the framework. The Working Group is comprised of central agencies from all levels of government including ATSIC; MCATSIA; the Australian Institute of Health and Welfare (AIHW); the Australian Bureau of Statistics (ABS) and Australian Local Government Association (ALGA).

In respect of consultation on the Draft framework, the consultation process has been devolved to each state and territory who have provided reports on their consultations (with Victoria and Tasmania yet to report). The Steering Committee itself has then conducted additional consultations.

Feedback on the framework to that time had shown broad support for the Draft framework. There is support for the whole-of-government approach and the focus on outcomes. A number of government agencies have indicated that they see the framework as synergistic to what they are doing. The Steering Committee noted that it needed further guidance on the inclusion of 'spiritual and cultural indicators' within the framework. A strong reaction has been that these may be too problematic, although they are matters which are at the same time fundamental to Indigenous well-being. Another matter requiring further consideration is how to measure indicators concerning decision-making, self-determination and autonomy.

The Steering Committee noted that the following concerns had been raised in consultations on the framework:

- the framework may be too sterile and requires qualitative contextual discussion;
- it may become an 'annual misery index' focusing on problems rather than positive developments;
- there are significant problems with data availability and statistical collection;
- there are problems of differentiation between population groups (eg urban/remote) – 'one size fits all' indicators may not be appropriate; and
- concern at how the reporting process of the framework will be tied to other processes in respect of policy and planning (in this regard, the question is whether there should be a third tier of indicators which is tied to service delivery. However, it has been suggested that this aspect could be appropriately covered under the Ministerial Action Plans reporting processes).

In terms of the future development of the Draft framework, it was noted that while the first step is the approval of COAG for the framework, this would not see the Draft framework as being inflexible or unable to be changed in the future. It will require a process of continuous improvement.

A number of suggestions and comments were made on the Draft framework in the workshop.

It was noted that the framework is stripped of any Indigenous specific content. The concern was expressed that the framework does not seek to include in its measurements of progress the extent to which services may be culturally appropriate, and involves Indigenous peoples in design and delivery.

A second related concern was the need to ensure that Indigenous participation and decision-making are reflected in and measured by the strategic indicators, and that, in particular, the framework incorporates and seeks to measure the goal of capacity building in Indigenous communities.

Measures of accessibility to services need to be reflected in the indicators (including in urban settings). Concern was also expressed that some of the draft indicators, for example measurements of building healthy communities and families, tend to focus on negative measurements (crime, abuse etc) rather than capacity building. In this respect, for example, the prominence given to child sexual abuse in the first tier 'headline' indicators appears to be indicative of a negative emphasis in the indicators, rather than a balance between negative results and positive developments in building the capacity of families and communities to function in a supportive and caring way.

Some participants felt that the construction of the indicators in this way perhaps indicated a lack of appropriate consultation and negotiation with Indigenous communities.

In a similar context, the relationship between the first and second tier indicators is not always clear. There was a concern that the indicators may reflect insufficient research or a failure to consult widely enough to obtain representative views of Indigenous peoples and communities.

A key concern with the Draft framework was the apparent failure to measure involvement in the subsistence economy and traditional activities as against the market economy. The importance of subsistence and traditional activities does not appear to be represented in the indicators and this would potentially skew the results, particularly against remote and outstation communities.

It was suggested that there is also a need to 'audit' existing commitments and measurements at the state and territory level to identify whether the Draft framework could build on already existing commitments. For example, it was noted that the Queensland Ten Year Partnership has a range of measurements for justice outcomes that may be appropriate or applicable to the draft Framework's attempt to measure similar outcomes. It was noted, for example, that the Queensland model uses a headline indicator of over-representation in corrections, but also notes a range of supporting indicators that contribute to this outcome such as changes in the percentage of Indigenous people who are given bail rather than remanded in custody; use of arrest rather than cautioning by police etc.

This is a technical issue that will need attention. Even though the Draft framework does not purport to establish targets, consistency of data sets will be important, and analysing why a target has or has not been met is a similar exercise to interpreting progress against the strategic indicators of the Draft framework.

Conclusion – Where to from here?

The Workshop and preparatory material raises a number of serious concerns from a human rights perspective about the current development of indicators and benchmarks in respect of Indigenous disadvantage. There are five main concerns identified by the workshop.

First, the current draft framework for reporting on Indigenous disadvantage appears to have been developed with little reference to human rights standards, to Australia's international obligations, or to relevant international experience. Perhaps reflecting an emphasis on 'practical reconciliation', the Draft framework

consequently fails to develop a series of indicators of Indigenous socio-economic disadvantage within a rights framework.

The Draft framework should be further reviewed against human rights criteria. Such a review needs to be informed by international standards and current international developments. Specific reference should particularly be made to the Draft Guidelines on Poverty Alleviation developed by the UNDP and the UN Office of the High Commissioner for Human Rights.

My office will continue to discuss these issues with the Steering Committee to seek to ensure that the human rights dimension of benchmarking reconciliation is understood and able to be built into the Draft framework.

Second, serious concerns were also expressed about the failure of the proposed indicators to adequately reflect Indigenous governance and capacity-building objectives. These matters require urgent attention before the Draft framework is approved by COAG. Given the apparent commitment to these issues by the federal Government, this is a test of the extent to which it is actually prepared to negotiate and enter into partnerships with Indigenous communities.

Third, the present failure of the indicators to reflect traditional and subsistence economic activity and production is a major concern. It is likely to skew results against remote and outstation communities. Urgent attention needs to be given to the literature and research on these matters, including the work of CAEPR, and subsistence production and activity needs to be accommodated in the indicators.

Fourth, the Draft framework intends to provide a reporting tool on a national basis. However, it needs also to be able to be disaggregated to a sufficient level to provide meaningful and realistic results as a guide to policy review and formulation. The ability to disaggregate results on a regional basis would appear to be a high priority (perhaps by ATSIC region). Consultation with the Commonwealth Grants Commission and ATSIC may be appropriate.

Fifth, considerable concern was evident at the Workshop about the level and nature of consultation to date with Indigenous representatives, organisations and communities about the Draft framework, including the tight deadlines prevailing and whether the consultation has been wide and/or representative enough. There is the possibility that the Draft framework, rather than being perceived as a positive tool for partnership between governments and Indigenous peoples, will be met with suspicion and distrust, and seen as yet another government contrivance thrust upon Indigenous society.

To ensure that the Draft framework is seen as a positive step towards reconciliation based on an effective partnership between government and Indigenous Australians, it would appear important at this stage to ensure that ATSIC and other relevant Indigenous peak bodies are brought fully into the consultation and negotiation loop, as a matter of priority.

These are significant issues that must be addressed. The Steering Committee framework though, must be acknowledged as a significant development. It is in fact the only positive form of monitoring and evaluation that the Government has provided for practical reconciliation. The overarching concern however is that if constructed and too narrowly focused on practical reconciliation, to the

exclusion of other important factors it could be co-opted as a political tool for reinforcing and legitimising what is ultimately a limited approach to Indigenous issues.

Care must be taken, however, to ensure that the Steering Committee framework is not seen as a panacea or as intended to fulfill the monitoring role across the full range of issues. In my view, the greatest deficiency in this process is not the draft indicative framework *per* se but the fact that it currently exists in isolation from any other form of performance monitoring, particularly on identifying progress on important goals such as capacity building and governance reform, as well as identifying the unmet need and accordingly whether policy approaches are moving forward or in fact regressing.

This raises significant challenges for ATSIC and peak Indigenous organisations in housing, health and other areas. There needs to be attention to understanding the implications of the indicative framework, as well as the Productivity Commission's report on government services, so that this significant statistical material can be used to underlie policy formulation and debate.

As part of its current restructure and review processes, ATSIC should consider whether at the national and regional level they have the capability and capacity to conduct the level of statistical analysis and research that is needed to capitalise on these developments.

The proposed framework also has implications for organisations such as the Centre for Aboriginal Economic Policy Research and the Menzies School of Health Research to name but two. Those organisations with the expertise to analyse this material should prioritise its use to ensure that their output is as policy relevant as possible.

The Steering Committee's framework is a significant institutional development in measuring progress for Indigenous peoples. It is a partial measure, however, and needs to be built on with other processes and analysis.

Chapter 5

Indigenous women and corrections – *A Landscape of Risk*

The *Social Justice Report 2001* reported on the situation of Indigenous prisoners in the decade following the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The report noted that the ten years since the Royal Commission have seen a rise in the adult prison population and an even sharper rise in numbers of Indigenous peoples in custody. While Indigenous men face unacceptably high rates of incarceration, the rate for Indigenous women is significantly higher[1] and is rising at a faster rate.[2] The *Social Justice Report 2001* noted that this situation is 'profoundly distressing' and yet 'Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs'.[3]

This chapter follows up on these concerns and provides an overview of issues facing Indigenous women in corrections. It is broadly divided into four sections – an overview of the status of Indigenous women in corrections; an analysis of policy debates about Indigenous women in corrections and the growing recognition of the need to identify intersections of racism and gender discrimination; an overview of the specific issues faced by Indigenous women in corrections; and an overview of developments and proposals for more appropriately addressing Indigenous women's needs in correctional systems.

Indigenous women face an unacceptably high risk of incarceration in prisons across Australia. The rising rate of over-representation of Indigenous women is occurring in the context of intolerably high levels of family violence, over-policing for selected offences, ill-health, unemployment and poverty. Studies of

1 Kerley, K and Cunneen, C, 'Deaths in Custody in Australia: The Untold Story of Aboriginal and Torres Strait Islander Women' in *Canadian Journal of Women and the Law* vol 8, no 2, 1995, p533.
2 Cameron, M, 'Women Prisoners and Correctional Programs' No 194, Australian Institute of Criminology, Feb 2001, p1.
3 *Social Justice Report 2001*, p15.

Indigenous women in prison reveal experiences of life in a society fraught with danger from violence. The consequences to the community of the removal of Indigenous women are significant and potentially expose children to risk of neglect, abuse, hunger and homelessness. Indigenous women also serve comparatively shorter sentences, suggesting a general failure to employ the principle of imprisonment as a last resort. Once imprisoned, recidivism statistics also indicate that Indigenous women are at greater risk of returning to gaol. Despite these factors, very little research has been conducted to explain the causes of it.

The reports of the Royal Commission also focus almost exclusively on the circumstances of Aboriginal men. Of the 99 deaths investigated, only 11 were the deaths of women, and none of the recommendations of the Royal Commission specifically addressed the circumstances of Indigenous women.[4]

Amid this bleak picture, there has been a growing awareness in recent years of the specific cultural needs of Indigenous women in corrections. It is beginning to be accepted that while much offending behaviour is linked to social marginalisation and economic disadvantage, the impact of non-economic deprivation, such as damage to identity and culture, as well as trauma and grief, have a significant relationship to offending behaviour. Effective crime prevention and pre- and post-release programs are beginning to recognise the need for Indigenous self-determination and participation, with a focus on cultural restoration and healing.

A statistical overview of Indigenous women in corrections

This section provides an overview of what is known about Indigenous female prisoners over the past decade. There is limited statistical data currently collected and limitations on the data are noted where relevant. This section considers changes in rates of incarceration over the past decade; recidivism statistics and descriptions of the type of offences committed by Indigenous women; sentencing patterns for Indigenous women; as well as a profile of the characteristics of the Indigenous women prison population.

a) Rates of incarceration of Indigenous women

Indigenous women are currently incarcerated at a rate higher than any other group in Australia.

The decade since the Royal Commission into Aboriginal Deaths in Custody has seen an increase in the overall national prison population of 28 percent.[5] By 2001, all States and Territories had recorded increases in prison numbers varying from 116 per cent in Queensland to 25 per cent in New South Wales.[6]

4 The RCIADIC did, however, receive evidence and provided analysis and instructive comment on the treatment of Indigenous women.
5 Australian Bureau of Statistics, *Prisoners in Australia, Summary of Findings,* Canberra, 2002.
6 *ibid.*

During this time, incarceration rates for women have increased at a more rapid rate than for men. The population of sentenced men incarcerated has increased from 12,429 in 1991[7] to 20,960 in 2001.[8] This represents a 68.7% increase. At the same time, the female prison population increased from 607 to 1,498.[9] This represents an increase of 147% from 1991.[10] In 1991, women represented 5 per cent of the proportion of all Australian prisoners. In 2001, this proportion had increased to 7 percent.[11]

The increase in imprisonment of Aboriginal and Torres Strait Islander women has been much greater over the period compared with other women.[12] The number of Indigenous women incarcerated has increased from 104 in 1991[13] to 370 Indigenous women in 2001.[14] This represents an increase of 255.8% over the decade. Similarly, rates of over-representation of Indigenous women are higher than for Indigenous men. For the June 2002 quarter, Indigenous women were over-represented at 19.6 times the non-Indigenous rate compared to Indigenous men at 15.2 times.[15]

Causes of the increases are complex and vary between jurisdictions. In New South Wales, the Select Committee into the Increase in Prison Population found in 2001 that the most significant contributing factor was the increase in the remand population. There was no evidence to suggest that an in increase in actual crime accounted for the prison increase, although increases in police activity and changes in judicial attitudes to sentencing were also important.[16]

The following three tables highlight different aspects of these incarceration rates. Table 1 shows the number of people incarcerated in Australia in the period 1991 to 2001 for men and women, and on the basis of Indigenous identity.

7 Cameron, M, *op cit*, p1. Note: differences in methods of statistical collection explain the difference in measures provided in the tables and text in this section.
8 ABS, *op cit,* Table 2.
9 *ibid.*
10 This rate for women is inflated by the inclusion of rates of incarceration of Indigenous women in the statistical calculation.
11 Australian Bureau of Statistics, *op cit.*
12 Cameron, M, *op cit,* p1.
13 *ibid.*
14 ABS, *op cit,* Table 3.
15 See Table 3 below.
16 Cunneen, C, NSW *Aboriginal Justice Plan – Discussion Paper*, 2002, p26.

Table 1: Changes in Incarceration in Australia between 1991-2001[17]

As at 30 June	All Prisoners	Males	Females	Indigenous Total Prisoners	Indigenous Males	Indigenous Females
1991	15021	14300	721	2163	n.a	n.a.
1992	15559	14797	762	2245	n.a	n.a.
1993	15866	15105	761	2411	n.a.	n.a.
1994	16944	16107	409	2800	2642	158
1995	17428	16593	835	2985	2821	164
1996	18193	17221	972	3273	3067	206
1997	19128	17987	1095	3580	3347	233
1998	19906	18778	1128	3750	3489	261
1999	21538	20173	1365	4307	3975	332
2000	21714	20329	1385	4095	3787	308
2001	22458	20960	1498	4445	4075	370

Table 2 distinguishes between rates of incarceration of Indigenous and non-Indigenous women and men expressed as rates of imprisonment per 100,000 of population. It reveals a steady rise in the over-representation of Indigenous women over the decade, to the point that by 1999 they were 17.5 times more likely to be incarcerated than non-Indigenous females. It also reveals that the rate (per 100,000) of Indigenous women in custody is approaching that of non-Indigenous men.

Table 2: Sentenced prison population – rate per 100,000 by Indigenous status[18]

	1991	1992	1993	1994	1995	1996	1997	1998	1999
Total women	607	638	649	718	709	816	919	939	1,124
Rate per 100,000[19]	9.2	9.6	9.6	10.5	10.2	11.6	12.9	12.9	15.3
Total men	12,429	13,067	13,334	14,280	14,720	15,071	15,603	16,179	17,208
Rate per 100,000	194	201.1	202.9	214.6	218.3	220.3	224.8	229.6	240.5
Non-ATSI women	503	522	538	583	570	638	722	722	851
Rate per 100,000	7.8	7.9	8.1	8.7	8.3	9.2	10.3	10.1	11.8
ATSI women	104	116	111	135	139	178	197	217	273
Rate per 100,000[20]	103.9	112	104.8	124.6	125.5	158.9	166.6	173.7	206.5

17 Hassing, C, *Indigenous Female Prisoner Profiles,* 2002, unpublished, commissioned by the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, p9.
18 Cameron, M, *op cit,* p1.
19 Figures taken from the *Estimated Resident Population by Sex and Age, State and Territories of Australia* series (ABS cat. no. 3201.0). Cameron, M, *op cit*, p1.
20 The ATSI population is based on numbers received directly from the ABS, and uses the high level estimates as seen in ABS (1996). Cameron, M, *ibid*.

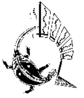


Table 3 shows over-representation rates on a state-by-state basis. New South Wales, Western Australia and South Australia have the highest over-representation rates.

Table 3: Indigenous imprisonment rates by state / territory – June 2002[21]

	Indigenous			All Inmates			Over-representation rate		
	Male	Female	Total	Male	Female	Total	Male	Female	Total
NSW	3852.4	379.3	2044.6	292.6	19.6	153.5	15.6	25.8	15.9
Victoria	2087.1	206.0	1137.4	180.0	13.1	94.2	12.1	16.5	12.6
Queensland	327.2	247.6	1723.4	336.1	20.8	175.8	12.7	15.5	12.6
SA	3452.1	259.2	1744	246.3	14.4	127.8	16.4	21.5	16.0
WA	4726	400.8	2493.6	364.7	26.1	194.1	18.3	24.1	18.2
Tasmania	n.p.	n.p.	678.8	229.9	19.7	121.9	n.p.	n.p.	6.3
NT	2751.4	76.7	1384.4	879.7	29 47	4.9	7.4	6.3	6.8
ACT	n.p.	n.p.	n.p.	46.8	2	23.8	n.p.	n.p.	n.p.
Australia	**3421**	**275.6**	**1790**	**276.4**	**18.2**	**144.8**	**15.2**	**19.6**	**15.2**

Other statistical reports also tell us the following about Indigenous women in corrections:

- In New South Wales, Indigenous women represented 30 percent of the total female population in custody in October 2002[22] despite constituting only 2 percent of the female population of the state.[23]
- In Queensland, the growth of Indigenous female offenders in Queensland secure and open custody over the five year period from 1994-1999 was 204 per cent, compared with an increase of 173 per cent for all female offenders in Queensland over the same period.[24] In February 2001, Indigenous women represented 28.2 per cent of the total female population in Queensland open and secure centres.[25]
- In Victoria, of the 4886 prisoners received into Victorian prisons in the 2000-01 period, only 539 were women.[26] Nevertheless, while female

21 'Corrective Services Australia', June Quarter 2002. Australian Bureau of Statistics, Catalogue No. 4512.0, n.p. – not published.

22 NSW Department of Corrective Services Research and Statistics Unit, *Indigenous Inmates Statistics Report,* 6 October 2002, p1.

23 Community Profile Series 2001 Census, Indigenous Profile, NSW, 2001, Australian Bureau of Statistics, Commonwealth of Australia, Canberra, 2002. Calculated from Table 1 02.

24 Aboriginal and Torres Strait Islander Women's Policy Unit of the Department of Corrective Services, Queensland, *Options for Diversion from Secure Custody for Indigenous Female Offenders,* May 2002, p8.

25 *ibid*, p7.

26 'Prisoner receptions by sex and race, 1996-97 to 2000-01' in *Statistical Report; Attachment One: Indigenous contact with the Criminal Justice System,* Indigenous Issues Unit, Department of Justice Victoria, 2002, p20.

representation is low overall, Indigenous women are over-represented,constituting 8% of all female prisoners.[27]

- In Western Australia, reception data[28] shows that for the period 1 July 2001 to 30 June 2002, Aboriginal women represented 51.7 per cent of all women received into prison[29] despite constituting 3.2 per cent of the female population of Western Australia.[30]
- In the Northern Territory, Indigenous women constituted 57 percent of the total female prison population[31] and 26 per cent of the female population of the Northern Territory.[32]

b) Recidivism rates among Indigenous women

A significant factor among the Indigenous female prisoner population is the high rate of recidivism. National statistical data indicates that nearly 3 in every 4 (76 percent) of all Indigenous prisoners had been previously imprisoned. This statistic replicates data collected in 2000.[33] In New South Wales, 'almost 85% of Aboriginal women in prison have previously been in custody compared with 71% of non-Aboriginal women'.[34] When the Aboriginal Justice Advisory Committee in New South Wales recently conducted interviews with Indigenous women in New South Wales prisons, 98 per cent of women had a prior conviction as an adult.[35] Table 4 shows recidivism rates for Indigenous compared to non-Indigenous women. It shows that recidivism rates are higher in all jurisdictions for Indigenous women.

27 Brenner, K, *Indigenous Women in the Victorian Prison System 2002: a snapshot,* Department of Justice, Victoria, June 2002, p4.

28 'Prison Census data records the information gathered from inmates in the institution on the nominated census day. Examination of quarterly prison statistics shows that numbers may fluctuate through throughout the year. Statistics based on reception data includes all prisoners received, and includes women who may serve short sentences and be absent on the census date.' Kerley, K and Cunneen, C, *op cit*, p536.

29 Department of Justice, Western Australia, 'Receivals (Including Recaptures following Escape) from 01/01/01 to 30/06/02'. The total number of women received for the period was 887. There were 459 Indigenous women received in the period. Twice as many women aged between 20-35 were received into WA prisons than any other age group.

30 Community Profile Series 2001 Census, Indigenous Profile, Western Australia, 2001, Australian Bureau of Statistics, Commonwealth of Australia, 2002. Calculated from Table 1 02.

31 Northern Territory Correctional Services, *Annual Report 2000-2001,* Northern Territory Government, Government Printer of the Northern Territory, 2001, p73.

32 Community Profile Series 2001 Census, Indigenous Profile, Northern Territory, 2001, Australian Bureau of Statistics, Commonwealth of Australia, 2002. Calculated from Table 1 02.

33 Australian Bureau of Statistics, *op cit*. 'Previous imprisonment rates are an indication of recidivism, although offender may re-enter prison for reasons unrelated to a prior offence.' Cameron, M, *op cit*, p2.

34 Cunneen, C, NSW *Aboriginal Justice Plan – Discussion Paper*, 2002, p25.

35 Lawrie, R, Draft of *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody* New South Wales Aboriginal Justice Advisory Council, 2002, p25.

Table 4: Sentenced women prisoners known to be previously imprisoned in Australian states in 1999[36]

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
Sentenced Non-ATSI women	380	38	171	45	94	15	7	1	851
Previously Imprisoned	155	82	78	24	30	6	0	0	375
-(%)	(40.8)	(59.4)	(45.6)	(53.3)	(31.9)	(40)	(0)	(0)	(44.1)
Sentenced ATSI women	86	6	62	10	92	2	15	0	273
Previously Imprisoned	62	5	39	9	64	1	9	0	189
-(%)	(72.1)	(83.3)	(62.9)	(90)	(69.6)	(50)	(60)	0	(69.2)

Preliminary findings of a Victorian study on the prison population found a rate of re-offending of 71 percent among Indigenous women compared to a rate of 61 percent average in 2000 among the female population. The report noted:

> The emerging pattern amongst this group of offenders is that they have had a history of contact with the criminal justice system throughout all of their adult lives. Such a pattern appears to be directly linked to the fact that the majority of women suffered from some sort of long term drug addiction that required constant funding.[37]

Statistics in relation to previous offending are a useful indication of a prison's achievements in rehabilitating offenders,[38] and these figures suggest a need to focus on the women prisoners offending and background with a view to effective interventions.[39] Development and support of effective programs for Indigenous women is clearly a priority to reduce rates of re-offending. The investigation of offences and sentencing patterns should be supported in order to clearly identify patterns which result in repeated use of custodial options.

The pattern of recidivism or repeat offending contributes to the trend of increasing over-representation of Indigenous women. Investigation of the causes and conditions which place Indigenous women at risk of repeated imprisonment is a pressing concern.

c) Types of crime committed by Indigenous women

There are some limitations to the statistical information on crimes committed by Indigenous women. Prison census data, for example, records prisoners on the date of the census. Prisoners who served short sentences and are no longer

36 National Prison Census 1999 (ABS) unit record file.
37 Brenner, K, *op cit*, p13.
38 Cameron, M, *op cit*, p2.
39 *ibid*.

present on the census day are not recorded. Therefore, these figures underestimate Indigenous women coming through the prison system on shorter sentences for more minor offences.

Prison census data records the most serious crime for which an inmate is convicted. Therefore, other offences which might contextualise the criminal behaviour are generally not recorded. For instance, a person in possession of drugs at the time of an armed robbery will be recorded as an armed robber. The primary offence is recorded, but an apparent drug addiction is not represented in the figures.[40]

Categories of criminal behaviour influence the image of criminal conduct provided by statistical records. For example, a broad range of events may be referred to as 'escape', 'assault' or 'fraud'. The word 'escape' may refer to a planned violent break out from a gaol, but it most commonly refers to the action of prisoners who are serving the end of their sentence in a minimum security facility, and who leave prior to the end of their sentence. Another example is 'assault', which conjures up images of a violent attack, but it may equally refer to less violent forms of physical contact or generating the fear of physical contact. Fraud may refer to complex deceptions, but it may also refer to the conduct of omitting to inform Centrelink of a de-facto relationship while claiming a supporting parent's pension.[41]

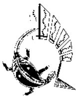
The importance of these distinctions is not intended to minimise criminal behaviour, but rather to signal the range of incidents and cultural contexts from which the statistical data is derived.

Statistics on crimes committed by Indigenous women indicate that there is a considerable degree of variation in criminal behaviour across jurisdictions and within regions. Table 5 shows rates of commission of particular crimes by Indigenous women across Australia between 1994 and 2001.

Table 5: Most Serious Offence, Indigenous Women Prisoners, Australia 1994-2001[42]

	1994 No	1995 No	1996 No	1997 No	1998 No	1999 No	2000 No	2001 No	1994-2001 % Change
Homicide	18	17	17	25	28	30	33	36	100
Assault and Related	40	39	42	53	48	91	69	91	127
Sex Offences	1			1		2	3	1	
Robbery	10	16	29	25	27	29	43	54	440
Extortion				1		1	1	4	
Break and Enter	32	24	28	39	45	43	42	51	59
Fraud	8	9	9	12	18	18	9	12	50
Theft and Related	16	20	32	30	32	28	37	36	125

40 *ibid*.
41 Telephone consultation, 5 December 2002.
42 Source: ABS, Prisoners in Australia, National Prison Census, 1994-2001. Tabulated by Chris Cunneen.



Property Damage	4	7	4	7	3	2	4	9	125
Justice Procedures	16	18	25	23	35	49	30	38	137
Weapons				1				1	
Good Order	2	1	2	3	5	11	6	4	100
Drugs	5	7	6	3	3	7	6	11	120
Driving and Related	3	5	10	10	16	20	22	14	366
Other	3	1	2		1	1	3	8	166
Total	**158**	**164**	**206**	**233**	**261**	**332**	**308**	**370**	**134**

This table shows the various categories of offences for which Indigenous women were in prison at the time of the census. While underestimating the numbers of women serving short sentences for minor offences, the table shows a steady and significant increase in most categories of offences. Thus, there were 100% more Indigenous women in prison for homicide related offences in 2001 than 1994, 127% more for assault and related offences, 440% more for robbery, and so on.

The increases were reasonably comparable across many offence categories, although of particular significance has been the increase in imprisonment for robbery offences, which outstripped all other changes. Imprisonment for fraud and break and enter convictions, although increasing over the period, did so less significantly than other categories of crime.

The rise in robbery offences clearly requires investigation to determine factors contributing to this increase. In a recent study of Indigenous women in prisons in Victoria, property and robbery offences were by far the most commonly committed with a significant increase in robbery offences.[43] It was noted that robbery 'offences appeared to be directly linked to long term drug use'.[44]

Nationally, Indigenous women comprise nearly 80% of all cases where women are detained in police custody for public drunkenness.[45] Similarly, by comparison to non-Indigenous women, Indigenous women are more likely to be incarcerated for violence.[46] In a number of jurisdictions there has been a rise in the numbers of Aboriginal women arrested and imprisoned for assaults. In Western Australia, 'Aboriginal females were over thirty six times more likely to be arrested for such offences than non-Aboriginal females'.[47] In Queensland, 'Indigenous female offenders are often incarcerated for violent offences and of these assault offences comprise the greatest proportion'.[48] Recent consultations by the Aboriginal and

43 Brenner, K, *op cit*, p11 .
44 *ibid*, p13 .
45 Cunneen, C, *Conflict, Politics and Crime Aboriginal Communities and the Police*, Allen & Unwin, Sydney, 2001, p165.
46 *ibid*, p167.
47 Fernandez, J A, and Loh, N S N, *Crime and Justice Statistics for Western Australia: 2001,* University of Western Australia Crime Research Centre, November 2002, p44.
48 Aboriginal and Torres Strait Islander and Women's Policy Units of the Department of Corrective Services, Queensland, *Options for Diversion from Secure Custody for Indigenous Female Offenders*, May 2002, p4.

Torres Strait Islander and Women's Policy Units in Queensland found that community groups and correctional personnel expressed the need to address the links between alcohol use and violence by women.[49]

Statistics on drug and alcohol related offences vary between jurisdictions. There has been a past general trend of low numbers of Indigenous people imprisoned for drug offences. In some jurisdictions this appears to be changing. Survey data from New South Wales and Victoria indicate wide use of drugs including narcotics. In a recent Victorian study, 'the offending behaviour of twelve of the fourteen women was directly linked to their drug addiction'.[50]

In a recent survey the New South Wales Aboriginal Justice Advisory Council's Research Teams asked:

> … Aboriginal women in custody whether they thought that alcohol and/ or drugs were a contributing factor in their offending behaviour and current imprisonment. The figures show that four out of five Aboriginal women in custody believed that alcohol or drugs was an underlying issue in their offending with approximately 80% of participants responding in the affirmative.[51]

In further discussions the Researchers asked Aboriginal women about this relationship. One woman who was a single mother to two children said that 'the reason why I am in here is because I assaulted someone…I was on speed at the time, and if I wasn't on that, then I wouldn't have done the assault.' The same woman had three prior convictions as an adult and mentioned that the first time she had been convicted was 'on fraud charges…I was twenty and got six months…the circumstances behind the offence was drugs...to pay for somewhere for us to live'.[52]

This report of the New South Wales Aboriginal Justice Advisory Council into the needs of Aboriginal women in custody also found that:

> Approximately 68% of Aboriginal women were on drugs at the time of the offence. 14% were under the influence of alcohol and 4% were on both drugs and alcohol at the time of committing the offence. At least 18% of Aboriginal women in custody were not under the influence of drugs or alcohol at the time of offending, however two of those women said they were heroin users at the time of the offence were not under the influence of drugs.[53]

In Queensland, however, only 2 per cent of Indigenous women were imprisoned for drug offences compared to 15 per cent of the non-Indigenous female prison population.[54] The use of illicit drugs is particularly low in north Queensland.[55]

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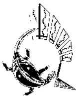
49 *ibid*, p23.
50 Brenner, K, *op cit*, p11.
51 Lawrie, R, *op cit*, pp29-30.
52 *ibid*, p30.
53 *ibid*, p29.
54 Falk, P, *Criminal Justice and Indigenous Incarceration,* unpublished, p14. Based on statistics from 30 June 1998.
55 Aboriginal and Torres Strait Islander and Women's Policy Units of the Department of Corrective Services, *op cit*, p16.



Instead, 'alcohol is often the drug of choice for Indigenous female offenders and a contributing factor to the offence for which they are incarcerated'.[56]

A further significant factor in the incarceration of Indigenous women is fine defaulting. Different jurisdictions deal with fine default in different ways, with varying impacts on Indigenous communities. It is important that the use of fines as a non-custodial option does not translate into a prison sentence for fine default. Alternatives for fine default must be developed to ensure that already financially disadvantaged people are not burdened with impossible sanctions.[57]

d) Over-policing

A further concern about Indigenous women's contact with criminal justice processes relates to the potential over-policing of Indigenous women. As Chris Cunneen notes:

> Surveys of people held in police custody regularly reveal that Aboriginal and Torres Strait Islander women comprise around 50 per cent of all women taken into police custody in Australia… The 1995 Police Custody Survey revealed that Indigenous women were 58 times more likely to be held in police custody then non-Indigenous women; by comparison Indigenous men were 28 times more likely to be held in police custody than non-Indigenous men.[58]

In NSW, 'Aboriginal people are over represented generally among persons arrested by police'.[59] In Western Australia:

> Aboriginal women comprise three-quarters of all women held in police custody and in the Northern Territory the proportion is close to 90 per cent of those detained. The police custody survey shows that women in general are detained in police custody proportionately more for offences of public disorder than are men, and that Indigenous women are particularly susceptible to being detained.[60]

Studies in WA also indicate that once a woman has been arrested it is very likely she will be arrested again. One WA study showed an 85% likelihood that a woman would be arrested again, after her first arrest.[61]

56 *ibid*.
57 For instance, an inquiry into fines and fine default in each state might establish whether the recovery of debt, is 'being won at the cost of discrimination against the poorest individuals and families in community.' Vinson, T, *Comparison of the Sentencing of Indigenous and non-Indigenous Prisoners in New South Wales,* Uniya Social Justice Centre, November 2002, p50. Sobering-up shelters, incremental repayment schemes for fines, investigation of discriminatory policing of Indigenous people's use public space could also provide some benefits.
58 Cunneen, C, *Conflict, Politics and Crime Aboriginal Communities and the Police*, *op cit*, p165.
59 Fitzgerald, J and Weatherburn, D, 'Aboriginal Victimisation and Offending: The Picture from Police Records', *Crime and Justice Statistics,* December 2001, NSW Bureau of Crime Statistics and Research, Bureau Brief, p4.
60 Cunneen, C, *Conflict, Politics and Crime Aboriginal Communities and the Police*, *op cit*.
61 *ibid*.

e) Sentencing patterns for Indigenous women

Indigenous women tend to receive shorter sentences than non-Indigenous women. General rates of over-representation tend to indicate that Indigenous women are not being provided with non-custodial sentencing options. Shorter sentences also appear to be linked to high rates of incarceration for public order offences.

As Chris Cunneen notes in relation to developments in the decade since the Royal Commission:

> Indigenous women are invariably serving short sentences, many of which relate to fine default and to convictions for public order offences… Although the offence may be relatively minor, such as swearing in public or drinking alcohol in public, the full impact of the intervention may well result in imprisonment in a maximum security prison, particularly if fines imposed by the court for minor offences are not paid.
>
> A recent NSW report found that a greater proportion of Aboriginal women were imprisoned for minor offences than non-Aboriginal women, imprisonment arising from the failure to pay fines for a range of minor traffic and public transport offences, such as disobeying traffic signs, driving with an unrestrained child, travelling on a bus with an incorrect ticket and avoiding railway fares.
>
> In Western Australia, some 20 percent of the offences for which Aboriginal and Torres Strait Islander women were gaoled related to public disorder, including disorderly conduct, drunkenness and other good order offences. Less than 3.5 per cent of sentenced non-Indigenous women were in prison for similar offences.[62]

A recent study of deaths in custody found that a large proportion of women who died in custody had been detained for good order offences and that over half of the offences related to public drunkenness. Similarly:

> the likelihood of detention for good order offences was greater for Indigenous women. One out of two Indigenous women and 28 percent of all non-Indigenous women who died in custody, were detained for such offences.
>
> The *Final Report* of the Royal Commission into Aboriginal Deaths in Custody (1991) noted the high incidence of good-order offences in the criminal histories of the women whose deaths it investigated. Similarly, in 1995, the National Police Custody Survey also found that Indigenous people were held in custody at higher rates than other Australians and that detention for public drunkenness was a serious problem among Indigenous women in particular.[63]

Despite concerns about connections between public drunkenness and incarceration expressed in the Royal Commission, Queensland, Tasmania and

62 *ibid*, p167.

63 Collins, L, and Mouzos, J, *Deaths in Custody: A Gender-specific Analysis,* Trends and Issues in criminal justice, No 238, Australian Institute of Criminology, Canberra, September 2002, pp5-6.

Victoria have yet to decriminalise public drunkenness.[64] It has been noted, however, in a Victorian study that Indigenous people have expressed concerns that decriminalisation of public drunkenness would not produce a fall in arrests for good order offences:

> They believed that if public drunkenness were no longer an offence, police would simply use other public order offences and resisting arrest as a means for detaining or arresting Koorie people.[65]

Payne points to another problem arising out of the decriminalisation of public drunkenness, in the absence of accessible, effective centres to house intoxicated people:

> By not providing alternatives to police cells, such as sobering-up centres or detoxification units for detaining those excessively affected by alcohol, one answer has been to take them home. It is often the wives, mothers and grandmothers who are left to deal with the consequent violence and mental and physical problems.[66]

There is currently discussion about abolishing shorter sentences to imprisonment in Western Australia in order to deal with Indigenous over-representation in custody.

The Western Australian Government has recently introduced a bill to Parliament which abolishes all sentences of 6 months or less.[67] This action was taken because the Western Australian Government was of the view that 'short prison sentences serve no useful purpose and that it is more appropriate to manage such offenders under a community sanction'.[68]

The bill is intended to reduce imprisonment rates for Indigenous people which were described by the Minister as a national disgrace. Western Australia had previously proscribed three month sentences, and required judicial officers to provide written reasons as to why no other form of punishment was appropriate, where they sentenced offenders for six months of less. The Government sees the abolition of sentences of six month or less as a natural progression.[69] The bill would also reverse a Court of Criminal Appeal decision in 1998, which ruled that non-custodial options could not be imposed for imprisonable offences. If the bill is passed this may also contribute to a reduction in rates of imprisonment of Indigenous women for driving offences in Western Australia.

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64 *ibid*. See also *Drugs and Crime Prevention: Inquiry into Public Drunkenness, Final Report,* Drugs and Crime Prevention Committee, Parliament of Victoria, June 2001 Government Printer for the State of Victoria, Melbourne, 2001.

65 Drugs and Crime Prevention Committee, *op cit.*

66 Payne, S, 'Aboriginal Women and the Law', in *Women and the Law*, Weiser Easteal, P and McKillop, S (Eds), *Proceedings of a conference held 24-26 September 1991*, Australian Institute of Criminology, Canberra, 1993, p69.

67 The *Sentencing Legislation Amendment and Repeal Bill* passed the House of Assembly and was read in the Legislative Council on the 3 December 2002. The bill will be considered by Council when parliament resumes on 25 February 2003.

68 Stephens, T, Second Reading Speech, *Hansard*, Parliament of Western Australia, 3 December 2002.

69 *ibid*.

In NSW it is considered that a similar move would have a significant impact on Indigenous imprisonment rates. As Chris Cunneen notes:

> Aboriginal men and women tend to be more concentrated among those serving sentences less than five years than non-Aboriginal people…Although the abolition of six month sentences would only provide for 82 less Aboriginal male prisoners and 12 less Aboriginal women prisoners on a particular day, we could expect that the overall significance would be considerably greater on the number of Aboriginal people entering the prison system. Other research has suggested that if Aboriginal people given sentences of six months or less were given non-custodial sanctions instead, then the number of Aboriginal people sentenced to prison would be reduced by 54% over a twelve month period.[70]

f) Characteristics of Indigenous women who are imprisoned

In general Indigenous women in gaol are slightly younger than non-Indigenous women. The majority are aged between 20 and 30 years old. There are no national figures for Indigenous women prisoners with children, but a majority of incarcerated women are mothers. In New South Wales, 54 per cent of incarcerated Indigenous women are single and 86 per cent have children. [71] In Western Australia, 70 percent of Indigenous women had children.[72] In Victoria, 80 percent of incarcerated Indigenous women were mothers, most with young children.[73]

Indigenous women also often enter custody with poor physical or mental health. A recent Queensland report noted:

> In general Indigenous female offenders entering custody have a poor health profile. For example, Indigenous female offenders report higher rates of sexually transmitted diseases, higher rates of current pregnancies, higher rates of respiratory conditions and diabetes and lower rates of contraception use than non-Indigenous women… Mental health problems are reported in similar proportions both Indigenous and non-Indigenous women…Domestic violence is identified as a health and safety risk for Indigenous female offenders. Indigenous female offenders represent a significant proportion of female offenders in incidents of self mutilation (40% of all reported incidents for the year ending June 1999).[74]

A recent Victorian study also found that the majority of women incarcerated had dealt with or were dealing with serious psychiatric or suicide issues.[75]

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70 Cunneen, C, NSW *Aboriginal Justice Plan – Discussion Paper*, *op cit*, p27 citing Baker, J, 'The Scope for Reducing Indigenous Imprisonment Rates' *Crime and Justice Bulletin No 55,* New South Wales Bureau of Crime Statistics and Research, Sydney 2001.

71 Lawrie, R, *op cit*, p53.

72 Western Australian Department of Justice, Community and Juvenile Justice Division, Planning, Policy and Review, *Profile of Women In Prison,* June 2002, Table 5.8, p32.

73 Brenner, K, *op cit*, p21.

74 Aboriginal and Torres Strait Islander Women's Policy Unit of the Department of Corrective Services, Queensland, *op cit,* p16.

75 Brenner, K, *op cit*, p11.

In Queensland, Indigenous women are 'over-represented in 'at risk' statistics, admissions to Crisis Support Units and self-mutilation incidents'.[76]

Research in Victoria has revealed that many women self harm soon after release from prison. This includes drug overdose & other types of self harm. In Western Australia, a recent study noted that 'Self-harming behaviour (such as cutting oneself) is more prevalent amongst female prisoners, as compared to their male counterparts. The majority of women (84%) have not self-harmed since their imprisonment. A higher proportion of Aboriginal women (22%) than non-Aboriginal women (13%) had self-harmed since entering prison'.[77] The rates and proportions of women who have self-harmed since imprisonment is shown below in Table 6.

Table 6 Western Australia: Female prisoner respondents: women who have self-harmed since imprisonment; October/November 2001.

Self-harmed since imprisonment	Non-Aboriginal Count	%	Aboriginal Count	%	Total Count	%
Had self-harmed	10	13	11	22	21	16
Had not self-harmed	68	87	40	78	108	84
Total[78]	**78**	**100**	**51**	**100**	**129**	**100**

When asked what led the women to self-harm or attempt suicide the respondents indicated that 'previous abuse, grief and loss, imprisonment and sentencing, family/relationship problems, isolation (particularly from family), depression, stress and a sense of hopelessness were the most common factors'.[79]

Indigenous women are victims of a complex frame of dynamics upon their lives including violence, poverty, trauma, grief, loss, cultural and spiritual breakdown. There is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives. A recent NSW study stated:

> The relationship between Aboriginal women and violence also highlights how the separation between 'victim' and 'offender' is not clear at all. In reality many Aboriginal people in the criminal justice system are both offenders and victims, for example, some 78% of Aboriginal women in prison have been victims of violence as adults. More than four in ten Aboriginal women in prison were victims of sexual assault as an adult (44%).[80]

76 Aboriginal and Torres Strait Islander Women's Policy Unit of the Department of Corrective Services, Queensland, *op cit*, p4.
77 Western Australian Department of Justice, Community and Juvenile Justice Division, *op cit*, p19.
78 Note: 5 non-Aboriginal and 6 Aboriginal women did not respond to the survey.
79 Western Australian Department of Justice, Community and Juvenile Justice Division, *op cit*.
80 Lawrie, R, *op cit*, p41.

In NSW, Aboriginal women are over represented as victims of violent crime. In comparison to a NSW non-Indigenous woman, an Aboriginal woman is:

- Four times more likely to be murdered;
- More than twice as likely to be the victim of sexual assault, or sexual assault against children;
- Four times more likely to be a victim of assault;
- Seven times more likely to be a victim of grievous bodily harm.[81]

Consistent with this, in Western Australia 67 percent of Indigenous women incarcerated in October/November 2001 reported having experienced abuse as children or adults.[82]

Accompanying these factors is a strong argument that Aboriginal women receive poor responses from police to complaints about violence and other disturbances.[83] One reason suggested for under-policing in relation to alleged assaults is a perception that family violence is part of Aboriginal culture or a 'tribal norm'.[84] Another connected reason is the view that Aboriginal women are undeserving of police protection.

In 2001, HREOC consulted with Indigenous women in rural NSW about their experiences with police. They stated:

- 'Rapes, bashings and sexual assault are always overlooked – instead people want to focus on the crime in the town that sees our kids put on death row.'
- 'The police do a bad job – they have a hands off approach, they will see a fight and just drive off in the other direction.'
- 'The police do nothing in this town, they just drive, stand by and watch people fighting.'
- 'The police do no community consultation and do not come to any of our meetings, including our working party meetings.'
- 'Police come to this town just to get their stripes.'
- 'There is one female police officer, however she wants nothing to do with women's issues – if you approach her because you've been bashed by your husband she does nothing. She is only interested in doing her job as a cop'.[85]

As Chris Cunneen notes:

> There are strong historical continuities in the nature of police responses to Aboriginal women. For instance the current allegations of police sexual abuse of Aboriginal women has a direct link with the sexual exploitation of Aboriginal women during earlier periods of colonisation. Similarly, the failure to take action against those responsible for violence against

81 Fitzgerald, J and Weatherburn, D, 'Aboriginal Victimisation and Offending: The Picture from Police Records', *Crime and Justice Statistics*, December 2001, NSW Bureau of Crime Statistics and Research, Bureau Brief, p2.
82 Western Australian Department of Justice, Community and Juvenile Justice Division, Planning, Policy and Review, *op cit*, p56.
83 Cunneen, C, *Conflict, Politics and Crime Aboriginal Communities and the Police*, *op cit*, p161.
84 *ibid*, p162.
85 HREOC Rural NSW Consultation, Thursday, 26 July 2001.

> Aboriginal women rests on a long tradition of seeing Aboriginal women and men as being undeserving of police protection – of being essentially outside the protection of the law. Thus policing *permits* violence against Aboriginal women.[86]

This stands in stark contracts to 'how police use their discretion to draw Aboriginal women into the criminal justice system for minor offences'.[87]

Judy Atkinson reports the following incident in Queensland which shows the complexity of policing and the burden which falls to Aboriginal women:

> A thirteen year old girl was recently raped in a small Aboriginal community. The child needed urgent medical attention because of her injuries. The State Police refused to take her to the nearest hospital which was 30 kilometres away. They would not investigate the assault, claiming it was the responsibility of the local Aboriginal Community Police. On the other hand, the Aboriginal Community Police said they did not have the power to conduct investigations of this nature and/or make arrests. Finally, an Elder woman was able to find a car and driver who was willing to drive her and the child into town to the hospital. There was a paralysis within the community to the child's urgent medical needs, as well as a paralysis in legal response to the criminal assault. This paralysis has links to the historical consequences of previous police inactivity on issues of Aboriginal interpersonal violence which they label as 'cultural'; the religious attitudes of missionaries in the community, which promote shame and denial that such things happen; and the closeness of family relationships in such small communities.[88]

Another aspect in the relationship between Indigenous women and police is the tendency for Indigenous women to be seen as criminals.[89] Indigenous women who seek assistance from police as victims of crime can be vulnerable to unsatisfactory treatment as a result.

Recent trends in incarceration also indicate that Indigenous women are increasingly gaoled for violent assaults, and some commentators suggest there is a relationship between violent behaviour by victims of violence. Carol La Prairie's investigations of similar statistics in Canada suggest that there are three ways Indigenous women living in violent situations may end up convicted of violence offences: 'they may retaliate with violence against abusive family members; they may resort to drug and alcohol abuse to escape abuse; or their victimisation may lead to the abuse or neglect of others'.[90]

Anecdotal evidence suggests increased arrest for violence is the result of Indigenous women who behave violently to protect or defend themselves, because they know that they would not receive police protection.

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86 Cunneen, C, *Conflict, Politics and Crime Aboriginal Communities and the Police*, *op cit*, p164.
87 *ibid*, p165.
88 Atkinson, J, 'A Nation Not Conquered' in *Indigenous Law Bulletin,* vol 3, at http://www.law.unsw.edu.au/centres/ilc/ilb/vol3/may/atkinson.html#commissions.
89 Cunneen, Chris, *op cit*, p175.
90 *ibid*, p167.

Indigenous scholars also argue that the violent responses to violence by Australian Indigenous women may be more structured than the retaliation La Prairie suggests.

Customary law punishments for violent attacks are practiced in many communities, often with the co-operation of the non-Indigenous legal system. In other communities, the term customary law punishment may not be used, but physical payback systems are generally used to settle a dispute or to right a wrong.[91] Women's violence may not always be so much unsystematic retaliation as it is implementation of payback or customary law.[92]

This is not an excuse for violence, but rather a way to understand the violence, to acknowledge the history which has shaped violent conduct and to recognise the need to incorporate cultural knowledge and traditional remedies into solutions for Indigenous women. Recognition of the causes of violence is crucial to developing solutions.

Policy debates about Indigenous women in corrections and human rights

While there are limits on the statistics that are available on Indigenous women in corrections, there is sufficient data to indicate serious problems underlying Indigenous women's contact with corrections. Historically, however, there has been little attention devoted to understanding these issues.

There is considerable diversity among Indigenous women. Identifying the specific causes of incarceration of the different groups will require further consultation, research and analysis. However, it is clear that the causes of the rise in rates of imprisonment of Indigenous women are complex and inter-related.

The reasons derive in part from a combination of the ongoing impact of colonisation on the culture, laws and traditions of Indigenous communities, poverty and other forms of socio-economic disadvantage. This manifests in many ways including alcohol and drug use, homelessness and violence. Research has identified a strong correlation between imprisonment of Indigenous women and the experience of sexual assault and separation from family.[93] The impact of alcohol related crime, and increasingly in some jurisdictions, drug related crime requires further investigation.

Poverty and disadvantage are widely recognised indicators for offending behaviour.

Although further research is needed to confirm the links, Cunneen notes the correlation between the highest rates of imprisonment of Indigenous people in the most disadvantaged areas of New South Wales. The ATSIC Murdi Paaki region (in western NSW) has the highest rate of matters proven before the local courts. Murdi Parki is also the ATSIC region classified as most disadvantaged in New South Wales. Kamilaroi region has the second highest rate of Aboriginal

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91 Consultation with Indigenous woman, 5 December 2002.

92 Consultation with Indigenous woman, 6 December 2002.

93 Atkinson, J, 'Violence Against Aboriginal Women' in *Aboriginal Law Bulletin,* vol 2, No 46, 1990 and Lawrie, R, *op cit*.

people appearing for local court matters and is the second most disadvantaged ATSIC region in New South Wales.[94]

In 2000, the Committee against Torture considered Australia's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee recommended that:

> The State party continue its efforts to address the socio-economic disadvantage that, inter alia, leads to a disproportionate number of Indigenous Australian coming into contact with the criminal justice system.[95]

The International Covenant for Economic, Social and Cultural rights provides for the progressive realisation of rights to work, housing, food, clothing, health, social security and education. In 2000 the Committee considered Australia's compliance with the Covenant and commented on the disadvantage faced by Indigenous people:

> The Committee expresses its deep concern that, despite the efforts and achievements of the State party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education…
>
> The Committee encourages the State party to pursue its efforts in the process of reconciliation with Australia's indigenous peoples and its efforts to improve the disadvantaged situation they are in.[96]

A further factor for the high incarceration rates is the frequency of arrest of Indigenous women and the frequent use of custodial sentences rather than non-custodial options.

While the link of incarceration to factors relating to the impact of colonisation was graphically illustrated by the Royal Commission into Aboriginal Deaths in Custody, this has largely been applied to the experiences of Indigenous males. Indigenous advocate Sharon Payne has observed the lack of recognition of difference in representations of Aboriginal women in anthropological studies. In 1991 she noted:

> [I]f they appeared at all, [Aboriginal women] were portrayed as the passive victims of white and Aboriginal men alike, and Aboriginal men as the freedom fighter. Male social and psychological researchers unquestioningly refer to the compromising of traditional male roles with the domestic or welfare economy, while describing women as conforming more easily to the welfare identity, implying that there is no difference between Aboriginal and Anglo cultures at least in relation to women.[97]

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94 Cunneen, C, NSW *Aboriginal Justice Plan – Discussion Paper*, *op cit*, pp17-18.

95 Committee against Torture, *Concluding observations of the Committee against Torture: Australia*. 21/11/2000, A/56/44,paras.47-53(Concluding Observations/Comments)

96 E/C.12/1/Add.50. (Concluding Observations/Comments) Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000 paras 15 and 25.

97 Payne, S, *op cit*, p1.

The result has been an underestimation of the effect of colonisation on women, and a reluctance to understand and respond to its impact on Indigenous women.

These factors are compounded by structural issues in relation to effective research and development of responses to the needs of Indigenous women. Tracking national trends in crime and sentencing is impeded by the manner in which data is collected. In smaller jurisdictions such as the ACT and Tasmania, the actual numbers of Indigenous women from which the statistical data is derived is comparatively small, compared with the overall offender population. Statistical measures based on such small numbers may result in outcomes which appear disproportionate to the true conditions. It is for this reason that the ABS does not publish rates by sex for a number of the small States/Territories. This reduces the extent to which meaningful analysis can be undertaken.[98]

The outcomes of the Royal Commission into Aboriginal Deaths in Custody resulted in Indigenous status of prisoners being a mandatory data item for collection by corrections agencies at time of reception into custody. However, the statistical information provided to the ABS is calculated from data received from a number of sources, and the methods of data collection and uniformity of those methods is still seen as an area that can improve further. The ABS standard is for each person to self-identify based on a standard Indigenous status question. While overall prisoner data on Indigenous status is seen as robust, there are concerns that some information is being collected on the basis of the physical appearance of the subject rather than self identification.

These deficiencies in focusing on the specific situation of Indigenous women have been mirrored through the international human rights system where recognition of Indigenous women's identity and experience in human rights discourse is a relatively new development. The absence of this recognition in the international human rights instruments is a result of the way in which human rights were articulated in the post-war era of decolonisation. If the features of identity of Indigenous women or the human rights which attach to those features were considered at the time of discussion and drafting, it was not in any way as a distinct class of rights. Consequently, a catalogue of Indigenous women's rights must be constructed from the rights as they were expressed by the drafters at the time, and the comments and recommendations of the monitoring committees. The linking of these features of identity and classes of rights in order to accurately represent Indigenous and other peoples is described as intersectionality.

In a general sense, intersectionality refers to the connection between aspects of identity, such as race, gender, sexuality, religion, culture, disability and age. An intersectional approach asserts that aspects of identity are indivisible and discussing them in isolation from each other results in concrete disadvantage. 'Intersectional discrimination' refers to the types of discrimination or disadvantage that compound on each other and are inseparable. In terms of effective rights-based protection, those who dwell at the places of intersection of enunciated rights bear the greatest risk. Providing for people at the intersections means the creation of a more comprehensive system of rights.

98 For this information I am indebted to Robert Letheby of the Australian Bureau of Statistics. Consultation and correspondence of 17 December 2002.

Intersectional discrimination is not understood by merely adding together the consequences of race, class and gender discrimination. That is, an Indigenous women's life is not simply the sum of the sexism she experiences because she is a woman *plus* the racism she experiences because she is Indigenous *plus* the disadvantage she experiences because of poverty and exclusion from services. A person may be discriminated against in qualitatively different ways as a consequence of the combination of the aspects of their identity.

The intersection between race, gender and class is of particular relevance to Indigenous women. The kinds of human rights abuses Indigenous women experience will generally cross the boundaries of race, gender and class at least. For example, the Tasmanian Aboriginal Issues Unit submitted to the Royal Commission into Aboriginal Deaths in Custody:

> Of particular concern to the community is the attitude of police officers to Aboriginal women. During arrest and detention, Aboriginal women are consistently abused, verbally with terms such as 'black slut' 'whore', etc…The attitudes expressed by police in these instances refer directly to an historical stereotype which maintains that Aboriginal women can be regarded as available for the convenience of those in power, and accorded little, if any, respect.[99]

A recent meeting of the Expert Committee of the United Nations Division for the Advancement of Women, reported on Gender and Racial Discrimination. The Expert Committee recognised the discriminatory impact of criminal justice systems on, *inter alia,* Indigenous women, noting the consequent over-representation, the impact on children and stating the following:

> The Expert Group Meeting discussed the increase in the rates of incarceration of racialised women in industrialised and developing societies. Incarceration policies have been addressed by racial justice advocates but this advocacy has focused predominantly on men. In many countries, racialised women, including indigenous women, represent the fastest growing segment of the prison population.
>
> Further, women in prison tend to suffer multiple oppression. Many have experienced violence and other forms of abuse that contributed to their circumstances leading to their incarceration. Most are low income, and, unlike racialised men who may have been convicted of violent crime, many have been incarcerated for non-violent offences, such as welfare fraud. All women, and particularly racialised women, are more likely to be subject to custodial rape by police and other criminal justice personnel. They also run the risk of gender discrimination in the judicial process. Because the majority of female inmates are mothers, the effects of the increase of female incarceration will have long-term cumulative adversive effects.[100]

The discrimination faced by Indigenous women is more than a combination of race, gender and class. It includes dispossession, cultural oppression,

99 Wooten, J H, Commissioner the Honourable, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania, Royal Commission into Aboriginal Deaths in Custody*, AGPS, Canberra, 1991. http://www.austlii.edu.au/au/other/IndigLRes/rciadic/regional/nsw-vic-tas/227.html.

100 United Nations Division for the Advancement of Women, Report of the Expert Group Meeting, *Gender and Racial Discrimination*, 21-24 November 2000, Zagreb, Croatia.

disrespect of spiritual beliefs, economic disempowerment, but from traditional economies, not just post-colonisation economies and more. Non-discrimination includes more than an aspiration for standards identical to those of the dominant culture; it requires respect for equal respect for difference.

International human rights mechanisms have begun, albeit belatedly, to request that governments address specific issues faced by women. They have recognised, for example, the need to prioritise gender based data in the development and evaluation of government policies. In 2000, the Committee on the Elimination of Racial Discrimination noted that 'some forms of discrimination have a unique and specific impact on women' and announced its intention to 'enhance its efforts to integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its inter-sessional working methods'. Accordingly, they requested governments:

> to describe as far as possible in quantitative and qualitative terms, factors affecting the difficulties experienced in ensuring the equal enjoyment of women, free from racial discrimination, of rights under the Convention. Data which have been categorised by race or ethnic origin, and which are then disaggregated by gender within those racial or ethnic groups, will allow the States parties and the Committee to identify, compare and take steps to remedy forms of racial discrimination against women that may otherwise go unnoticed and unaddressed.[101]

International human rights bodies have requested state parties to collect and provide information on the conditions which contribute to poverty and disadvantage. In relation to Article 6 of the ICCPR, the right to life, the Human Rights Committee requires state parties to provide information on the particular impact on women of poverty and deprivation that may pose a threat to their lives.[102]

General Comment 28 of the United Nations Human Rights Committee also requires state parties (or governments) to report on the impact of other forms of discrimination on women:

> Discrimination against women is often intertwined with discrimination on other grounds such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. States parties should address the ways in which any instances of discrimination on other grounds affect women in a particular way, and include information on the measures taken to counter these effects.[103]

In General Recommendation 19 on Violence against Women, the Committee on the Elimination of Discrimination Against Women notes the effects of family violence on women and requires state parties to compile statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence. State parties are required to report on gender violence, to monitor its impact on women, and to put in place services and measures to reduce the incidence of violence against women.

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101 CERD/C/56/Misc.21/Rev3 paras 3, 4, 5. General Recommendation 25: Gender Related Dimensions of Racial Discrimination.

102 CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28. (General Comments) para 10.

103 UN Doc: CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28 (General Comment) para 30.

Good policy directions and compliance with human rights standards need to be based on sound and comprehensive research. The standard of research can be enhanced through increased liaison between the Australian Bureau of Statistics, crime researchers, correctional departments and Indigenous peoples.[104]

Experiences of Indigenous women in corrections

This section provides an overview of the specific experiences of Indigenous women in the correctional system. It is through these experiences that the intersections of race and gender are most felt.

• *Disruption to family life*

One of the greatest impacts of imprisonment on Indigenous women is the disruption to the family life of children through taking mothers into custody. This disruption impacts on the women, the children and the community who remain to take care of the children.

The consequences of the separation of mothers from their children through the policies of forced removal have been thoroughly documented in the Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families.

Some correctional institutions have programs which provide for women to have care of their children (under five years) in prison. In NSW a Mothers and Children Program exists for women at Emu Plains Correctional Centre and Parramatta Transitional Centre. The Program consists of a number of options including full time care, occasional care and care in an alternative supported environment. Inmates are required to meet certain eligibility criteria.

Of the Indigenous women surveyed recently by the New South Wales Aboriginal Justice Advisory Committee:

> Only 2% had ever used the Mothers and Children program, for occasional care. Many Aboriginal women had said they had 'never heard of the program before', or 'had no information about the program, but would probably use the program' or 'they could not access because they could not meet the required stages', or 'did apply, but nothing came through, I'm still waiting' or 'currently trying to access the program'.[105]

The importance of programs for Indigenous women which provide improved access and care of their children while in custody was expressed by this woman:

> I think there should be a program for Koori mothers to have their children more accessible to them, because a lot of Koori inmates have kids and while they are in gaol they worry that their kids will go to DOCs and never be able to get them back or it will take time and a lot of effort to get the kids back when they are released from custody.[106]

104 See example: Lawrie, R, *op cit*; Brenner, K, *op cit*.
105 Lawrie, R, *op cit*, p45.
106 *ibid*, p46.

A disincentive to use of the program is that a woman can only have one child with her. Indigenous women who have more than two children are reluctant to nominate one child rather than another. In this way, the program is inappropriate for Indigenous child-raising practices.[107]

Women had strong feelings about the ways in which they were able to engage with their children during visits. 'Many women noted that when they did see their children, they often felt stripped of the humanity and cultural responsibility as a mother, and that often access to plain familiar clothes would make a difference to their children'.[108] One woman said:

> wearing the white overalls while visitors are here makes us feel uncomfortable because the children ask why we wear them and the overalls make us look ridiculous. We have visits and we are strip searched before and after the visits.[109]

In Queensland Indigenous women are subjected to a full 'cough and squat' strip search after every family and legal visit. Women must decide that in order to see their family they will undergo this indignity. For women who have been previously sexually assaulted the search procedure may result in the woman becoming re-traumatised.[110]

In Western Australia, the mother or primary care giver of a child, less than 12 months of age may apply to the Superintendent of the gaol to have the child live with the prisoner:

> Both sentenced and remand prisoners may apply for permission for their child to reside in prison. In deciding whether to allow a child to reside in the prison, the primary considerations will be the maintenance of the custody of the mother/primary care-giver and the welfare of the child. A secondary consideration will be the likely impact of the decision on the mother/primary care-giver during imprisonment or on release.[111]

Human rights instruments set standards for situations where children are separated from their families through conditions such as detention. Article 2 of the Convention on the Rights of the Child provides that:

> State Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Indigenous children are not protected against the impact of the discriminatory practices of over-representation of their mothers in the criminal justice system.

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107 Telephone consultation, September 2002.

108 Lawrie, R, *op cit*, p46.

109 *ibid*.

110 Kilroy, D, Sisters Inside Inc, *The White Wall Syndrome: An Indigenous Framework for Practice Operating within the Women's Prison.* Paper presented at *Best Practice Interventions in Corrections for Indigenous People Conference,* Sydney, Australian Institute of Criminology, 8-9 October 2001, p7.

111 Director General, Western Australian Department of Justice, *Prisoner Mothers – Primary care Givers and their Children,* 14 May 2001. Primary care-givers are defined as individuals, either male or female, who are responsible for the custody or care of a child or children.

They are not protected against the impact of the status of their parents as prisoners.

The state has an obligation to care for the children of women who are incarcerated. As Winsome Matthews has stated:

> A risk assessment should be conducted to establish the situation of a woman's children as soon when she enters custody. If a single mother with a young family is incarcerated, for example, the 12 year old daughter might take on the role as head of the family. She takes on those cultural responsibilities. She needs to look after her brothers and sisters, she becomes a child at risk. The Housing Commission comes and removes the house, because there is no adult to hold the lease. The children are considered at risk and DOCS can remove the kids. Or, if no one is paying the rent while the woman is incarcerated, the woman comes out and there is no house – the Housing Commission has evicted her because she has outstanding arrears.[112]

• *Pregnancy*

General Comment 28 of the Human Rights Committee, articulates the obligations of parties in accordance with Article 9 of the ICCPR, in relation to arbitrary deprivation of liberty. It states:

> Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times, and in particular during the birth and while caring for their newborn children; States parties should report on facilities to ensure this and on medical and health care for such mothers and their babies.[113]

Pregnant women need prenatal support, support during labour and access to family and their baby after birth. Contact between mothers and babies is crucial to development of a physically and emotionally healthy baby. Indigenous women in detention often present with compromised health. When these women give birth their children may require hospitalisation in intensive care units until they are stabilised. It is very important that the mothers of those babies are able to access their children to breastfeed where possible, bond and care for the baby.

Article 24.1 of the Convention on the Rights of the Child states:

> State Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right of access to such health services.

In north Queensland, Indigenous women prisoners attend the local hospital to give birth. Mothers are not able to breast feed their babies. The baby is released into the care of the family if possible, and it is the family's responsibility to transport the baby to the prison for feeding. Regular transport to the prison is usually impossible so the baby misses out on the benefits of breast feeding.

112 Matthews, W, Consultation Meeting, Sydney, 19 November 2002.

113 UN Doc: CCPR/C/21/Rev.1/Add.10, CCPR General Comment 28. (General Comments) para 15.

The baby's health could be maximised by providing a method for allowing mothers to breastfeed. A higher standard of health for the baby, in compliance with CROC would be attainable by a protocol between the hospital and the correctional institution which sets out procedures for breastfeeding.[114]

• *Provision of health care*

Where women are treated in hospitals outside the correctional facility, it is important to prove a standard of care which meets requirements for privacy. In north Queensland, Indigenous women are brought for health check-ups to the hospital in handcuffs. Their details are taken at the reception area of the hospital in public view. There is no secure area of the hospital where the women can be received in privacy and without the public embarrassment of attending in handcuffs.

If a woman requires treatment she is handcuffed to the bed by her hands and legs. She is accompanied by a correctional officer, frequently a man, and the officer is present while the women is examined, and treated.[115] The patient's confidentiality is compromised and treatment may also be compromised if women are not able to express themselves openly in this environment.

General Comment 16 on Article 17 of the ICCPR requires that body searches be carried out by personnel as the same sex as the prisoner. In the spirit of this right, same sex security personnel should be provided for escort, and secure facilities should be provided to ensure confidentiality.

Protocols between the correctional institution and hospital for dealing with inmates could prevent this experience for women. A secure area where women could be received and treated within the hospital may alleviate some of the problems.

• *Visits with Family and Friends*

A recent survey of the needs of Indigenous women prisoners in New South Wales, noted the following:

> Overall Aboriginal women in custody required longer visits with family members and significant others, more appropriate visiting space, and alternative days for visits to occur. Aboriginal women suggested that access to visits would improve for Aboriginal women in general if there was additional accommodation and travel support in particular for families who come from remote areas. One woman had not received a visit because the public transport system does not travel from the remote area on weekends, so expanding the visiting times made common sense, as well as the need to have financial support for accommodation, especially for families in regional and remote area of NSW.[116]

Families are often not aware of the exact location of prisoners, or of conditions attached to visits. The need for liaison officers to reach communities with

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114 Telephone consultation, 6 December 2002. Practical alternatives such as expressing milk should be explored. Hospitals could develop a secured area for women prisoners. This could provide some privacy for women, babies and families.

115 *ibid*.

116 Lawrie, R, *op cit*, p47.

information about their incarcerated family members was stressed.[117]

In Queensland, it is reported that:

> Indigenous women in Brisbane Women's Prison are subjected to a full strip search including cough and squat after every visit (family – legal). If the Indigenous woman is menstruating she is required to remove her tampon or pad and hand it to the screw for disposal. This is an enormous decision for Indigenous women to make. They have to decide to be subjected to this indignity and sexual abuse in order to see their family or have legal counsel…Given the sexual abuse statistics constant strip searching can be life shattering for some women. They relive their previous sexual assault and become re-traumatised. Some decide not to see their families because of this… Strip-searching is an abusive process for women screws, as well, they too are women who think, feel and menstruate. They tend to become desensitised and abusive, stressed or leave, remember the culture (prison culture) allows 'no weakness'.[118]

Principle 19 of The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

> A detained or imprisoned person shall have the right to be visited by and correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

It is arguable that strip searching, as a condition of a family visit, is not reasonable. Article 17 of the International Convention on Civil and Political Rights also provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, nor to lawful attacks on his honour or reputation.

General Comment 10 of the Human Rights Committee, in interpreting this provision, states:

> So far as personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex.

Many women prisoners are subjected to strip searches for a number of reasons. The practice has a detrimental impact on women who have been previously assaulted or sexually assaulted. The following description of strip search practice gives an idea of the degrading nature of the process.[119]

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117 Telephone consultation, 6 December 2002.

118 Kilroy, D, *op cit*.

119 Adapted from Appendix A, Strip Searching of Prisoners, Minogue, C, 'An Insider's View: Human Rights and Excursions from the Flat Lands' in Brown, D and Wilkie, M, (Eds) *Prisoners as Citizens,* Federation Press, Sydney, 2002 pp 209-10.

Prisoners are required to remove each and all articles of clothing one at a time and hand them to the prison officer. The prison officer wears rubber gloves and examines each article of clothing individually, and discards them onto the ground. 'The process of removing ones clothes and having them searched usually leaves a prisoner standing naked in front of staff and other prisoners for some minutes'.[120] The following directives are given by an officer:[121]

1. Bend your head forward and run your fingers through your hair.
2. Bend your head back and open your mouth.
3. Remove any dentures if used.
4. Pull down your bottom lip.
5. Pull up your top lip.
6. Lift and wiggle your toes.
7. Turn your head to the right and pull back you ear.
8. Turn your head to the left and then to the right to (to allow officers to look in your ear canal).
9. Hold both your arms out and show the officers the front and back of your hands, between your fingers and under your arms.
10. Turn around and pull the cheeks of your buttocks apart.
11. Female prisoners are required to remove any sanitary device and squat on the ground twice as well as bending over and pulling the cheeks of their buttocks apart.
12. Lift your right foot and wiggle your toes.
13. Lift your left foot and wriggle your toes.
14. Get dressed. ('It is part of the procedure that you are told to "get dressed". It is the last little insult to demonstrate just how powerless you are that they even instruct you to put on your clothing.')[122]

Invading the physical privacy of women in a manner which degrades and humiliates women, especially women with a history of the degradation of sexual assault fails to provide the practice in a 'manner consistent with the dignity of the person who is being searched.'

The following case study shows the detriment that can result from strip searching women who are particularly vulnerable to the effect of the procedure.

In September 2002, Melbourne Coroner Ms Heffey investigated the death of Rebecca Richardson, a 23-year-old Aboriginal woman who died while inmate of the Deer Park women's prison in Victoria in 1998.

The inquest heard that Ms Rebecca Richardson, who was in jail for breaching parole, hanged herself at the Metropolitan Women's Correctional Centre a day after the state Government launched a review of prison safety. In July 1998, two male and two female prison officers strip-searched Ms Richardson and cut her clothes with a knife after she concealed a drink can believed to be used as a water pipe for smoking marijuana.

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120 *ibid*, p209.

121 Orders specifically for men include the requirement to lift the scrotum and men may be required to peel back their foreskin. *ibid*.

122 *ibid*.

Lawyers for Ms Richardson's family earlier told the inquest that the strip search was inappropriate and insensitive, as Ms Richardson had been raped five times in the past – the last instance while working as a prostitute shortly before her incarceration in April 1998.

Rebecca Richardson was found hanging by a plastic shower curtain shortly after being put in an empty cell for assaulting an accommodation supervisor. Ms Heffey found Ms Richardson simulated suicide because 'she felt extreme remorse after assaulting Ms (Gail) Johnston, an officer of whom she was very fond'. Ms Heffey described strip-searching Ms Richardson as 'unnecessary and invasive'; however, she cleared the former private operators of Deer Park women's prison of wrongdoing over the death.[123]

• *Disruption to cultural responsibilities and dislocation from community*

Indigenous women often bear great responsibilities to their families and communities even while in custody. As NSW AJAC notes:

> The concept of responsibility is something that does not seem to leave Aboriginal women while they are in custody. They are worrying for their family members (sometimes who they usually provide care for) and children, as well as being homesick for their community.
>
> Outside of prison Aboriginal women perform significant roles in their communities and families as carers. Most of the women (interviewed by AJAC) had children with approximately one third having between 2 and 4 children and almost half of them were single mothers. Almost one third of women in prison (29%) cared for children other than their own biological children. Also almost (29%) said they were normally responsible for the care of other people principally their mother, father and other family members.
>
> Fundamentally the imprisonment of Aboriginal women has a significant impact on broader Aboriginal community causing further strain on limited resources and providing stresses for Aboriginal families. Potentially the removal of a primary carer can place children and others in situations of greater risk and without the support of a primary care giver.[124]

A recent survey of Aboriginal women incarcerated in Sydney gaols found that 73% felt they would have the support of their family and community on release, but 28% either felt that would not have this support or were not sure.[125] The women stated that family and community support was very important. An individual woman's sense of shame can be a powerful block to accessing vital support. In some instances women may also be facing payback and may not tell authorities about it: 'Consequently they may avoid returning to the community and become itinerant in the next town'. [126]

123 Adapted from Milovanovic, S, 'Prison cleared over inmates death' *The Age,* September 10 2002, http://www.theage.com.au/articles/2002/09/09/1031115997628.html.

124 Lawrie, R, *op cit*, p53.

125 *ibid*, p49.

126 HREOC Consultation notes, *Darwin, op cit,* p7.

• *Dislocation from Services*

Indigenous women experience dislocation from services as a result of incarceration. This may be experienced as loss of housing and loss of medical or dental programs among others.

Indigenous women find may find that access to services is difficult because of the compound issues they are faced with. For example:

> many domestic violence shelters exclude people with drug problems, and many hostels exclude women with children. Given that for women prisoners, coping with drug related issues and motherhood are often critical to their re-integration back into the community, these sorts of exclusions can seriously impede successful re-integration into the general community.[127]

Indigenous women in remote communities suffer particular dislocation from services. Women from Alice Springs and surrounding areas who are convicted and sentenced to prison are sent to serve the sentence in Darwin.

• *Housing*

Consultations with Indigenous women in Darwin indicated that a major issue faced by women incarcerated is the knowledge that they may lose their homes. Culturally when imprisoned, the women's children are left in the care of their father's mother and the children are cared for in their grandmother's home. The father remains in the family home but often, for unknown reasons, does not upkeep the payments because the children are cared for in the grandmother's home. The house is generally rented by the women from the NT Housing Commission, but if the father does not pay the rent, the house will no longer be available for the woman and her children on her release.[128]

Dr Emma Ogilvie makes the following observations about housing for inmates:

> At present, housing assistance for prisoners post-release is plagued with difficulties.
>
> Within Victoria it has been noted that even though prisoners may have been suffering housing crises of homelessness prior to incarceration, they are 'not currently able to apply for public housing through any of the priority Segmented Waiting List (SWL) categories because they are not deemed to be "homeless" in prison' (Victorian Homelessness Strategy (a), 2001:2).
>
> Additional difficulties are also involved in prisoners being cut off waiting lists for public housing, through being incarcerated and hence under 'state care' already and the fact that prisoners currently inside incarceration are often not aware of the exact time they may be released (pending parole etc) and so are unable to apply for public housing while within prison. These service difficulties are compounded for women as a range of additional factors come into play, most particularly in relation to the needs of their children. As noted by the Victorian Homelessness

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127 Ogilvie, E, *Post Release: the Current Predicament and Potential Strategies,* http://www.aic.gov.au /crc/reports/ogilvie.html, p2.

128 HREOC Consultation notes, *Darwin, op cit*, p7.

> Strategy, for women, issues of housing usually have to take account of factors such as the number of children, access to schools, and (often) child protection agencies (Victorian Homelessness Strategy (b), 2001).[129]

Chronic homeless and the loss of accommodation due to incarceration creates one of the most urgent needs of Indigenous women post-release.

Addressing the needs of Indigenous women in corrections

It is not always to the offender that we need to look to understand the causes of increasing incarceration. Election driven law and order campaigns primed to drive up incarceration, a lack of government action to implement the recommendations of the Royal Commission into Aboriginal Deaths in Custody and lack of judicial activism to implement the recommendation of the Royal Commission on non-custodial sentences are some obvious and ongoing causes of over representation.

In some instances, the causes of over-representation are more complex and profound. Offender focused answers frequently identify the effects of colonisation as the cause of offending behaviour. For example, issues such as unresolved trauma, loss and grief are identified as core problems with 'social issues/ problems such as family violence, crime/imprisonment, alcohol and drug abuse, suicide, low self-esteem, ill-health, self-haring, etc. etc are in the periphery and are the symptoms'.[130] Understanding intergenerational violence, for instance, requires us to consider the impact of colonisation, the breakdown of cultural norms, and repeated abuse. The symptoms and the causes need to be identified and addressed.

Criminal conduct by Indigenous women must be viewed as a symptom and offenders as the casualties of colonisation. Seen in the context of surviving colonisation it:

> becomes easier to understand why there are so many casualties in this process; these are the statistics we always hear about, such as mortality rates, suicide, mental illness, substance abuse and crime in Indigenous communities. The latter, of course, is where we come in. The Indigenous offenders whom we see in our work are the casualties whose problems took a form where they broke the law. These people are the life-blood behind that abstract thing I've been referring to as 'indigenous overrepresentation in the criminal justice system'. This way of looking at the situation may help us remember to put current Indigenous struggles into an accurate context, and this in turn can help define the shape that programs for Indigenous offenders need to take.[131]

Links must be drawn and holistic models developed and supported which address the connections between culture, drug use, alcohol use, separation

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129 Ogilvie, E, *op cit,* pp3-4.

130 Morseu-Diop, N, 'You say you hear us, but are you really listening or are we just noise in the distance?' Australian Institute of Criminology, Best Practice Interventions in Corrections for Indigenous People Conference, Sydney, 8-9 October 2002, p3.

131 Jones, R, 'Indigenous Programming: A National and International Literature Review', Australian Institute of Criminology, Best Practice Interventions in Corrections for Indigenous People Conference, Sydney, 8-9 October 2001, p4.

from family, violence, poverty, spiritual needs, housing, health, boredom, race discrimination and gender discrimination.

Indigenous people are constructing, reconstructing and participating in programs and models for dealing with criminal justice issues. These include community policing, night patrols, Community Justice Panels and Groups, circle sentencing, and participation in courts such as the Nunga court (SA), Murri court (Qld) and Koori court (Vic).

Programs have now been developed and evaluated, particularly around family violence for women, men and children, and Indigenous participation in drug court trials. These indicate that it 'is very important to give responsibility back to the community, through the case management, future planning and post release programs and services. The community must also be properly supported in these initiatives'.[132]

Indigenous people have looked to new models and in so doing, look to the past for answers. One example is the development of restorative justice models to deal with violent behaviour within communities. Restorative justice models engage community, victim and offender. The victim's rights to safety and security are paramount, and the participation of Indigenous Elders is essential.[133]

In Canada, there has been considerable success with residential Healing Lodges.[134] A women's centre, Okimaw Ohci Healing Lodge, is a 30-bed treatment facility for Canadian Indigenous women located in Cypress Hills, Nekaneet First Nation. The lodges are based on aboriginal ethics, values and principles, while maintaining the statutory mandate of the Correctional Services of Canada (CSC). They were planned in full partnership with the aboriginal community. The majority of staff, including the wardens, are aboriginal. A body of aboriginal community members monitors the lodges' operations and provides advice on further development. Inmates and staff are reported to be enthusiastic about the lodges; evaluations, to date, have been very positive.

The Healing Lodge was completed in 1995. Rehabilitation of offenders utilises traditional healing practices, based on healing through Indigenous teachings and culture. The central emphasis of the healing program is on survival of physical and sexual abuse, and freedom from substance abuse, through reconnection with Canadian aboriginal culture in its broadest sense.

Correctional Services of Canada recently conducted a follow-up of the 412 Aboriginal offenders admitted to several Healing Lodges. The results showed that 286 or 69.4% have completed the program (others are still resident in the program). Of those completing, 6% had been returned to federal custody for committing a new offence while on conditional release. In contrast, the national federal recidivism rate was 11% in 1997-98 (for full parole and statutory release). According to the CSC, this means that the relatively low federal recidivism rates

132 Matthews, W, Consultation Meeting, *ibid*.

133 Kelly, L, *Developing a Restorative Justice Approach to Aboriginal Family Violence,* (unpublished and forthcoming), p8.

134 The following material on the Healing Lodges is from Cunneen, C, *The impact of crime prevention on Aboriginal Communities,* Institute of Criminology, University of Sydney, September 2001, pp118-20.

among Aboriginal Healing Lodge participants are an early indication of having made a positive impact. It also means that CSC is encountering some success in its mandate to safely and successfully reintegrate offenders.

This approach has been considered by the Indigenous Services Unit of New South Wales Corrective Services with the view of developing a similar initiative for Aboriginal women in New South Wales. The New South Wales Law Reform Commission, during the course of an inquiry into Aboriginal sentencing, stated that such an initiative could be enormously effective in rehabilitating offenders, and in reducing recidivism. The Commission endorsed steps to implement a facility along the lines of the Healing Lodge. Support has also been provided for the development of small, residential centres strategically placed around the state, and run by Aboriginal women, with drug rehabilitation, strong personal support, and living skills and health programs. In 2000, the New South Wales Law Society also supported the creation of a residential rehabilitation facility, offering a holistic program for Aboriginal women to which they could be diverted from full-time custody.

An organisation called Yulawirri Nurai Indigenous Association Incorporated has been working with Indigenous people providing pre- and post-release support since 1996. Yulawirra have secured land through the Indigenous Land Fund on which they propose setting up the Yula-Panaal Cultural and Spiritual Healing Program. Women will be encouraged to have access to or care of their children. The program will run for three to six months. The proposed healing centre would meet the most urgent need of women when they are released, that is housing. But it would also provide respite experience of incarceration, a chance to begin reintegration into the community and most importantly an opportunity to identify and heal the issues and traumas which underlie the offending behaviour.

Programs such as Yula Panaal Cultural and Spiritual Program need to be supported, and evaluated in order to continue the capacity building in Indigenous communities, and the support of Indigenous women post release. Despite the above support for programs such as this one, the transitional residential program for Indigenous women offenders remains unfunded.

In Australia, Indigenous women need a range of services from housing to healing, from counselling to assistance with sufficient identification to open a bank account to access Centrelink payments.[135] The profound and the mundane are equally powerful when it comes to facing post release life.

The Importance of Pre- and Post-Release Programs for Indigenous Women

Chairperson of the Aboriginal Justice Advisory Council in New South Wales, Winsome Matthews, gave the following evidence to the NSW Select Committee on the Increase in Prisoner Population:

135 Interim Report: Issues Relating to Women, Select Committee on the Increase in Prisoner Population, July 2000, NSW Legislative Council, p146. See Recommendation 6.192: 'The Minister for Corrective Services ensure that any issues relating to an inmate requiring identification when released from prison, such as for Medicare, Centrelink and the opening of bank accounts, are part of the inmate's case management plan and are resolved prior to release. This should occur in all prisons. This should be extended to include all dependent children.'

> When you mention post release programs, in our community they say the missing in action person list because you never see them. This is the feedback from the community but also inmates themselves getting ready for post release.[136]

Indigenous women are disadvantaged by the lack of services designed for them. This is an example of intersectional discrimination. It is a consequence of a rights and policy structure which identifies groups of needs and rights holders such as women and Indigenous people, but fails to provide for the needs of people who dwell at the intersection of these groups.

It is essential to recognise and provide for Indigenous women as a distinct group. For too long women's services have been compromised by a lack of identified programs and facilities. Women end up having to use either Indigenous men's services, or mainstream services for women. They are disadvantaged both ways.[137]

In relation to programs dealing with violence Judy Atkinson notes:

> Aboriginal women say they have asked for such programs for a considerable time but that their requests are being ignored by those people in government who are responsible for implementing a structural response to issues of violence in society. Most women I work with are feeling that even when they choose to use the programs and systems being made available, sometimes 'women only' services, sometimes 'generalist services', these services are not meeting their needs. The women often experience another level of victimisation.[138]

It is essential to recognise the diversity of needs of Indigenous women. While there are some similarities, women in rural and urban areas will have different needs, women in remote areas will have different needs again.

There is a need to provide services and information to women in prison is as soon as they enter the institution, as well as upon release. Women need to know that they can keep their house, and that their kids are looked after: 'If she's stuck in Mulawa, wondering how her kids are – that's a terrible stress'.[139]

Case management for Indigenous women pre-release is of particular importance. As Winsome Matthews notes:

> During the time the woman is in prison, they need help to do some 'future planning'. They need future planning so they can aspire to something. They need something to distract them from the depression and from going back to crime or the circumstances which caused the problem.
>
> It is very important to look at the connections between the incidence of sexual assault and custody. It is essential to set up sexual assault, violence and safety initiatives in gaols.
>
> Case management inside prison is very important at the pre release stage. It is important to take a holistic view and look to the individual

136 *ibid*, 142-43.
137 Matthews, W, Consultation Meeting, *op cit*.
138 Atkinson, J, 'A Nation Not Conquered', *op cit*.
139 Matthews, W, Consultation Meeting, *op cit.*

> woman's circumstances. She needs help with legal issues of family and kids, housing, employment, training, health and it needs to be linked to post release services and programs.
>
> It is important to take a managed approach to the woman's aspirations. It is important to be based in culturally and spiritually framed concepts that reduce dependence on the criminal justice system.[140]

There should also be recognition that community extends into gaols. Elders recognised this long ago and have been visiting the large numbers of incarcerated Indigenous people for many years. Programs like CDEP could be run in gaols.[141]

The many successful programs now running in communities could be adapted for Indigenous women in gaol. For many women, gaol is a time of reflection and a time where culturally appropriate programs would be extremely beneficial.

By contrast, there is an increasing understanding of the vulnerability of Indigenous women to the impact of a lack of post-release resources.[142]

Evidence indicates that women are at serious risk of self-harm and harm from others in the period immediately after incarceration. While there is limited research on this point specifically on Indigenous women, the figures for women in general give cause for concern:

> The high death rate of those serving community corrections orders is an issue that is receiving increasing attention. In 1989, Haege noted that the death rate of people serving community corrections orders was 6 times that of people in a comparable age group, with the most common cause being suicide, and the most common period being a few weeks after release from prison (Haege *cited in* Aungles, 1994: 207).
>
> Similar research conducted by Biles, Harding and Walker (1999) notes that deaths of people on community corrections orders exceed both prison populations, and those of the general community, and Cook and Davies (1998) report that the mortality rate for women on parole is three times higher than that for men.[143]

Similarly, in Victoria:

> between 1987-1997, 93 women were identified as dying shortly after release from prison…Traditionally it was not seen as the role for correctional services to take responsibility for offenders post release and in the past our attempts to reintegrate women have been minimal. We spend on average $55,000 a year to keep someone in prison and only about $300 a year on post release. However this attitude is gradually changing as it becomes clear that structured pre and post release support has a crucial role to play in intervening in a cycle of recidivism which results in almost two thirds of offenders re-offending and returning to the system.[144]

140 *ibid.*
141 *ibid*.
142 Ogilvie, E, *op cit*, p2
143 *ibid*, p4.
144 Armytage, P, et al, p14.

Dr Emma Ogilvie states that the current state of post-release programmes for Indigenous and non-Indigenous inmates is 'behind the game'. There is thus a clear need for research which focuses upon three key criteria:

1. Identifying what purpose we want post release programs to serve,
2. Identifying how best to achieve our specified goals and;
3. Identifying how best to *work across organisations* in order to achieve these goals.[145]

A recent survey of Aboriginal women in NSW found that although 91% had received support to draw up a pre- and post-release plan, most felt that they needed the support of an Aboriginal worker who understood their situation.[146] Indigenous women seek Indigenous-run, culturally and spiritually appropriate services. Programs for Indigenous women need to be run by Indigenous people, and be linked into other Indigenous specific programs such as crime prevention strategies.

Article 10.3 of the ICCPR states the duty of the state to provide rehabilitation options for offenders: 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

Rehabilitation of prisoners is a primary goal of pre- and post-release programs. Rehabilitation is a form of healing. Indigenous-specific programs that currently exist take an holistic approach aimed at healing on a general level. This holistic approach requires broad community support and participation. It recognises that for some women the goal will not be re-integration but 'rather the challenge of integration as a "new" experience'.[147]

A New South Wales Aboriginal Justice Advisory Council study suggests that:

> Aboriginal women were needing to have ongoing support from professionals in a cultural sense, and calling for more Aboriginal specialists, to provide appropriate counselling on a one to one basis to help them deal with problems such as sexual assault and drug abuse issues, especially concerning their inherent fears upon release and then the ongoing maintenance within the community, that supports them in their traditional roles as mothers and family carers. Aboriginal women particularly, felt that local communities, and Aboriginal female Elders had a rather significant role to play in this.[148]

Finnish academic Matti Laine reported to the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders that rehabilitation must be tailored to the individual:

> The idea that we can find a universal form of rehabilitation has vanished. Matching should as a general principle of probation services institutions and prisons. Match the program to the offender and the cognitive style of offender and the cognitive style of the staff member. These should be

145 Ogilvie, E, *op cit*, p8.
146 Lawrie, R, *op cit*, p48.
147 Ogilvie, E, *op cit*, p2.
148 Matthews, W, 'Managing holistic programs', Best Practice Interventions in Corrections for Indigenous People Conference, Sydney, Australian Institute of Criminology, 8-9 October 2001, p4.

> matched as closely as possible. Problems of cognitive injury and damage should be recognised. The cultural matching of the program to the offender is important. The elements of the programs and methods must not be culturally strange to the offenders.[149]

It is important that rehabilitation be undertaken in prison and continued on release. Rehabilitation is important of itself, but it is also crucial in preventing recidivism.[150]

What Issues Should Pre- and Post-Release Programs Address?

• *Housing issues*

Housing has been identified as the most important basic need of women leaving gaols. Some women may be able to access public housing, but this needs to be in place before their release date. Others may not be eligible due to previous problems with the department. These women need support with at least temporary accommodation until they are established and can attempt to access to private housing market. Transition accommodation is perhaps the most important service for women, especially if they have children. Ultimately,

> finding somewhere to live is one of the major problems faced by ex-offenders. Without an address, it is difficult to claim benefits, almost impossible to get a job and harder to avoid resorting to crime. The links between homelessness and offending suggest that a decent ands secure housing plays a vital part in the resettlement process and in reducing the likelihood of people committing crime.[151]

A recent report on homeless Indigenous women in Brisbane noted that:

> Indigenous women who are discharged from correctional facilities without support, appropriate transitional accommodation or money also often find their way to inner city parks and public spaces. Many would return home but do not have enough money, and so go to the parks looking for a loan or for company... These women are vulnerable to a range of factors including re-arrest for street/public order offences.[152]

Ogilvie notes the importance of stable housing for women prisoners generally:

> stable accommodation can have significant consequences in other areas of the prisoners' life. For example, satisfactory accommodation

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149 Laine, M, 'Some old and some new experiences: Criminal justice and correction in Finland', Principal Lecturer at Prison Personnel Training Centre, Finland. 109th International Training Course Effective Treatment Measures for Prisoner to Facilitate their Reintegration into Society. UN Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders. www.unafei.or.jp\

150 Ogilvie, E, *op cit*, p5.

151 National Association for the Care and Resettlement of Offenders (UK) in Dutreix, C, Offenders Aid and Rehabilitation Services, SA, *Women's Accommodation Support Service and other Post Release Issues from a Client Perspective,* Best Practice Interventions in Corrections for Indigenous People Conference, Australian Institute of Criminology, Sydney, 8-9 October 2001, p2.

152 Coleman, A, 'Sister, it Happens to Me Everyday: An exploration of the needs of and responses to, Indigenous Women in Brisbane's Inner City Spaces', Brisbane City Council, the Department of Families, the Department of Aboriginal and Torres Strait Islander Policy and the Department of Premier and Cabinet, Office for Women, 2000, p13.

> arrangements are crucial with respect to women regaining access to children who have been placed in 'care' situations of one type of another. This can mean that in the absence of any alternative, some women may feel compelled to return to violent partners post release (Cook and Davies, 1999). Quite apart from the extent to which these sorts of issues can be implicated in criminality – we also need to recognise the extent to which they are associated with poor health and premature death.[153]

Lawrie notes the importance of supported accommodation for women seeking rehabilitation from drug dependency. Noting the success of Drug Court and the MERIT programs, she states that many Aboriginal women fail to meet the eligibility criteria because they:

> have either lived on the streets or in the inner city regions… What is needed is a supported accommodation service that actively rehabilitates drug usage by Aboriginal women, that can establish and support the connection between Aboriginal families.[154]

Coordinator of Guthrie House, the only half-way house for women in New South Wales, states that in 1999 she was forced to turn 90 women away, because the half way can only accommodate 8 women and children. She gave the following evidence to the NSW Select Committee on the Increase in Prisoner Population:

> Our client had to go some where quite early in the morning and she was on her way to the station. She walked through Belmore Park near Central and she found one of our turnaways, a young Aboriginal woman lying on the grass just waking up from her night's sleep. She had been pretty stoned, drug affected, and my client stopped to talk to her and ask her how she was going. The young women replied that she was not going very well, she thought she would be dead very soon and she was pretty desperate and did not know what to do.[155]

Indigenous post release support agency, Yulawirri Nurai has been attempting to launch a post release transitional residential program for Indigenous women. They have land, a house and equipment, but are consistently unable to achieve core funding for the project.

• *Dealing with Violence*

Effective pre- and post-release programs should include community based, Indigenous specific programs to help women deal with the effects of violence and to help women develop alternative strategies for coping with violence in the future.[156] People require protection from violent behaviour and alternative structures for prevention and punishment of violent behaviour which provide more than imprisonment with all its risks and consequences.

153 Ogilvie, E, *op cit*, p4.
154 Lawrie, R, *op cit*, p31.
155 Webb, A, Coordinator, Guthrie House, evidence, Interim Report, *op cit*, pp147-8.
156 CEDAW General Recommendation 19, Specific recommendation 24 (k) States parties should establish or support services for victims of family violence, rape, sexual assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling.

After examining the relationship between victim and offender, Fitzgerald and Weatherburn stated the urgent need to provide means of dealing with violence without increasing Indigenous over-representation in the criminal justice system.

> In the long term it is important to address the structural causes of Aboriginal crime and victimisation (e.g. poverty, unemployment, family breakdown). Levels of violence and crime in Aboriginal communities, however, are severe enough to warrant immediate action. Unfortunately the short-term options for dealing with violent crime are fairly limited. A reduction in alcohol consumption will help where the violence is alcohol related. The conventional response to problems such as sexual assault and the sexual abuse of children, however, is to encourage greater reporting of the offence so that offenders can be identified, prosecuted and sanctioned. The difficulty with this option is that, at least in the short term, it will further exacerbate Aboriginal over-representation in the criminal justice system. The policy challenge, then, is to find ways of bringing immediate relief from crime to Aboriginal people (particularly women and children) without further increasing the already high levels of contact between Indigenous Australians and the criminal justice system.[157]

Indigenous people have been developing and implementing models such as Strong Culture, Strong Families (Western Australia). The Kapululangu Aboriginal Women's Association project is aimed at revitalising cultural practices and principles to challenge and overcome family violence. The project activities include a series of camps on traditional bush and cultural experiences including medicine and food gathering; programs on substance abuse; programs for young women, young mothers and young families; activities aimed at children and the community including banners, murals, music and sports programs; training Aboriginal health workers, teachers, wardens and parents in counselling and support skills.[158] Programs such as Strong Culture, Strong families could be adapted to be suitable as an option for Indigenous women in Western Australia.

The We Al-li project in Queensland provides a series of educational/therapeutic programs for workers and for victims and perpetrators of age, gender, race or class violence. The workshops enable individuals to 'own' their violent experiences and behaviours, to become aware of the many forms of violence in our society, and to be empowered to change their own victim/victimising behaviours. Many people who have been involved in workshops have moved beyond victim/victimising behaviours. The Central Queensland University is presently negotiating with Bookoola Research Pty Ltd, the organisation responsible for this project, to run the programs in Indigenous Therapies. The project received an Australian Institute of Criminology Crime Prevention Award in 1996.[159] Evaluation of this project for adaptation into a prison environment may result in a valuable program for Indigenous women.

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157 Fitzgerald, J and Weatherburn, D, 'Aboriginal Victimisation and Offending: The Picture from Police Records', *Crime and Justice Statistics,* December 2001, NSW Bureau of Crime Statistics and Research, Bureau Brief.

158 Cunneen, C, *op cit*, p59.

159 *ibid*, p58.

The methods for dealing with violence outside the gaol system, include development of restorative justice models. Kelly describes restorative justice as follows:

> Any restorative justice program must be framed in the context of Aboriginal community justice. It must be a grass-roots community initiative. The entire Aboriginal community must be consulted and involved with eh whole process of establishing the program….An essential element that must be met in order to implement restorative justice practices for Aboriginal family violence is that the rights of the victims must be maintained. The importance of Aboriginal women Elders and community leaders in facilitating the process designed to address family violence must be stressed…Finally any restorative justice scheme musty be part of an holistic strategy.[160]

The benefits of a model which provide for extensive participation by Indigenous Elders will allow a place for the criminal behaviour to be seen through the appropriate cultural context. Atkinson notes:

> Aboriginal people often know the circumstances which are part of offending behaviours. Elders need to be included in the court/sentencing process. They are better able to decide on appropriate punishment and treatment for offenders.[161]

Effective pre- and post-release programs need to recognise and treat the complexity of the experience of Indigenous individuals who are both victims and perpetrators of violence. Programs will also need to provide support for Indigenous women to reintegrate back into the community. The types of support required by each woman will be determined by her location and other issues. For instance, for some women there may be issues of payback, and she may not be able to return to her community until those issues are resolved. Other women may need to return to small communities, where contact with the perpetrator of violence cannot be avoided.

Pre- and post-release programs should include assistance for past injuries suffered by women, and strategies for dealing with these issues in the future. Where drug and alcohol use, associated with incidents of violence has become problematic programs should address these needs.

• *Children and Families*

Tauto Sansbury, Chair of the National Aboriginal Justice Advisory Committee, has identified the need for programs to assist mothers and children with the impact of high incarceration rates. He states:

> In a population where incarceration rates have been so high for so long, we need to consider what the effect of this is upon the next generation – the impact does not end with the generation that is in prison now...the impact will continue to be felt by every child who has been deprived of a parent, who has seen their parent locked up, who has know what it is to fear the justice system. We know that Aboriginal women are far more

160 Kelly, L, *op cit*, p8.
161 Atkinson, J, 'A Nation is Not Conquered', *op cit*.

> likely to be imprisoned than non-Aboriginal women...we also know that imprisonment of a mother is more damaging for child than imprisonment for a father. A child whose parent goes to prison has committed no offence, however, when a mother is given a jail sentence, a child is given a life sentence. We are already seeing the effects of family separartion in those families who were divided by the assimilation policies of the past – yet while the Government deeply regrets this shameful past, Aboriginal families are being divided by incarceration in the shameful present.[162]

Women need support to maintain contact with their children while they are incarcerated. Where that is not possible, they need to be provided with information as to the well being of their children. Women need support when they resume contact with their children. Women need practical advice on how to deal with family court procedures and departments of community services.

Women in New South Wales identified a need to have more flexible and more frequent visits with children and family.[163] Consideration should also be given to ensuring culturally appropriate residential placements for children for the duration of their mother's sentence. Women may need assistance readjusting to their role as mother while re-establishing themselves in the broader community.

• *Kinship Obligations*

Aboriginal women are an integral part of the cultural, economic, and family life of an Aboriginal clan and community. But the removal of Aboriginal women from the family and community places a burden on them beyond the loss of one member of a family unit. Aboriginal clans and communities are already highly vulnerable and stressed by poor standards of health, housing, poverty and the loss of men to the criminal justice system. Taking women and mothers from these family structures leaves an important gap which places further stress on adults and children.

Aboriginal women in custody are ever-conscious of the impact their absence has on the day to day lives of their families and children. This creates stress on them during the period of their custodial sentence, and creates additional stresses on them when they return home. Programs which are sensitive to the kinship obligations of Indigenous women and supportive of these roles are important. Indigenous women have identified help with family and community relationships as an issue they want help with. Sixty percent of women surveyed in NSW felt that programs dealing with relationships would benefit them.[164]

A Queensland study found that in some communities the reintegration of an Indigenous woman may be complicated by kinship obligations:

> payback and retaliation when the offender returns to the community, particularly if the victim is still residing there. These issues are often complicated by kinship issues within the communities... While practices very in different communities, Indigenous female offenders may be left

162 Sansbury, T, *Indigenous Community Expectations of Best Practice,* Corrections for Indigenous People Conference, Australian Institute of Criminology, Sydney,13-15 October 1999, p6.

163 Lawrie, R, *op cit*, p47.

164 *ibid*, p51.

homeless or their time in secure custody may be increased. The practice has the effect of punishing the offender twice for the same offence.[165]

Some women may face another form of dispossession because of the impact of violent relationships on their lives. They may not be able to return to their home community, as a result of their own or other people's violence.[166] In either scenario, women need support to re-enter potentially volatile situations. Pre- and post-release programs need to be sensitive to kinship obligations, and to support Indigenous women to work with their customary obligations and to positively re-integrate into the community in which they will live.

• *Financial Issues, Employment, Education and Training*

There is an absence of consistent data in relation to educational background of prisoners available. Research analyst, Margaret Cameron of the Australian Institute of Criminology notes:

> Unfortunately, background information on the educational levels of prisoners and whether they were employed is not available. These questions are included in the National Prison Census questionnaire, however, they do not appear to be systematically administered. In some correctional institutions, for example, prisoners' responses are recorded, while in other the questions appear to have been ignored completely. Nevertheless, education levels are important to consider.[167]

Cameron observes the importance of this information for policy and planning of programs, in view of evidence that unemployment is a predictor for recidivism.[168] On the issue of employment and education programs within the prison Cameron notes that 'no formal consideration has been given to the needs of ATSI women'.[169] Statistical analysis, based on sound data is required in order for Australia to meet its obligations to international human rights bodies, and it is important for development of good policy.

According to a recent survey of the needs of Aboriginal women in custody:

> [a] significant concern was the one quarter of women who stated that their income came solely through the proceeds of crime. It is evident that these women are becoming increasingly entrenched in a cycle of drug dependency, crime and imprisonment.[170]

The need for education and training is clear. A recent survey of NSW women noted that 84% of the women said they would like to work on release.[171]

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165 Queensland Report, p23.This report was provided but it has no title page, so the title is unknown. The effects of customary law and customary practice may be that the offender is punished twice, unless prior arrangement is made with authorities. It is important that this effect is noted.
166 Matthews, W, Consultation Meeting, *op cit*.
167 Cameron, M, *op cit*, pp2-3.
168 *ibid*, p4.
169 *ibid*.
170 Lawrie, R, *op cit*, p54.
171 *ibid*, p51.

• Access to health services

The high incidence of health problems among Aboriginal women is an indicator that pre- and post-release programs should target the health needs of Aboriginal women. The high incidence of deaths in custody attributable to natural causes indicates an urgent need for better health care while in custody, and better health care on release.

There is also a specific need to address drug abuse among Indigenous women. As the recent study by NSW AJAC into the needs of incarcerated Indigenous women in NSW stated:

> The most significant findings of this study are the level of serious drug addiction among women in prison and the causal role that addiction has played in their current imprisonment. Fundamentally significant is the levels of abuse that has been suffered by the women and the clear link those women have drawn between that abuse and their drug use, their drug use and their current imprisonment… It is clear from this study that unless the abuse experienced by Aboriginal women is effectively addressed they will continue with their drug habit and continue to offend.[172]

Conclusion

This chapter has provided a broad overview of issues that Indigenous women face in criminal justice processes. Due to the general dearth of research and statistics it is necessarily broad in its focus, and points to areas requiring follow up action and further investigation. Despite these limitations, what is clear is that there is a crisis in the level and type of contact of Indigenous women with correctional systems in Australia. There is insufficient attention devoted to their circumstances when in custody and insufficient attention to the environmental factors which contribute to their being in custody at all. Indigenous women indeed live in 'a landscape of risk' and suffer at the crossroads of race and gender.

172 *ibid*, p54.

Chapter 6

International developments in the recognition of the rights of Indigenous peoples

The circumstances of Indigenous peoples were virtually invisible at the United Nations approximately thirty years ago. Very little attention had been devoted to their situation and their claims were by and large unheard in international fora. Since the early 1970s, however, Indigenous peoples have made significant inroads towards the recognition of their rights and acceptance of their legitimate place within the international community. The results, while incomplete, have been nothing short of extraordinary.

In this chapter I examine the current status of the recognition of the human rights of Indigenous peoples at the international level and in the processes of the United Nations. In particular, I examine these issues within an historical context and within the framework of the United Nations International Decade for the World's Indigenous People. Where relevant, I also note the role of the Australian Government in occasionally supporting and occasionally opposing international developments on Indigenous issues.

Developments in the United Nations in the past three years, particularly the establishment of the Permanent Forum on Indigenous Issues and the appointment of a Special Rapporteur to focus on the situation of Indigenous human rights, offer great potential for the protection and promotion of Indigenous human rights at the international level. But these important developments have been accompanied by a continued reluctance, and in some instances outright opposition, by governments to provide full and non-discriminatory recognition to the rights of Indigenous peoples. Consequently, as we enter the final two years of the International Decade for the World's Indigenous People, we find that many of the objectives of the Decade have barely begun to be met and that Indigenous peoples continue to face uncertainty in several key areas at the international level.

Indigenous peoples in international law – A history of exclusion

Throughout this chapter I will be highlighting two main aspects to Indigenous peoples' struggle for recognition at the international level. The first concerns the participation of Indigenous peoples or put differently, the struggle for

recognition of our legitimate place at the negotiating table. The second is the struggle for the recognition and protection of Indigenous peoples' distinct rights in international law.

The two are inter-related and cannot be separated. Indeed they have operated in tandem for the past thirty years, with gains in participation at the international level influencing the development of standards relating to Indigenous peoples. In turn the elaboration of such standards has also opened up further mechanisms and processes to Indigenous participation.

The struggle for participation at the international level and the recognition of Indigenous rights has at its core the same purpose. As Sharon Venne has stated: 'The goal of Indigenous Peoples is to act and be treated as subjects – and not as objects – in international law'.[1]

This goal is to have recognised that Indigenous peoples possess systems of organisation, governance and law that continue to be observed, and that have survived colonisation. The consequence of this is that Indigenous peoples retain authority over their cultures and that it is legitimate – and essential – that they be involved at the international level in matters concerning them and in instituting efforts to protect their cultures.

Historically, Indigenous peoples have been denied such involvement and protection in international law. This dates back to the time of the Spanish conquests of the Americas in the 15th and 16th centuries. The self-constructed doctrine of discovery, and later that of *terra nullius*, were used to define Indigenous peoples as lacking any form of international legal personality. By the nineteenth and early twentieth century, international law had shifted even further to a system dominated by predominately western, colonising nations that protected the integrity of the territorial gains made through colonisation. This construction of international law was based on the premise that 'international law upholds the exclusive sovereignty of states and guards the exercise of that sovereignty from outside interference'.[2]

This approach has been reinforced through the structures and processes of the League of Nations and its successor, the United Nations. Both organisations are comprised of nation-states who are primarily concerned with the preservation of their territorial integrity, their sovereignty and their power. The two world wars which led to the creation of these organisations, however, also created challenges for them such as the protection of minorities, the recognition of universal, inherent human rights, and processes of decolonisation. Each of these processes has challenged this State-centred approach and has slowly seen the recognition of non-State actors at the international level.

1 Venne, S, *Our elders understand our rights: Evolving international law regarding Indigenous rights*, Theytus Books Ltd, Penticton, British Columbia 1998, pi.

2 Marks, G, 'Sovereign states vs peoples: Indigenous rights and the origins of international law' (2000) 5(2) AILR 1, 3. For an overview of international law developments as they relate to Indigenous peoples see Havemann, P, *Chronology 1: Euro-American Law of Nations and Indigenous* Peoples, and *Chronology 2: Twentieth Century Public International Law and Indigenous Peoples,* in Havemann, P (Ed.), *Indigenous peoples' rights in Australia, Canada and New Zealand*, Oxford University Press, Auckland, 1999.

For Indigenous peoples, the fact that international law is primarily determined by those who have colonised their lands and subjugated them has operated as the primary obstacle to the consideration of Indigenous issues at the international level until into the 1970s and of any recognition of Indigenous peoples as subjects at international law until into the 1980s. It clearly remains the primary obstacle to the full realisation of Indigenous human rights at the international level today.

The basic United Nations texts and treaties, for example, contain no specific or explicit reference to Indigenous populations.[3] It was not until 1990, when the *Convention on the Rights of the Child* entered into force, that there was any explicit reference to Indigenous peoples in a human rights treaty. Article 30 of that Convention today remains the sole human rights treaty provision that specifically refers to Indigenous peoples.

This is not to say that there was no consideration of Indigenous issues until the 1970s.[4] But Indigenous issues were generally considered as part of a broader focus on human rights problems such as forced labour, slavery or through a focus on the human rights situation in a particular country or region.

The one international agency that had devoted specific attention to Indigenous peoples up to the 1970s was the International Labour Organisation (ILO). The ILO had identified Indigenous peoples as a disadvantaged group within societies as early as the 1920s. It drafted a number of conventions and recommendations between 1936 and 1944 which related to the recruitment and conditions of employment of Indigenous peoples. The ILO's intervention, however, was premised on the basis that it was the lack of education and the primitive nature of Indigenous societies that left Indigenous peoples vulnerable to the type of exploitation and enslavement that existed at the time.[5] 'The intent was to change Indigenous Peoples… rather than respecting their rights'.[6]

The ILO then created an international convention concerned principally with the working conditions of Indigenous peoples between 1953 and 1957. ILO Convention 107, titled *Convention concerning the protection and integration of Indigenous and other tribal and semi-tribal populations in independent countries*, aimed to ensure that the process of integration of Indigenous peoples into mainstream economies was not coercive or abusive. The Convention continues the trend of treating Indigenous peoples as objects of international law with no international legal personality. Indigenous peoples had no direct role in

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3 Note: One of the key issues considered in this chapter relates to the collective rights of Indigenous peoples. As a matter of practice, this text will refer to Indigenous peoples as 'peoples' unless reference is being made to a particular document or title which uses a different phrase such as 'populations', 'people' or 'Indigenous issues'.

4 Bolivia, for example, had proposed at the third session of the General Assembly in 1948 the establishment of a sub-commission to study the 'social problems' of Indigenous peoples. This proposal was quickly transformed into a proposal for a study into the situation of Indigenous populations. It was ultimately adopted as a resolution, the sole outcome of which was 'the eradication of the chewing of coca leaf in Bolivia and Peru': Cobo, J M, *Study of the problem of discrimination against Indigenous populations: Volume V, Conclusions, Proposals and Recommendations*, United Nations Geneva 1987, UN Doc: E/CN.4/Sub.2/1986/7, para 6.

5 Venne, S, *op cit*, pp30-34.

6 *ibid*, p33.

negotiating the convention and for years afterwards campaigned vigorously against the convention's assimilationist goals. ILO Convention 107 was ultimately revised and replaced with ILO Convention 169 in 1989.[7]

Despite the seriously flawed nature of ILO Convention 107, it remains historically significant for its recognition that Indigenous peoples occupy a special status in national society and require special protection, and for the recognition of Indigenous peoples' individual and collective rights to ownership of traditional lands.[8]

The 1970's can generally be seen as the turning point at which the international community began to pay more intensive and sustained attention to the situation of Indigenous peoples. In 1971, a study on racial discrimination submitted to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (the Sub-Commission) included a chapter titled 'Measures taken in connection with the protection of Indigenous peoples'. This included a recommendation that a specific study be conducted on the situation of the problem of discrimination against Indigenous populations.[9] Such a study was authorised by the Economic and Social Council (ECOSOC) of the United Nations in 1971 and was commenced by Jose R. Martinez Cobo in 1972.[10]

The Cobo report, as it is commonly known, was prepared over the next decade. It was submitted to the Sub-Commission in 24 instalments between 1981 and 1984 with its conclusions and final recommendations compiled in a consolidated volume in 1987. Underpinning the report's detailed conclusions and recommendations is the recognition that, despite the great diversity of their cultures and systems, Indigenous peoples throughout the world have common experiences of discrimination, oppression and exploitation. It recognises that in many countries they were at the lowest socio-economic rung of society, and did not have equality of opportunity in employment and access to services; and that they lacked protection in the fields of health, education, culture, religion and the administration of justice, and could not participate meaningfully in political life. In submitting the report to the Sub-Commission, Special Rapporteur Cobo stated that it should be regarded as an appeal to the international community to take heed of the discrimination practised against Indigenous peoples and for action to be taken accordingly.[11]

The Cobo report remains influential at the international level, with programmes and policies still being introduced which are in accordance with its recommendations nearly twenty years after they were first submitted to the Sub-Commission.

The 1970s also saw the international mobilisation of Indigenous peoples with the support of non-government organisations (NGOs). In 1977, an historic NGO conference of Indigenous Peoples of the Americas was held in Geneva. It

7 Note that ILO Convention 107 remains in force today in 19 countries that have ratified it but who have not subsequently ratified ILO Convention 169.

8 ILO Convention 107, Article 11. For a discussion of the Convention see Lâm, M, *At the edge of the State: Indigenous peoples and self-determination*, *op cit*, p42.

9 For the history of this recommendation see Cobo, *op cit*, para 6.

10 *ibid*, para 7.

11 UN Doc: E/CN.4/Sub.2/1984/SR.32, para 48.

resulted in the *Declaration of principles for the defense of the Indigenous Nations and Peoples of the Western Hemisphere* as well as a series of resolutions calling for:

- recognition that Indigenous peoples and nations are subjects of international law and must be included within international law processes;
- recognition of Indigenous peoples' special relationship to land and its integral link to their beliefs, customs, traditions and cultures and for efforts to be taken to maintain or restore that relationship;
- the ratification and implementation by States of international human rights treaties such as those on genocide, anti-slavery, racial discrimination, civil and political, and economic, social and cultural rights; and
- the establishment of a working group on Indigenous peoples at the United Nations under the Sub-Commission.[12]

This was followed in 1978 by the first World Conference to Combat Racism and Racial Discrimination. The final declaration of the conference included a call for States to recognise the rights of Indigenous peoples to call themselves by their proper name and to express freely their ethnic, cultural and other characteristics; to have an official status and to form their own representative organisations; to carry on in their territories with a traditional way of life, should they so choose; to maintain and use their own languages; and to receive education and information in their own languages.[13]

An international NGO conference on Indigenous peoples and land was held in Geneva in 1981. The conference sought to 'call the attention of the international community to the desperate conditions in which they live and to their struggle to survive as nations and communities' and to the root cause of denial of rights to their land.[14] The conference specifically called for the 'due participation' of Indigenous peoples in activities by the Sub-Commission and Commission on Human Rights to formulate standards incorporating the specific rights of Indigenous peoples in response to the recommendations of the Cobo report; and for the establishment of a Working Group on Indigenous Populations.

In response to these calls and the preliminary findings by Cobo, the Working Group on Indigenous Populations (WGIP) was established at the United Nations in 1982 as a forum to specifically address the issues of Indigenous peoples.

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12 International Indian Treaty Council, 'International NGO Conference on Discrimination against Indigenous Populations in the Americas – 1977, September 20-23' (1977) 1(7) *Treaty Council News* 1, pp22-27. See also doCip, *The documentation of the United Nations Working Group on Indigenous Peoples, Geneva, 1982 to 2000*, CD-Rom, doCip Geneva 2001.

13 Lâm, M, *At the edge of the State: Indigenous peoples and self-determination*, Transnational Publishers, New York, 2000, p38.

14 *Report of the International NGO conference on Indigenous Peoples and the land*, *Geneva 15-18 September 1981*, p10, reproduced in doCip, *op cit*.

The Working Group on Indigenous Populations – from exclusion to participation at the international level

The Working Group on Indigenous Populations was established by the Economic and Social Council (ECOSOC) of the United Nations in 1982. The Working Group comprises five independent experts who are to implement the Working Group's twofold mandate.

First, they are required to 'review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations' and accordingly to submit conclusions and recommendations to its parent body, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (recently renamed the Sub-Commission on the Promotion and Protection of Human Rights).

Second, they are required to 'give special attention to the evolution of standards concerning the rights of Indigenous populations, taking into account both the similarities and the differences in the situations and aspirations of Indigenous populations throughout the world'.[15]

The Working Group was created at the lowest possible level of the United Nations. For its recommendations to be adopted, for example, requires approval by the Sub-Commission, the Commission on Human Rights, the Economic and Social Council, followed by the Third Committee of the General Assembly and finally the Plenary of the General Assembly.

Its influence over the first twenty years of activity, however, has far outstripped its operational level within the United Nations. The Working Group consistently attracts a large number of participants across governments, United Nations agencies, Indigenous organisations and non-government organisations. The 2002 session, for example, was attended by 1076 people representing 170 NGOs and Indigenous organisations.[16]

The contribution of the Working Group in shaping the consideration of Indigenous issues at the United Nations has been most felt in three ways.

First, its historic – and ongoing – significance remains the opening up of international processes to the participation of Indigenous peoples. As the Working Group's Chairperson for most of its twenty year history, Professor Erica-Irene Daes, has stated:

> [T]he most important achievement of the WGIP should be considered the mobilisation of the international movement of the world's Indigenous peoples. Above all it became the most important meeting point for the Indigenous peoples. The United Nations created a space where Indigenous people feel free to speak frankly and felt safe to share their experiences without fear of retaliation. As it is well known everywhere else at the United Nations system, the right to speak is limited… (Early on) the WGIP decided on a number of basic unwritten rules of procedure, which allowed any Indigenous person to address the WGIP…

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15 Economic and Social Council Resolution 1982/34, 7 May 1982.

16 Working Group on Indigenous Populations, *Report on 20th session*, UN Doc: E/CN.4/Sub.2/2002/24, 8 August 2002, para 3.

> While the Chairperson has often stated and explained that the WGIP is not a 'chamber of complaints' the annual sessions have become, in certain cases, a place for airing grievances. Although these complaints were formally unacceptable they created opportunities for the matters of these complaints to be discussed with Governments and thus a constructive liberal dialogue has developed for the benefit of all concerned. Also the principles of mutual respect between all the participants to the WGIP including Governments, and solidarity between the Indigenous peoples of different regions of the international community, were developed.[17]

The flexible processes for participation of Indigenous organisations in the Working Group's deliberations set a precedent which has been followed by some UN agencies and international organisations. The waiving of the requirement for (Indigenous) non-government organisations to be in consultative status with ECOSOC in order to participate has provided unprecedented access for Indigenous peoples to put their claims in the international arena.

A significant feature of this participation has been its equal nature. Ordinarily, the participation of NGOs in UN processes is secondary to the role of States. The members of the Working Group, however, have not replicated the pre-eminence of the views of States in its operating procedures allowing greater space and recognition for the views and suggestions of Indigenous peoples. Accordingly, the Working Group can be seen as a process of engagement with Indigenous stakeholders by the United Nations.

Second, the Working Group has been highly successful in influencing the agendas and advising the various agencies of the UN on their approaches to Indigenous peoples. It has made recommendations, subsequently implemented, for:

- the establishment of the International Year and International Decade for the World's Indigenous People;
- the establishment of the UN Indigenous Fellowship Programme and the Voluntary Fund for Indigenous Populations (which has greatly enhanced the capacity of Indigenous communities to participate at the international level);
- the establishment of the UN Permanent Forum on Indigenous Issues;
- the undertaking of a range of studies, reports, working papers, and explanatory notes on issues including the protection of Indigenous heritage; Indigenous peoples' relationship to land; treaties and agreement making between States and Indigenous peoples; Indigenous media; human genetic information; and issues of definition of who is 'Indigenous';
- the convening of a workshop on Indigenous peoples, mining and human rights; and
- The development of strategies on Indigenous peoples in Africa and Asia, and the convening of workshops in those regions.

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17 Daes, E, *The Working Group on Indigenous Populations: Achievements at the United Nations system and a vision for the future*, Unpublished Working Paper presented at 20th session of the Working Group on Indigenous Populations, Geneva, July 2002, pp3-4.

Nearly every activity of the UN relating to Indigenous peoples since 1982 can be traced back to the Working Group's deliberations and recommendations in some way.

This achievement of the Working Group, however, should not be seen purely as historic. It has an ongoing dimension. In recent years the Working Group has adopted a thematic approach to its work – focusing each year on one particular set of issues such as Indigenous children and youth (2000), the right to development (2001 and 2002), the impact of globalisation on Indigenous peoples (the forthcoming session in 2003), conflict resolution of Indigenous issues (2004), Indigenous traditional knowledge (2005) and Indigenous children and youth (2006).

The Working Group continues to make an important contribution to international developments and the evolution of standards. At the 2002 session it was also agreed that the Working Group would annually review progress in implementing relevant provisions of the Programme of Action of the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

It is anticipated that the Working Group will continue to form a useful source of information for other newly created mechanisms dealing with Indigenous issues within the United Nations. The newly appointed Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples, for example, stated in his inaugural report to the Commission on Human Rights in April 2002 the importance of the work of the Working Group:

> Its annual reports to the Sub-Commission comprise a wealth of information on the human rights situation of Indigenous peoples and the accumulated communications and interventions of Indigenous associations and other non-governmental organisation (NGOs) provide a rich overview of current concerns. In obtaining information for his activities, the Special Rapporteur expects to draw extensively on this material.[18]

Third, the Working Group has fulfilled an enormously valuable standard setting role under the second element of its mandate. In 1985 the Working Group began preparing a declaration setting out the rights of Indigenous peoples, through a process of engagement with the comments and suggestions of participants in its sessions. At its eleventh session in July 1993 the Working Group agreed on a final text for the *Declaration on the Rights of Indigenous Peoples* and submitted it to the Sub-Commission.

In 1994, the Sub-Commission (which is comprised of independent experts) adopted the WGIP's Declaration unaltered and submitted it to the Commission on Human Rights (a body comprised of Government representatives) for consideration. The Commission on Human Rights then established an inter-

18 Stavenhagen, R, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, Commission on Human Rights, UN Doc: E/CN.4/2002/97, 4 February 2002, para 7.

sessional, open-ended working group[19] on the Draft Declaration which has been considering the Declaration as drafted by the WGIP for the past seven years.

For Indigenous peoples, the Declaration is seen as a compromise which does not fully reflect their aspirations. At the same time, it is seen as the best that could have been achieved, and an important document which reflects the minimum standards of treatment necessary for the survival and well-being of Indigenous peoples the world over.

The Declaration consists of 19 preambular paragraphs and 45 Articles. It covers rights and freedoms including the preservation and development of ethnic and cultural characteristics and distinct identities; protection against genocide and ethnocide; rights related to religions, languages and educational institutions; ownership, possession or use of Indigenous lands and natural resources; protection of cultural and intellectual property; maintenance of traditional economic structures and ways of life, including hunting, fishing and cultivation; environmental protection; participation in the political, economic and social life of the States concerned, in particular in matters which may affect Indigenous people's lives and destinies; self-determination; self-government or autonomy in matters relating to Indigenous peoples' internal and local affairs; traditional contacts and cooperation across State boundaries; and the honouring of treaties and agreements concluded with Indigenous peoples.

The Declaration as drafted also foresees mutually acceptable procedures for resolving conflicts or disputes between Indigenous peoples and States, involving means such as negotiations, mediation, arbitration, national courts, and international and regional human rights review and complaints mechanisms.[20]

While the Draft Declaration has floundered in the Government controlled Working Group on the Draft Declaration, it has already been of great normative value. The consistent elaboration of Indigenous peoples' claims, particularly in relation to cultural identity, self-determination, informed consent and self-identification, has influenced the policy approaches of international agencies such as the World Bank, UNESCO, UNDP and World Health Organisation.

It was also a major influence in the International Labour Organisation's decision to revise ILO Convention 107 and develop ILO Convention 169, titled *Convention concerning Indigenous and tribal peoples in independent countries*, in 1989.[21] This Convention has been equally controversial to ILO Convention 107 in part due to its treatment of Indigenous self-determination in Article 1(3). This provision seeks to defer recognition of a right to self-determination by stating that the use

19 The working group is 'intersessional' as it meets between the annual sessions of the Commission on Human Rights and 'open-ended' as governments not on the Commission (which is comprised of 53 governments), as well as ECOSOC accredited NGOs, inter-governmental organisations and Indigenous organisations can participate in the meetings.

20 Office of the High Commissioner for Human Rights, *Fact sheet 9 (rev.1): The rights of Indigenous peoples*, United Nations, Geneva 1997, www.unhchr.ch/html/menu6/2/fs9.htm, accessed 16 September 2002. See also Pritchard, S, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the first six sessions of the Commission on Human Rights Working Group*, ATSIC, Canberra, 2001.

21 Though note, the tripartite structure of the ILO between employer organisations, employee organisations and States did not allow for any direct involvement of Indigenous peoples in the negotiation of ILO Convention 169.

of the term ‘peoples’ in the convention has no meaning or implications in international law. Indigenous peoples in Australia advised the Government in 1995 not to ratify the convention due to concerns that its provisions are patronising and do not appropriately reflect Indigenous aspirations.

Human rights treaty committees have also responded to the advocacy of Indigenous peoples’ rights through the processes of the Working Group. Both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have interpreted common Article 1 of the international covenants (the right of all peoples to self-determination) as applying to the situation of Indigenous peoples.[22] Through a number of individual communications and general recommendations, the Human Rights Committee has also elaborated on the scope of Article 27 of the International Covenant on Civil and Political Rights (the protection of minority group rights) and its application to the land and resource rights of Indigenous communities, and the positive obligation on States to protect Indigenous cultures.[23]

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) has issued a General Recommendation emphasising that the International Convention on the Elimination of All Forms of Racial Discrimination places obligations on States who are parties to the Convention to take all appropriate means to combat and eliminate racism against Indigenous peoples, and calling on States to:

> a) recognise and respect Indigenous distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation;
>
> b) ensure that members of Indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on Indigenous identity;
>
> c) provide Indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> d) ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life, and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> e) ensure that Indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and practice their languages.[24]

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22 See the discussion of this in chapter 2 of this report.

23 For an overview of the Human Rights Committee’s jurisprudence on Article 27 see Jonas, W, *The recognition of distinct cultural rights in international law*, Speech, Lanzhou China 17 June 2000, Available online at: http://www.humanrights.gov.au/speeches/social_justice/recognition_of_cultural_rights.html. See also the following recent concluding observations of the Committee: Human Rights Committee (HRC), Concluding observations on Venezuela, UN Doc: CCPR/CO/71/VEN, 26/4/2001, para 28; HRC, Concluding observations on Guatamala, UN Doc: CCPR/CO/72/GTM, 27/8/2001, para 29.

24 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, UN Doc CERD/C/51/Misc.13/Rev.4, 18 August 1997, para 4.

The CERD has also, under its early warning / urgent action procedure and periodic reporting mechanism, highlighted the necessity for the informed consent of Indigenous peoples in decision-making that affects their lives.[25]

Despite the completion of the Draft Declaration, the Working Group has yet to exhaust its standard setting function. At the 2002 session of the Working Group, proposals were received for the elaboration of standards relating to issues as varied as relationships between Indigenous peoples and mining or logging companies; developing legal standards on intellectual property with a focus on traditional knowledge; a legal framework for free, prior and informed consent; and environmental or development accountability standards.[26] This is in addition to the ongoing work referred to above on Indigenous peoples and development.

Members of the Working Group also suggested possible elaboration of standards on relationships between Indigenous peoples and international bodies; the impact of trans-national corporations; the review of monitoring and implementation processes; and elaboration on Indigenous peoples' economic, social and political rights.[27] Ultimately, the Working Group recognised the importance of undertaking new standard setting activities and decided to prepare for consideration at the next session in 2003 a list and commentary of potential future standard setting activities; an overview and commentary on the most controversial aspects of the Draft Declaration; and a potential list of studies to be undertaken in the short and medium term.[28]

The importance of the role of the Working Group in giving voice and attention to the situation of Indigenous Peoples and in influencing developments across the full range of UN activities cannot be underestimated. As Maivân Clech Lâm notes:

> Had Indigenous peoples been required, back in 1982, to take their case initially to a states-composed body like the current [Working Group] on the Draft Declaration, the ensuing years would have looked very different. States are intimately associated with the status quo, which is precisely what Indigenous peoples needed altered; and state representatives, at their best, envisage alternatives to it with great difficulty. The experts who served in their individual capacities on the WGIP, on the other hand, enjoyed the possibility of critically distancing themselves from that status quo. Certainly, they conceived of their task as one of identifying standards that both states and Indigenous peoples could accept… [But] as Erica-Irene Daes essentially said in response to the U.S complaint in 1993 that the Draft Declaration was stretching the boundaries of international law, stretch they could.[29]

25 See for example, Committee on the Elimination of Racial Discrimination (CERD), *Decision 2(54) on Australia – Concluding observations / comments*, UN Doc: CERD/C/54/Misc.40/Rev.2, 19/3/1999; CERD, *Concluding observations – Australia*, UN Doc: CERD/C/304/Add.101, 19/4/2000.

26 Working Group on Indigenous Populations, *Report on 20th session*, *op cit*, paras 19, 54.

27 *ibid*, paras 77, 79.

28 *ibid*, paras 96-98.

29 Lâm, M, *op cit*, p77.

Commitments to developing partnerships with Indigenous peoples – from Rio and Vienna to the International Decade of the World's Indigenous people

By the early 1990s, governments and the United Nations began to commit to developing partnerships with Indigenous peoples at the international level.

On 18 December 1990 the General Assembly of the United Nations proclaimed 1993 as the International Year of the World's Indigenous People. The objective of the Year was to strengthen international cooperation for the solution of problems faced by Indigenous peoples in such areas as human rights, the environment, development, education and health. The theme for the Year was 'Indigenous people – a new partnership' and was aimed at the development of a new and equitable relationship between the international community, States and Indigenous peoples based on the participation of Indigenous people in the planning, implementation and evaluation of projects affecting their living conditions and future.[30] The International Year provided a platform for greater international attention to the situation and desires of Indigenous peoples, and for identifying the challenges that remained at the international level.

Around the same time, the role of Indigenous peoples in addressing environmental and sustainable development issues became increasingly recognised in a variety of international processes. Indigenous issues and the importance of the participation of Indigenous peoples were given prominent attention at the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. Chapter 26 of the conference's outcome document, titled *Agenda 21*, recognised the importance of Indigenous peoples having meaningful input in the global environmental agenda. It recommended that Indigenous lands be protected from environmentally unsound practices and from socially and culturally inappropriate activities.

Chapter 26 recognised the need for Indigenous peoples to maintain greater control over their lands and resources, and for States to adopt laws and policies to preserve customary practices and protect Indigenous property, including ideas and knowledge. It also called for Indigenous peoples' active participation in shaping national laws and policies on the management of resources and other development processes that affect their livelihoods; and for strengthened inter-agency coordination and collaboration with Indigenous peoples to incorporate Indigenous perspectives into program design and delivery.[31]

Since the Rio Summit a number of legal instruments on the environment have been developed which are relevant to Indigenous peoples. These include the United Nations Framework Convention on Climate Change, the Convention to

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30 Office of the High Commissioner for Human Rights, *Fact sheet 9 (rev.1): The rights of Indigenous peoples*, *op cit.*

31 For an overview of the involvement of Indigenous peoples in global environmental processes and the Rio Summit see Carino, J, 'Global environmental processes' in Netherlands Centre for Indigenous Peoples (ed), *Final report – Indigenous Peoples' Millennium Conference, 7-11 May 2001 Panama City*, NCIV, Amsterdam 2001, pp11-14.

Combat Desertification, and the establishment of the United Nations Forum on Forests. Perhaps most notably, the Convention on Biological Diversity was adopted in Nairobi in 1992.

The Convention on Biological Diversity was ratified by Australia in 1993. Its primary aims are the conservation of biological diversity, the sustainable use of biodiversity components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. The Convention is the only international instrument that provides for the recognition and protection of the role of Indigenous peoples in biological diversity conservation, use and management.

Article 8 (j) of the Convention requires States parties to respect, preserve and maintain knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity; and to promote their wider application and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. Article 10(c) requires States to protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements. Articles 17(2) and 18(4) encourage the recognition and use of traditional knowledge in the exchange of information, and development of technologies relevant to the conservation and sustainable use of biological diversity.

At the fourth meeting of parties to the Convention (the Conference of Parties) in 1998, a working group was established to address the implementation of Article 8(j) and related provisions of the Convention (the Article 8(j) Working Group). The working group is open to Indigenous representatives and has the role of providing advice to the Conference of Parties on the application of legal and other forms of protection for traditional knowledge; the development and implementation of a programme of work at the international and national levels; and on measures to strengthen international cooperation for the protection of traditional knowledge.[32]

The Article 8(j) Working Group has met twice, in March 2000 and February 2002. The recommendations of the Working Group have formed the basis of discussion and decisions at the subsequent meetings of the Conference of Parties to the Convention.[33] At the 5th meeting of the Conference of Parties in Nairobi in May 2000, for example, a work plan was adopted for advancing awareness of the protection of Indigenous Traditional Knowledge and recognition of the role of women in the conservation and sustainable use of natural resources. The work plan seeks to place priority attention on:

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32 For an overview of the Article 8(j) Committee and Indigenous peoples' participation in processes under the Convention on Biological Diversity see www.biodiv.org/programmes/socio-eco/traditional/; and Permanent Forum on Indigenous Issues, *Information received from the United Nations System – The Convention on Biological Diversity and Indigenous Peoples,* UN Doc: E/CN.19/2002/2/Add.11, 9 April 2002.

33 For the reports of the Article 8(j) Working Group see UN Doc: UNEP/CBD/COP/5/5 and UN Doc: UNEP/CBD/COP/6/7, available online at: www.biodiv.org.

- developing and enhancing the capacity of Indigenous communities and the full and effective participation of those communities in decision-making related to the use of their traditional knowledge;
- research on the status and trends regarding the knowledge, innovations and practices of Indigenous and local communities;
- the development of guidelines for the mechanisms, legislation or other appropriate initiatives to ensure the equitable share of benefits arising from the use and application of Indigenous peoples' knowledge, innovations and practices;
- processes for the exchange and dissemination of information with Indigenous and local communities;
- developing guidelines and recommendations for the conduct of cultural, environmental and social impact assessments regarding developments proposed on sacred sites and on lands or waters occupied or used by Indigenous peoples; and
- the development of participatory mechanisms for Indigenous and local communities in the implementation of the work plan.[34]

The significantly increased focus over the past decade on Indigenous issues relating to the environment and sustainable development at the international level can also be seen from the Johannesburg Declaration and Plan of Implementation of the World Summit on Sustainable Development. The World Summit, a ten year review of progress from the Rio Summit, was held in South Africa in August / September 2002. The conference documents reaffirm the vital role of Indigenous peoples in sustainable development,[35] and emphasise the need to:

- develop policies and ways and means to improve access by Indigenous people and their communities to economic activities and to increase their employment in order to address issues of poverty;
- recognise that traditional and direct dependence on renewable resources and ecosystems continues to be essential to the cultural, economic and physical well-being of Indigenous peoples; and
- provide access to agricultural resources, and promote land tenure arrangements that recognise and protect Indigenous resource management systems.[36]

The Johannesburg documents also acknowledge the important role of Indigenous peoples and their knowledge systems in addressing issues relating to disaster relief, climate change, biological diversity, sustainable tourism

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34 Note also the related work of the World Intellectual Property Organisation on traditional knowledge, benefit sharing, genetic resources and intellectual property: Åhrén, M, 'An introduction to the WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Expressions of Folklore' (2002) 1 *Indigenous Affairs* 64; Permanent Forum on Indigenous Issues, *Information received from the United Nations system – World Intellectual Property Organisation*, UN Doc: E/CN.19/2002/2/Add.1.

35 *Johannesburg Declaration on Sustainable Development of the World Summit on Sustainable Development*, 4 September 2002, para 25. Available online at: www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm.

36 *World Summit on Sustainable Development Plan of Implementation*, 23 September 2002, para 6. Available online at: www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm.

development, traditional knowledge, sustainable forest management, mining and resources management and the provision of adequate and appropriate health services.[37]

Indigenous peoples' rights also received significant attention at the second World Conference on Human Rights, which was held in Vienna in June 1993. The final Declaration and Programme of Action of the conference called for:

- Recognition of the inherent dignity and the unique contribution of Indigenous people to the development and plurality of society, and a reaffirmation of the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development;[38]
- States to ensure the full and free participation of Indigenous people in all aspects of society, in particular in matters of concern to them; and
- States to take concerted positive steps to ensure respect for all human rights and fundamental freedoms of Indigenous people, on the basis of equality and non-discrimination, and recognise the value and diversity of their distinct identities, cultures and social organisation.[39]

The Vienna Conference also called for 'the renewal and updating of the mandate of the Working Group on Indigenous Populations' upon completion of the drafting of the Declaration on the Rights of Indigenous Peoples that year.[40] It also called on the General Assembly to proclaim an international decade of the world's Indigenous people, including action-orientated programmes to be decided upon in partnership with Indigenous people. The conference recommended that the framework for such a decade should include consideration of the establishment of a permanent forum for Indigenous people in the United Nations system.[41]

In December 1993 the General Assembly acted upon the recommendation of the Vienna Conference and proclaimed the *International Decade of the World's Indigenous People*.[42] The Decade is to run from 10 December 1994 to 9 December 2004 and the theme of the Decade is 'Indigenous people: partnership in action'. The General Assembly set the following five, inter-related objectives for the International Decade.[43]

1) **International Cooperation:** The strengthening of international cooperation for the solution of problems faced by Indigenous people in such areas as human rights, the environment, development, health, culture and education. This is described by the General Assembly as the main objective.

37 *ibid*, paras 35, 36, 38, 40, 42, 43, 44, 45, 47, 53, 57, 58 and 103.

38 *Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights*, UN Doc: A/CONF.157/23, 12 July 1993, Section I, para 20.

39 *ibid*.

40 *ibid*, Section II(B)2, paras 28-29.

41 *ibid*, Section II(B)2, para 32.

42 General Assembly, *Resolution 48/163*, 21 December 1993.

43 United Nations General Assembly, *Resolution 50/157*, 21 December 1995, Annex: *Programme of activities for the International Decade of the World's Indigenous People*, paras 1-6; United Nations General Assembly, *Resolution 48/163*, 21 December 1993.

2) **Education:** The education of Indigenous and non-Indigenous societies concerning the situation, cultures, languages, rights and aspirations of Indigenous people. This is described by the General Assembly as a major objective.

3) **Recognition and protection of Indigenous rights:** The promotion and protection of the rights of Indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organisation.

4) **Implementing recommendations on Indigenous peoples:** The implementation of recommendations pertaining to Indigenous people of all high-level international conferences as well as of all future high-level meetings. In particular, the General Assembly requested that 'priority consideration' be given to the recommendation of the Vienna World Conference on Human Rights for the establishment of a permanent forum for Indigenous people in the United Nations system.

5) **Adoption of international standards on Indigenous rights:** The adoption of the draft United Nations declaration on the rights of Indigenous peoples and the further development of international standards, as well as national legislation, for the protection and promotion of the human rights of Indigenous people, including effective means of monitoring and guaranteeing those rights.

In establishing the International Decade the General Assembly stipulated that:

- the objectives of the Decade should be assessed by quantifiable outcomes that will improve the lives of Indigenous people and that are evaluated halfway through the Decade (ie, 1999) and at its end (2004);
- the activities and objectives for the Decade be planned and implemented on the basis of full consultation and collaboration with Indigenous people; and
- the specialised agencies, regional commissions, financial and development institutions and other relevant organisations of the United Nations system increase their efforts to take into special account the needs of Indigenous people in their budgeting and in their programming.[44]

The Programme of Activities for the Decade, adopted by the General Assembly in 1995, proposed a substantial list of activities to be conducted within the framework of the Decade. It includes 38 main proposals for activities by UN agencies and a further 19 for Governments, Indigenous organisations and non-government organisations. These include:

- the establishment of an International Day of the World's Indigenous People;
- the creation of an Indigenous Fellowship Programme in the office of the High Commissioner for Human Rights;

44 *ibid*.

- the establishment of focal points for Indigenous issues in all appropriate organisations of the United Nations system;
- the making available of training and resources to Indigenous peoples, and the development of specific Indigenous programmes and policies across the UN agencies;
- examination of the possible establishment of a permanent forum on Indigenous issues within the United Nations structure;
- the conduct of workshops, seminars and specific studies on issues relating to Indigenous issues;
- the conduct and publishing of research on the socio-economic conditions of Indigenous people across the world;
- the establishment of national committees for the Decade and the development of national action plans for the Decade; and
- educational activities at the national and local levels.[45]

The International Decade provides a framework for the strengthening of activities relating to Indigenous issues across the UN. It is a strong indication of the priority which the international community states it attaches to addressing Indigenous peoples' issues through international cooperation and to strengthening the participation of Indigenous peoples at the international level in issues that affect them.

Action at the international level has, however, been slow in implementing these commitments and in addressing the objectives of the Decade. Three years of the Decade passed before the General Assembly decided to appoint the United Nations High Commissioner for Human Rights as coordinator for the Decade.[46] The annual reports of the High Commissioner on progress in implementing the programme of activities for the decade also indicate that very little funding has been forthcoming from States or through the Voluntary Fund for the Decade to resource the activities of the Decade. Similarly, very little information has been provided by States as to activities undertaken to implement the International Decade.[47]

The High Commissioner for Human Rights had been requested to conduct a mid-term report reviewing the implementation of the programme of activities for the Decade. The report was to include the identification of obstacles to the achievement of the goals of the Decade and recommendations for solutions to overcome those obstacles, and to take into account the views of Member States, the specialised agencies, organisations of Indigenous people and other interested bodies.[48]

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45 See further: United Nations General Assembly, *Resolution 50/157*, 21 December 1995, Annex: *Programme of activities for the International Decade of the World's Indigenous People*, paras 8 – 65.

46 General Assembly Resolution 52/108, 12 December 1997.

47 See the various reports of the High Commissioner for Human Rights on Implementation of the programme of activities for the International Decade of the World's Indigenous People, such as: UN Docs: A/57/395 (11 September 2002); E/CN.4/2001/84; E/CN.4/2000/85; E/CN.4/1999/81; and E/CN.4/1998/107.

48 Commission on Human Rights Resolution 1999/51, 27 April 1999.

The High Commissioner requested information from governments regarding the implementation of programmes for the international decade that might be included in this review in 1999. Only three countries provided responses – Canada, New Zealand and the Russian Federation.[49] The mid-term review that was submitted only provided information about the activities of the United Nations system in meeting the objectives and implementing the programme of the Decade. This was as 'insufficient information was received from Governments, non-governmental organisations (NGOs) and Indigenous organisations for inclusion in the… report'.[50]

The mid-term review built on the analysis of the Secretary-General of the United Nations in his 1996 review of the existing mechanisms, procedures and programmes within the United Nations concerning Indigenous peoples.[51] That review had been conducted to contribute to the debate on the need or otherwise for a permanent forum within the UN on Indigenous issues. It found that:

- 'Indigenous people are largely absent from the meetings of the legislative bodies of the United Nations system',[52] in part because very few Indigenous organisations enjoyed consultative status with the Economic and Social Council which is a pre-requisite for participation in the majority of United Nations public meetings;
- there are few regular scheduled meetings on Indigenous issues in the United Nations;[53]
- funding for Indigenous programmes and projects 'is rarely available from the various United Nations bodies' aside from the 2 voluntary funds for assistance and participation of Indigenous peoples in the human rights area;[54] and
- there is a 'noticeable difference in level of activity even among United Nations bodies whose mandates have a bearing on Indigenous peoples' concerns'.[55]

Accordingly the Secretary-General concluded that:

> [O]n the positive side, it may be suggested that the efforts by the United Nations and certain of its organs… have contributed to the generation of widespread public interest in the issue of Indigenous people, renewed national commitment to improving the condition of these peoples, and international initiatives to support these activities…
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> [But] on the other hand, there are apparent lacunae and inconsistencies within the United Nations system on these issues. For example, there are no internationally accepted guidelines on the rights of Indigenous

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49 See UN Doc: E/CN.4/2000/85.

50 United Nations High Commissioner for Human Rights, *Programme of activities of the International Decade of the World's Indigenous People – Report of the Secretary-General*, UN Doc: A/54/487, 21 October 1999, para 2. See also: UN Doc A/54/487/Add.1, 21 October 1999.

51 *Report of the Secretary-General on the review of the existing mechanisms, procedures and programmes within the United Nations concerning Indigenous people*, UN Doc: A/51/493, 14 October 1996.

52 *ibid*, para 37.

53 *ibid*, para 40.

54 *ibid*, para 108.

55 *ibid*, para 161.

> peoples… [and] the different United Nations agencies relate to Indigenous peoples in quite distinct ways. Some United Nations meetings, even those dealing directly with Indigenous matters, offer relatively open participation, while others are almost entirely closed off to Indigenous organisations. Above all, there are virtually no mechanisms in the United Nations organisations which give the nominated representative of Indigenous organisations or peoples the opportunity to provide expert advice or take part in decision-making.[56]

Referring back to the goals of international cooperation and the importance of facilitating Indigenous participation in the activities of the Decade, the review also stated that:

> The fact that there are now a number of Indigenous related programmes and projects being implemented and planned by United Nations agencies only underlines the striking absence of a mechanism to ensure regular exchange of information among the concerned and interested parties – Governments, the United Nations system and Indigenous people – on an ongoing basis… In particular, it might be seen as particularly important, both from a human rights perspective and for cost-effectiveness to establish procedures that help to avoid projects and programmes in Indigenous areas which are unwelcome by the supposed beneficiaries. In this respect it is fitting to recall the commitment of the General Assembly to the principle of full and effective involvement of Indigenous people in the planning, implementation and evaluation of projects affecting them. The information provided by the United Nations agencies does not indicate that adequate procedures are already in place to accommodate the General Assembly's recommendation.[57]

The High Commissioner's review in 1999 noted that there has been 'an evolution over the last five years in the development of policy guidelines, programme activities, consultation mechanisms, specific funding and staff resources being dedicated to Indigenous peoples issues' in many United Nations agencies and that accordingly, the objectives of the Decade were beginning to be met by a growing number of UN agencies.[58]

But it also highlighted as ongoing problems for implementation of the Decade 'the limited human resources available and the lack of funding for the activities themselves'.[59] Halfway through the Decade, only a quarter of the United Nations organisations for which information was available had a designated focal point or unit for Indigenous people or for the Decade. Contributions to the Voluntary Fund for the International Decade, established by the General Assembly to fund activities of the Decade, totalled only US$1.1 million for the initial five years of the Decade. Three countries provided more than 70 per cent of those contributions, with Denmark contributing 40 per cent of the total. The review stated the impact of this lack of funding was that 'at the present time, insufficient

56 *ibid*, paras 164, 165.
57 *ibid*, para 166.
58 United Nations High Commissioner for Human Rights, *Programme of activities of the International Decade of the World's Indigenous People – Report of the Secretary-General*, UN Doc: A/54/487, 21 October 1999, paras 6 and 7.
59 *ibid*, para 16.

funds are available to complete the programme approved… for 1999 and no funds are available for the programme for 2000'.[60]

The problem of financing, however, goes beyond the lack of contributions by States to the Voluntary Fund for the Decade. As the Chairperson of the Working Group on Indigenous Populations, Madame Daes, stated at the 19th session of the Working Group, it also extends to the programming of the UN specialised agencies:

> [T]he International Year and the International Decade of the World's Indigenous People have received appallingly meager financial support; and while United Nations operational bodies and specialised agencies have taken greater heed of the concerns of Indigenous peoples, they still devote *less than one-tenth of one percent of their program budgets* to activities that benefit Indigenous peoples directly.[61]

Similarly she noted that despite the International Decade and the activities of the UN agencies, there is no specific commitment or reference to Indigenous peoples in the United Nations Millennium Declaration adopted by the General Assembly in 2000. This Declaration sets out the United Nations vision for the twenty-first century.

The High Commissioner's mid-term review reflected the feelings of many Indigenous peoples when it stated that:

> The proclamation of the International Decade of the World's Indigenous People has raised high expectations among Indigenous people worldwide. It has set objectives which are ambitious but realistic. The achievement of some of the goals of the Decade — the adoption of a declaration and the establishment of a permanent forum for Indigenous people within the United Nations — are dependent upon the will of Member States and progress in the negotiations… With respect to the other objectives of the Decade and the fulfilment of the broader trust which Indigenous peoples have in the United Nations system, it is necessary to renew the commitment of the international community to contributing to improvements in the lives of Indigenous people.[62]

Ultimately, the High Commissioner's mid-term review returned to the central issue identified by the Secretary-General's earlier review, namely the proposal for a permanent forum to address the 'striking absence of a mechanism to ensure regular exchange of information' and the participation of Indigenous peoples.

The review argued that 'implicit in the theme of the Decade, 'Indigenous people: partnership in action'… is the notion that Indigenous people and organisations should have recognised rights of participation in the United Nations decision-making bodies and have a formal or institutional role in international policy-formulation and policy-making in areas affecting their lives'.[63] It lamented that until such a permanent forum was created, Indigenous peoples would continue

60 *ibid.*
61 Daes, E, *Statement to the 19th session of the Working Group on Indigenous Populations*, July 2001. Emphasis added.
62 *ibid*, para 17.
63 *ibid*, para 11.

to participate in the distinct United Nations organisations on quite different bases, with consultations being conducted on an ad hoc basis and with the recommendations arising from such consultations lacking any institutional recognition.

The mid-term review, along with the report of the Secretary-General in 1996, supported the establishment of a permanent forum on Indigenous issues within the UN as a matter of priority and as a main way of meeting the objectives of the International Decade.

Indigenous peoples have criticised the mid-term review as not providing any meaningful monitoring of how the objectives of the International Decade have been met. It contains no quantifiable outcomes by which to measure whether the objectives of the Decade were being addressed. It did not provide information about the 'partnership' role of Indigenous peoples in the Decade, nor any information or critique of the often counter-productive and oppositional approach adopted by some governments to meeting the objectives of the Decade.[64]

To address these deficiencies, Indigenous peoples decided to convene their own summit to review the implementation of the programme and objectives of the International Decade. Accordingly, the Indigenous Peoples' Millennium Conference was convened in Panama City from 7-11 May 2001.

The Indigenous Peoples' Millennium Conference statement acknowledges the range of activities that have been undertaken within the framework of the Decade, including the substantial activities of Indigenous peoples throughout the Decade.[65] It also identifies four broad set of concerns about lack of progress of the Decade, namely:

- the inability of the UN system to undertake the internal organising essential to implement the Decade's objectives and programme;
- the lack of adequate funding for the Decade;
- the lack of cohesion within the United Nations system, which results in different agencies addressing Indigenous issues in vastly different ways and levels of sophistication. The overall result of this is that it renders it impossible for the UN system to implement a strategic plan to address the needs of Indigenous peoples; and
- the lack of progress on recognising Indigenous rights, particularly through acceptance of the principles of the Draft Declaration on the Rights of Indigenous Peoples.[66]

The Conference Statement concludes by noting that 'the theme of a working partnership also seems to be illusive' with consultations conducted by States and UN agencies resulting in little follow up or change. Indigenous peoples are anxious to ensure that the end of the Decade does not pass with the lack of

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64 See the critique of the mid-term review in Indigenous Peoples' Millennium Conference review of the UN Decade of the World's Indigenous People, Netherlands Centre for Indigenous Peoples (editor), *Final report – Indigenous Peoples' Millennium Conference, 7-11 May 2001 Panama City*, NCIV, Amsterdam 2001. The review of the Decade is available online at: www.nciv.net/engels/Reviewmiliani.htm.

65 *ibid*, pp58-61.

66 *ibid*, pp58-60.

attention that met the mid-point of the Decade. Accordingly the Millennium Conference recommended that:

> As the mid-decade period passes, there is an increased urgency to address the goals and objectives of the Decade. The Indigenous Caucus came to consensus that the UN system should end this Decade with a World Conference on Indigenous Peoples so that the UN system, States and Indigenous Peoples can establish a template for future efforts to address and resolve the critical issues of the new millennium.[67]

'You have a home at the United Nations' – The creation of the Permanent Forum on Indigenous Issues

The most concrete and significant achievement of the International Decade has been the establishment of the Permanent Forum on Indigenous Issues by the Economic and Social Council on 28 July 2000.[68] Significantly, it was established as a subsidiary organ of the Council. In practical terms, this places the Permanent Forum at the highest level of the United Nations possible without amendment to the UN Charter.

As an advisory body to the Economic and Social Council, the Permanent Forum has a wide-ranging role to discuss Indigenous issues that fall within the mandate of the Council. This includes issues relating to economic and social development, culture, the environment, education, health and human rights. Its function is to:

> a) Provide expert advice and recommendations on Indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council;
> b) Raise awareness and promote the integration and coordination of activities relating to Indigenous issues within the United Nations system; and
> c) Prepare and disseminate information on Indigenous issues.[69]

The Permanent Forum is to report annually to the Council on its activities, at which time it can make any recommendations on Indigenous issues. It is required that the Permanent Forum's report then be distributed to the relevant United Nations organs, funds, programmes and agencies as a means of furthering the dialogue on Indigenous issues within the United Nations system.[70]

The Permanent Forum met for its inaugural session in New York from 13-24 May 2002. At this early stage there are four main factors about the Permanent Forum that warrant comment in relation to the objectives of the International Decade.

First is to note the sheer scope of the role of the Permanent Forum and its potential to transform consideration of Indigenous issues at the international level. As Kofi Annan stated to the Permanent Forum during its first session:

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67 *ibid*, p61.
68 Economic and Social Council Resolution 2000/22, 28 July 2000.
69 *ibid*, para 2.
70 *ibid,* para 5.

> [Y]our Forum has formidable responsibilities. You must determine how best to mobilise the expertise and resources of the United Nations system. You will need to forge new relationships between Indigenous communities and specialised agencies. And you will have to convince governments that they must join these efforts and increase the attention they pay to Indigenous issues.[71]

The size of the coordination role of the Permanent Forum can be seen by looking at the list of United Nations agencies that either participated in the Inter-Agency Support Group for the Permanent Forum in the lead up to its first session or were referred to in the recommendations of the Permanent Forum's first report. These agencies include the World Intellectual Property Organisation; United Nations Human Nations Human Settlements Programme; United Nations Children's Fund (UNICEF); United Nations Development Programme; United Nations Environment Programme; Office of the United Nations High Commissioner for Refugees; Office of the United Nations High Commissioner for Human Rights; World Trade Organisation; United Nations Educational, Scientific and Cultural Organisation; World Health Organisation; United Nations Population Fund; United Nations Institute for Training and Research; World Bank; Convention on Biological Diversity; Food and Agriculture Organisation; International Labour Office; Global Alliance for Vaccination Initiative; UNAIDS and others.

It is not the role of the Permanent Forum to identify every aspect of the mandates of each of these and other UN agencies that relate to Indigenous peoples or to identify every programme that is relevant to Indigenous needs. That is clearly the role of each of the UN agencies themselves, preferably through the establishment of a centralised focal point within each agency.

But it *is* the Permanent Forum's role to identify linkages, overlaps and gaps between the UN agencies, as well as to examine the processes for Indigenous participation in the activities of the UN agencies and the appropriateness or otherwise of the basis of such engagement.

The difficulty and size of this task is demonstrated by examining the recommendations that emerged from the first session of the Permanent Forum. One of the most basic conclusions from the first session was to note the lack of information about the activities of the various UN agencies, such as what programmes and policies do the UN agencies have specific to Indigenous peoples? What programmes do they have that are not specific but are generally accessible to Indigenous peoples? How much of their budgets are devoted to Indigenous specific activities? What mechanisms exist for Indigenous participation in setting policies, programmes and priorities? And how are programmes and policies kept under review and monitored?

To address these preliminary concerns about information on the treatment of Indigenous issues by the United Nations the Permanent Forum recommended to the ECOSOC that:

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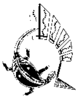
71 United Nations Secretary-General (Kofi Annan), 'You have a home at the United Nations', Speech to Permanent Forum on Indigenous Issues, 24 May 2002, p1.

- all UN agencies be requested to provide information on their activities relating to Indigenous peoples to the next session of the Permanent Forum;
- a comprehensive questionnaire be prepared with the objective of standardising and coordinating the collection of data on Indigenous issues within the UN system;
- a study be prepared reviewing the necessary policy, programme and technical issues to be addressed for the establishment of an integrated database on Indigenous issues;
- consideration be given to technical training for Indigenous peoples to access UN data systems and to the role of Indigenous and mainstream media in disseminating information and education on Indigenous issues;
- a website be created for the Permanent Forum to coordinate information about all UN activities on Indigenous issues;
- data be disaggregated and transmitted to the Permanent Forum on an annual basis on Indigenous peoples generally and Indigenous women and children specifically in terms of a) programmes and services impacting Indigenous peoples and b) fiscal allocations for Indigenous peoples' programmes and services;
- all UN agencies transmit to the Permanent Forum on an annual basis copies of all relevant data sources, publications and internet services relating to Indigenous peoples, as well as of all internal policies and procedures relating to Indigenous peoples, noting any limitations on their activities in particular states or regions (for example, does the World Health Organisation address Indigenous issues in so-called 'first-world' countries or does it focus on the situation in more disadvantaged countries?); and
- the UN system produce a triennial report on the state of the world's Indigenous peoples, including data and issues discussed in a thematic matter in accordance with the Permanent Forum's mandate.[72]

As these recommendations demonstrate, the potential of the Permanent Forum is that it will be able to mobilise the entire United Nations system to addressing the circumstances and issues of Indigenous peoples the world over. It is ultimately a powerful monitoring mechanism to hold these agencies accountable for their performance on Indigenous issues.

The second feature of the Permanent Forum is that it offers unprecedented scope for Indigenous peoples to participate in the programming and policy directions of the agencies of the United Nations. ECOSOC Resolution 2000/22 which establishes the Permanent Forum provides for such participation in two main ways – through the appointment of Indigenous peoples' elected representatives as members of the Forum and by adopting the procedures of the Working Group on Indigenous Populations to facilitate the participation of Indigenous organisations in the Permanent Forum's activities.

72 Permanent Forum on Indigenous Issues, *Report of the First session of the Permanent Forum on Indigenous Issues*, UN Doc: E/2002/42, Sup.43, 1 June 2002, pp4-6.



The Permanent Forum is constituted of 16 members. Eight of these are nominated by Governments and elected by the Economic and Social Council, and eight are appointed by the President of the Council following consultations with Indigenous organisations. These eight 'Indigenous nominated' experts are to be selected on the basis of 'the diversity and geographical distribution of the Indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all Indigenous people, including internal processes, when appropriate, and local Indigenous consultation processes'.[73]

While there were difficulties with the initial selection processes for the Indigenous nominated members,[74] this process is revolutionary in United Nations terms. It is the first time that appointments to a body of the Economic and Social Council – one of the primary and most significant agencies of the United Nations – have not been solely determined by governments or their representatives. It represents an opening up of the United Nations decision-making process to non-government, Indigenous interests. As Willie Littlechild, an Indigenous nominated member of the Permanent Forum has stated, this process 'is a step in the direction of recognition of our right to self-determination. We shall participate in the Permanent Forum on an equal footing with members appointed by the states. For the first time in history we will be part of the UN family'.[75]

The resolution establishing the Permanent Forum also provides that 'organisations of Indigenous people may equally participate as observers (at the Permanent Forum) in accordance with the procedures which have been applied in the Working Group on Indigenous Populations of the Sub-commission on the Promotion and Protection of Human Rights'.[76] This is in addition to the regular list of participants, namely States, United Nations bodies and organs, inter-governmental organisations and non-governmental organisations in consultative status with the Council.

The importance of facilitating such broad participation was noted above in relation to the activities of the Working Group on Indigenous Populations. The practical effect of this approach was quite noticeable at the first session of the Permanent Forum, where the opportunities for governments and Indigenous organisations to contribute to the work of the Forum were equal. Normally, governments have pre-eminence in speaking rights in UN forums. NGOs are usually limited to making contributions during left over time once governments have concluded their discussions, or in the short periods allocated by the chair at the beginning or end of each meeting (usually 5 to 10 minutes of each 3 hour session). If anything, governments played a secondary, though still important, role at the Permanent Forum with the majority of time and discussion coming from Indigenous organisations.

In a special meeting of the Permanent Forum, the Secretary-General of the United Nations – Kofi Annan – captured the significance of this by stating:

73 ECOSOC Resolution 2000/22, 28 July 2000, para 1.

74 See for example: Indigenous Peoples' Millennium Conference, *Resolution on the Permanent Forum*, *op cit.*

75 Quoted in García-Alix, L, 'Editorial' in (2002) 1 *Indigenous Affairs* 4, p4.

76 ECOSOC Resolution 2000/22, 28 July 2000, para 1.

> You have a home at the United Nations. Indeed, you have rights, needs and aspirations that can and must be addressed by the world Organisation. And you have knowledge, vision, value, skills and many other attributes that can and must help us at the United Nations, and indeed all humankind, to achieve our long-sought goals of development and peace… With the inauguration of this Forum, Indigenous issues assume their rightful place – higher on the international agenda than ever before…[77]

The third feature of the Permanent Forum is that it has the potential to mainstream the Indigenous rights agenda within the United Nations system. Human rights are but one of several mandated areas which the Permanent Forum is to consider. Despite this, they have already begun to occupy a central position in the considerations of the Forum.

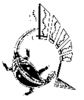
One reason for this is that the Permanent Forum has emerged largely from debate in the human rights field, led by the Working Group on Indigenous Populations and the Commission on Human Rights. Most of the members appointed to the Forum also have significant experience in the human rights field, with most of the Indigenous members having contributed to debates on Indigenous rights at the United Nations over a prolonged period of time. Similarly, as I stated at the outset of this chapter, there is an integral link between Indigenous participation at the international level and the struggle for recognition of Indigenous rights. It is inevitable that the Indigenous rights agenda will be prominent in a forum whose purpose is linked to facilitating Indigenous participation in decision-making processes.

Most Indigenous speakers at the Permanent Forum's first session argued that each UN agency must adopt a human rights approach to address Indigenous issues. Regardless of whether the discussion related to education and culture, the environment or economic and social development, for example, the key issues that were continually emphasised were Indigenous peoples' participation in decision-making that affects them; self-determination; governance and capacity building; free, prior and informed consent; and recognition of the differential impact on vulnerable groups such as women, children and people with disabilities.

The difficulty which exists for the Permanent Forum and the UN agencies at this time is that there is still no universal set of principles setting out the rights of Indigenous peoples which could be applied to the activities and programmes of all UN agencies. At present, the extent to which UN agencies take account of Indigenous rights varies enormously. The Permanent Forum joined the chorus of voices calling for the swift adoption of the Draft Declaration on the Rights of Indigenous Peoples within the framework of the International Decade to provide greater consistency in this regard.

The fourth feature of the Permanent Forum is that the limitations of what it can achieve will primarily be set by the human, technical and financial resources which are made available to it. The issue of resourcing remains the primary obstacle to the success of the Permanent Forum.

The ECOSOC Resolution establishing the Permanent Forum states that 'the financing of the Permanent Forum shall be provided from within existing resources through the regular budget of the United Nations and its specialised



agencies and through such voluntary contributions as may be donated'.[78] Like contributions for the International Decade, voluntary contributions for the Permanent Forum have been extremely limited.

The governments of Australia and the USA have advocated that the correct interpretation of 'within exiting resources' is within existing *Indigenous* resources. Given that Indigenous issues are already severely under-resourced within the UN system, this position is unsustainable.

At this stage, the Permanent Forum is comprised solely of the 16 appointed members who are due to meet once annually. They have no Secretariat and hence no capacity to advance consideration of issues between sessions. The primary recommendation of the Permanent Forum at its first session was for the ECOSOC to address this very issue. It states that the ECOSOC should accept the following decision:

> **Draft decision 1: Establishment of a Secretariat**
>
> The Economic and Social Council decides that a Secretariat shall be established as a matter of urgency and that, given the broad mandate of the forum, the secretariat shall be located in New York and be attached to the Secretariat of the Council. The Secretariat will… comprise five professionals and two administrative staff, with due consideration being given to qualified Indigenous persons. The secretariat will assist members of the Permanent Forum to fulfil their mandate by implementing the approved programme of activities, including organisation of meetings; undertaking research projects and preparing the annual report to the Economic and Social Council; raising awareness and promoting the integration and coordination of activities relating to Indigenous issues within the United Nations system; and preparing and disseminating information on Indigenous issues. These activities are to be funded from the regular budget.[79]

In July 2002 the ECOSOC responded to this recommendation by requesting the Secretary-General of the United Nations to appoint a Secretariat Unit to the Permanent Forum, attached to the Department of Economic and Social Affairs (DESA) of the UN in New York; and to establish a voluntary fund for the Permanent Forum for the purpose of funding the implementation of recommendations made by the Forum.[80] The ECOSOC has also requested the Secretary-General to submit proposals for the provision of adequate resources for the Permanent Forum to the 57th session of the General Assembly for decision.[81]

At the time of writing, the issue of resourcing was making its way through the processes of the United Nations General Assembly for decision. It was discussed within the framework of the International Decade by the 3rd Committee of the General Assembly in October 2002[82] where the Australian Government provided

77 Annan, K, *op cit*, p1.
78 ECOSOC Resolution 2000/22, *op cit*, para 6.
79 Permanent Forum on Indigenous Issues, *Report of the First session of the Permanent Forum on Indigenous Issues*, UN Doc: E/2002/42, Sup.43, p2.
80 ECOSOC Resolution E/2002/L.16, 25 July 2002.
81 UN Docs: E/2002/L.32 and E/2002/L.33, 24 July 2002.
82 See United Nations General Assembly, *Third committee delegates say completion of draft on Indigenous rights is critical by 2004, as discussion of Indigenous people concludes*, media release GA/SHC/3704, 21 October 2002.

positive support for the establishment of a Secretariat for the Permanent Forum. Notably though the Government is yet to contribute any funding towards this end or towards the implementation of the recommendations of the Forum's first session.

In December 2002 the 5th committee of the General Assembly, which makes the budgetary decisions, decided to provide US$450,000 in funding to the Permanent Forum from the contingency budget until the regular budget can be decided in the 2004-2005 UN budget biennium cycle. A two person Secretariat for the Permanent Forum is likely to now be operational by February 2003. Unfortunately it appears likely at this stage that the Permanent Forum will be unable to advance the numerous recommendations and activities contained in their first report prior to their second session in May 2003.

The Permanent Forum has the potential to revolutionise the way that the United Nations engages with Indigenous peoples and addresses their circumstances. Its importance cannot be over-estimated. It is clear, however, that it is a massive undertaking that requires significant technical, human and financial resourcing from the United Nations and governments of the world. Such support has not been forthcoming to date. Until such support is forthcoming it is not possible to argue that the Permanent Forum implements several of the key objectives of the International Decade.

As Mililani Trask, one of the Indigenous nominated experts to the Forum, stated in her opening remarks at the Forum's first session, there is a danger that the Permanent Forum could become an example of institutionalised racism within the United Nations system if such support is not forthcoming to enable the Forum to undertake its mandate.

Recognising and protecting the rights of Indigenous peoples – The Special Rapporteur, Durban and the Draft Declaration

This chapter has outlined an extraordinary variety of achievements in the recognition of Indigenous rights and the participation of Indigenous peoples at the international level over the past thirty years. Despite these achievements, there remains a great distance to be travelled for international law to provide full and non-discriminatory recognition of Indigenous peoples' rights and for the objectives of the International Decade to be met.

If there were any doubt as to the extent of the recognition still required it can be immediately dispelled by considering one simple fact relating to the process of negotiation on the Declaration on the Rights of Indigenous Peoples as drafted by the Working Group on Indigenous Populations and accepted by the Sub-Commission on the Promotion and Protection of Human Rights. The Draft Declaration has been under consideration by governments in an inter-sessional working group of the Commission on Human Rights for seven years. In this time, governments have adopted just two of the Declaration's 45 Articles.

While there are a myriad of reasons for this slow progress, there is one fundamental issue that underlies it – the reluctance (or refusal) of governments to recognise the application of the right of self-determination to Indigenous peoples. As Sharon Venne has described it, 'The difficulty for Indigenous peoples has been to obtain the rights which have been applied and accepted as rights

of peoples, that is, to add 'Indigenous' to 'Peoples'.'[83] This issue is the reason that we have an International Decade for the World's Indigenous *People*; a Permanent Forum on Indigenous *Issues*; and a Working Group on Indigenous *Populations*. The word 'peoples' is conspicuously absent from all UN processes relating to Indigenous peoples.

It is worth recalling that the objectives of the International Decade include:

- The promotion and protection of the rights of Indigenous people and their empowerment to make choices which enable them to retain their cultural identity while participating in political, economic and social life, with full respect for their cultural values, languages, traditions and forms of social organisation;
- The implementation of recommendations pertaining to Indigenous people of all high-level international conferences as well as of all future high-level meetings; and
- The adoption of the draft United Nations declaration on the rights of Indigenous peoples and the further development of international standards, as well as national legislation, for the protection and promotion of the human rights of Indigenous people, including effective means of monitoring and guaranteeing those rights.

Since 2000, there have been three main processes which are related to these objectives of the International Decade. They are the establishment of a Special Rapporteur on Indigenous people by the Commission on Human Rights; the Durban World Conference Against Racism; and the ongoing negotiations on the Draft Declaration on the Rights of Indigenous Peoples.

Concerned at the lack of progress in adopting standards on Indigenous rights and the consequent lack of specific protection of Indigenous peoples, the Commission on Human Rights acted on 24 April 2001 to create the position of Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people.

The Special Rapporteur has the following functions:

a) to gather, request, receive and exchange information and communications from all relevant sources, including Governments, Indigenous people themselves and their communities and organisations, on violations of their human rights and fundamental freedoms;

b) to formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of Indigenous people; and

c) to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights.[84]

The Commission requested the Special Rapporteur to particularly pay attention to discrimination against Indigenous women; violations of the human rights

83 Venne, S, *op cit*, p96.

84 Commission on Human Rights Resolution 2001/57, 24 April 2001.

and fundamental freedoms of Indigenous children; the recommendations of the WGIP and of the Permanent Forum on Indigenous Issues; and the recommendations of the World Conference Against Racism (2001). The Special Rapporteur, Mr Rodolfo Stavenhagen, is to report annually to the Commission on his activities. Governments are requested to give serious consideration to the possibility of inviting the special rapporteur to visit their countries so as to enable him to fulfil his mandate effectively.

In introducing the resolution to create the role of Special Rapporteur, Mexico highlighted the need to strengthen the protection of Indigenous peoples and monitor the human rights of specific vulnerable groups. Guatemala stated that Indigenous peoples could not wait until the adoption of the Draft Declaration to have their rights protected.

Canada, Argentina and Australia argued against the creation of the position of Special Rapporteur by stating that the Permanent Forum and the Draft Declaration were priority issues that would have a major impact on the consideration of any future mechanism or process pertaining to Indigenous issues. Australia expressed the view that:

> until the permanent forum is established, we consider it premature to establish any new mechanisms in this area, such as the Special Rapporteur on the Human Rights of Indigenous Peoples. We see no need for such a mechanism and consider that to establish it would divert valuable time and energy away from the work required to establish the Permanent Forum.[85]

Ultimately Australia joined with United States of America in supporting the creation of the role of Special Rapporteur:

> with the expectation that the Working Group on Indigenous Populations will focus its next session on how best to hand its work to the Permanent Forum. The WGIP has had a successful history. However with the establishment today of a new Special Rapporteur, the imminent start of the Permanent Forum and the continued work of the Working Group on the Draft Declaration, the US believes the Working Group on Indigenous Populations has fulfilled its mandate.[86]

The Special Rapporteur submitted his first report to the Commission on Human Rights in April 2002. It provides an overview of the current level of protection of Indigenous peoples' human rights. He notes that there is a 'problem of a "protection gap" between existing human rights legislation and specific situations facing Indigenous people' which is 'of major significance and presents a challenge to international mechanisms for the effective protection of human rights'.[87] The Special Rapporteur anticipates that in his capacity he shall address these issues through two processes – communications and thematic research.

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85 Australian intervention, Commission on Human Rights, 24 April 2001.
86 Intervention by the United States of America, Commission on Human Rights, 24 April 2001.
87 Stavenhagen, R, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people*, *op cit*, para 102.

His first report identifies the following issues as deserving particular attention:

- The impact of development projects on the human rights and fundamental freedoms of Indigenous communities;
- Evaluation of the implementation of recent legislation at the national level related to the rights of Indigenous peoples;
- Human rights issues for Indigenous people in the realm of administration of justice, including, where relevant, the relationship between positive and customary (non-written) legal systems;
- Cultural rights of Indigenous peoples as reflected in bilingual and intercultural education, as well as the preservation and development of their own cultural heritage;
- Human rights issues – particularly economic and social rights – regarding Indigenous children, especially girls, in different settings, such as migrations, trafficking of women and girls, violent conflicts, the informal economy;
- Participation of Indigenous peoples in decision-making processes, autonomic arrangements, governance and policy-making, with special regard to the full implementation of civil and political rights; and
- Old and new forms of discrimination against Indigenous people, within a gender perspective, in the light of the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as measures and remedies undertaken to combat discrimination and implement the human rights and fundamental freedoms of Indigenous peoples.[88]

The Special Rapporteur has indicated that he intends to focus particularly on one of these topics each year, as well as to address immediate violations of human rights brought to his attention through communications processes. In 2002-03, the Special Rapporteur has sought information on two topics: the impact of development projects on the human rights and fundamental freedoms of Indigenous communities, and the human rights issues for Indigenous people in the realm of administration of justice. It is anticipated that his 2003 report will address the first issue and the 2004 report the second issue.

The establishment of the Special Rapporteur joins the Permanent Forum as one of the most important achievements of the International Decade. Like the Permanent Forum, issues of resourcing will determine the scope of work that can be undertaken by the Rapporteur and the extent to which the potential of the Rapporteur's role is turned into a reality. The limitations of the Special Rapporteur are demonstrated by the fact that he is currently only funded to undertake two country visits each year.

The advances that have been made during the course of the International Decade and the great challenges that remain for Indigenous peoples are perfectly illustrated by the consideration of Indigenous issues in the Durban Declaration and Programme of Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The World

88 *ibid*, para 111.

Conference was held in Durban South Africa in August-September 2001. The documents of the World Conference demonstrate the positive recognition that Indigenous issues have achieved over the course of the International Decade. But they also reveal the major limitations that remain in the treatment of Indigenous issues.[89]

On the positive side, the Durban Declaration states unequivocally that the full realisation by Indigenous peoples of their human rights and fundamental freedoms is indispensable to the elimination of racism and that the full participation of Indigenous peoples in society, along with cultural pluralism, is essential for political and social stability.[90] Accordingly, States express determination 'to promote [Indigenous peoples'] full and equal enjoyment of… rights, as well as the benefits of sustainable development, while fully respecting their distinctive characteristics and their own initiatives'.[91]

The Durban Declaration also acknowledges:

- the 'importance and necessity' of teaching about the facts and truth of the history, causes, nature and consequences of racism, including that resulting from colonialism;[92]
- that Indigenous peoples have suffered as a consequence of colonialism and that contemporary social and economic inequalities are a consequence of this history;[93]
- that Indigenous peoples have been victims of discrimination for centuries and there is an ongoing need to overcome persistent racism;[94] and
- the value and diversity of the cultures and heritage of Indigenous peoples.[95]

The Programme of Action of the World Conference, which is intended to detail the practical, action oriented steps which must be taken, places an emphasis on adopting a gendered approach to racism including the adoption of policies and programmes in concert with Indigenous women in order to promote their rights and deal with urgent problems that they face in relation to education, health, economic life and violence.[96]

It calls on the UN agencies to assign particular priority to and allocate sufficient funding to Indigenous issues within the framework of the International Decade;[97] and calls on States to ensure adequate funding for the Permanent Forum and the Special Rapporteur in order that they can fully undertake their mandates.[98]

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89 For an overview of the conference process see Dick, D, 'The United Nations World Conference Against Racism' (2001) 5(13) *Indigenous Law Bulletin* 5.
90 *Durban Declaration of the World Conference Against Racism*, para 40.
91 *ibid*, para 41.
92 *ibid*, paras 98-99.
93 *ibid*, para 14.
94 *ibid*, para 30.
95 *ibid*, para 40.
96 *Durban Programme of Action of the World Conference Against Racism*, para 18.
97 *ibid*, para 209.
98 *ibid*, paras 204, 205.

The Programme of Action also calls on States to:

- work with Indigenous peoples to stimulate their access to economic activities and increase employment, including through the acquisition of enterprises ands provision of training, technical assistance and credit facilities;[99]
- promote better knowledge of and respect for Indigenous cultures and heritage;[100]
- promote understanding among society at large of the importance of special measures to overcome Indigenous disadvantage; and
- consult with Indigenous representatives in the process of decision-making concerning policies and measures that directly affect them.[101]

Notably, in light of the International Decade, the Programme also calls for:

- the Secretary-General of the United Nations conduct an evaluation of the results of the International Decade and make recommendations concerning how to mark the end of the Decade, including appropriate follow up[102] ;
- States to conclude negotiations on and approve as soon as possible the Draft Declaration on the Rights of Indigenous Peoples;[103] and
- States to give 'full and appropriate consideration to the recommendations produced by Indigenous peoples in their own forums on the World Conference.[104]

Despite this positive recognition and recommendations, the World Conference documents also contain numerous negative provisions. The documents tend to make only vague or qualified references to Indigenous rights and contain no recognition of the collective dimension of Indigenous peoples' livelihoods.

So while the Declaration notes that 'efforts are now being made to secure universal recognition for [Indigenous peoples' rights] in the negotiations on the Draft Declaration',[105] at no stage does it provide any positive recognition that the claims of Indigenous peoples through the Draft Declaration amount to existing rights or that they should be recognised. The closest to this is the Programme's urging States to conclude the negotiations on the declaration as soon as possible.

While the Declaration affirms that Indigenous peoples 'are free and equal in dignity and rights and should not suffer any discrimination, particularly on the basis of their Indigenous origin and identity'[106] it does so subject to 'the principles of sovereignty and territorial integrity of States'.[107]

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99 *ibid*, paras 16, 17.
100 *ibid*, para 15.
101 *ibid*, para 22.
102 *ibid*, para 203.
103 *ibid*, para 206.
104 *ibid*, para 21.
105 *Durban Declaration of the World Conference Against Racism*, para 42.
106 *ibid*, para 39.
107 *ibid*, para 23.

The Declaration also recognises 'the special relationship that Indigenous peoples have with the land as the basis of their spiritual, physical and cultural existence'.[108] But in encouraging States to ensure that Indigenous peoples are able to retain ownership of their lands and of natural resources, limits such recognition to that 'to which they are entitled under domestic law'.[109] This is a regression from the text of the first two world conferences against racism in 1978 and 1983 and potentially in conflict with the international law doctrine of permanent sovereignty over natural resources.[110]

The documents refer to Indigenous 'peoples' but do so on the following basis:

> We declare that the use of the term 'Indigenous peoples' in the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance is in the context of, and without prejudice to the outcome of, ongoing international negotiations on texts that specifically deal with this issue, and cannot be construed as having any implications as to rights under international law.[111]

This text provides no acknowledgement of that Indigenous peoples constitute a 'peoples' and consequently no acknowledgement of the application of the right of self-determination. It does not, however, preclude such recognition in the future.

Indigenous peoples responded to this qualification by noting that Indigenous peoples are the only group of people identified in the World Conference documents as victims of racism to have their identity qualified. As the Indigenous Peoples' Millennium Conference stated:

> We call upon States to recognise that Indigenous peoples are 'peoples' as within the full meaning that attaches to that term under international law. We condemn the continual denial of the recognition of Indigenous peoples as having the rights of all other Peoples. We consider the continued denial of this recognition an act of racial discrimination by the States within the United Nations itself, as this refusal is a distinction based on race or ethnic origin which has the purpose of nullifying or impairing all other human rights of Indigenous Peoples.[112]

Overall, it cannot be said that the World Conference took advantage of what was described in the preamble of the Durban Declaration as 'a unique opportunity to consider the invaluable contribution of Indigenous peoples… to our societies, as well as the challenges faced by them, including racism and racial discrimination.'

108 *ibid*, para 43.
109 *ibid*.
110 For a discussion of this concept see Daes, E, *Working paper on Indigenous peoples' permanent sovereignty over natural resources*, Un Doc: E/CN.4/Sub.2/2002/23, 29 July 2002.
111 *Durban Declaration of the World Conference Against Racism*, para 24.
112 *Statement on the World Conference Against Racism of the Indigenous Peoples' Millennium Conference* in Netherlands Centre for Indigenous Peoples, *op cit,* p51.

These inadequacies of the Durban documents in recognising Indigenous rights are particularly noticeable when compared to the outcomes of the various meetings of Indigenous peoples in the lead up to that World Conference, such as:

- The Regional Preparatory meeting of the Americas for the World Conference Against Racism in Santiago de Chile in December 2000;[113]
- The meeting of Indigenous peoples' of Australia, New Zealand, the United States of America, Hawaii and Canada in Sydney, February 2001;[114] and
- The Indigenous Peoples' Millennium Summit convened in Panama City in May 2001.[115]

Each of these documents shows how great the divide is between recognition by States and the assertion of rights by Indigenous peoples.

A further disappointment of the Durban World Conference has been the lack-lustre follow up and implementation process of the agreed outcomes by governments and by the United Nations. This has in part been due to controversies on the Durban text on Zionism, the Middle East and slavery issues, which delayed adoption of the text by the General Assembly for a considerable period after the Durban conference had concluded.

One of the objectives of the International Decade, however, is the implementation of recommendations pertaining to Indigenous people of all high-level international conferences. The commitments in the Durban documents, alongside the recommendation in the Durban Programme of Action for States to act upon the documents prepared by Indigenous peoples in the preparation for the World Conference, provides ample scope for advancing significant aspects of the Indigenous rights agenda.

One could ask what is the point of having reached consensus in the Durban documents to urge the UN agencies to allocate sufficient funding to Indigenous issues within the framework of the International Decade and for States to ensure adequate funding for the Permanent Forum when there has been no effort to these ends in the eighteen months since the World Conference.

It is a significant failure by governments and the UN system to have not yet acted in accordance with the commitments of the World Conference Against Racism to address ongoing racism against Indigenous peoples.

The Durban World Conference documents ultimately defer consideration of controversial issues relating to the recognition of Indigenous rights to the annual sessions of the inter-sessional, open-ended working group on the Draft Declaration of the Commission on Human Rights. As noted above, this working group has adopted just two of the 45 Articles of the Draft Declaration in its first seven years.

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113 *Regional Conference of the Americas for the World Conference Against Racism – Santiago, Chile, 5-7 December 2000*, UN Doc: A/CONF.189/PC.2/7, 24 April 2001. This is in fact a meeting of States, but included significant Indigenous participation and support for Indigenous rights.

114 UN Doc: A/CONF.189/PC.2/Misc.5, available online at: www.racismconference.com.

115 Netherlands Centre for Indigenous Peoples, *op cit*.

There are two main features to the negotiations at the working group. The first is related to participation and the decision-making process. The working group on the Draft Declaration is constituted of members of the Commission on Human Rights. There are 53 States that are elected as members of the Commission on Human Rights. Only members of the Commission can formally vote in the proceedings of the Working group on the Draft Declaration. Initially, only governments not on the Commission, inter-governmental organisations and ECOSOC accredited NGOs could participate (though not vote) in the working group meetings in addition to members of the Commission. A special accreditation process was introduced to enable Indigenous organisations to participate in the working groups' deliberations.

In the initial sessions of the working group, Indigenous peoples sought a greater presence in the meetings and in the decision-making process. At the 1997 session, it was agreed that the meetings would be divided into formal and informal sessions. States and Indigenous organisations would have equal status in the informal sessions; whereas States would have sole decision-making power in the formal sessions. No issues could be forwarded to the formal sessions until there was consensus in the informal sessions.[116]

Wrangling over procedure is a feature of each session of the working group. Nevertheless, it is increasingly recognised that Indigenous peoples have a legitimate and important role to play in the negotiations on the Draft Declaration in the working group. It is quite feasible that had Indigenous peoples been excluded from such a negotiation role an extremely watered down, and from an Indigenous perspective entirely unacceptable, version of the Draft Declaration would have been accepted by States by now. For all the frustration and anger that attaches to the negotiation process in the working group, it is important to acknowledge this acceptance of the participation of Indigenous organisations (albeit a reluctant acceptance by some, and a partial one).

There remains potential, however, for States to agree to an altered version of the Draft Declaration through this process *without* Indigenous participation. Given the precedent set by other UN meetings, including the WGIP and the new Permanent Forum, the special procedures for participation in the working group can be seen to be obsolete and should be revisited with the view of opening the meeting up and bringing the procedures into line with the other bodies.

The second feature of the working group's negotiations is substantive. The central issue in the negotiations on the Draft Declaration is the unwillingness of States to accept that Indigenous peoples have an unqualified right to self-determination, as set out in Article 3 of the Draft Declaration.

Australia has played a vital role in this process, being one of the most vocal and oppositional countries during the debates since 1997. Australia's role on the working group is now enhanced with its recent election to the Commission on Human Rights providing the Government with voting rights in the decision-making process.

Given the significance of the debate on the recognition of Indigenous peoples' right to self-determination, and the role of the Australian Government in this

116 Lâm, M, *op cit*, pp70-71.

process, I have devoted a chapter in this Report solely to reviewing the current state of debate on this issue. Consequently, it is not discussed further here. While governments have raised other concerns with the provisions of the Draft Declaration it is envisaged that they will be able to be resolved once consensus has been reached on the headline issue of self-determination and the status of Indigenous peoples as 'peoples'.

There is an increased sense of urgency for States to adopt the Draft Declaration within the timeframe of the International Decade. There remain two, possibly three, sessions of the working group for this to be achieved. At this point it is difficult to see how this can be achieved when States are unwilling to accept the text of Article 3 of the Declaration, which adopts common Article 1 of the international covenants. It can only be hoped that the oft-repeated commitment of States to work towards the finalisation of the Declaration within the framework of the International Decade will result in genuine engagement with the issues and with Indigenous peoples rather than the outright, inflexible opposition that has characterised debate in the first seven years of the working group.

Clarifying the complementary roles of the various mechanisms addressing Indigenous issues within the United Nations – emerging challenges

Despite the clearly unsatisfactory progress in recognising Indigenous human rights through the adoption of a universal declaration, it is quite possible that the final years of the International Decade of the World's Indigenous People could see the dismantling of some of the machinery now in place within the United Nations for addressing Indigenous human rights issues. ECOSOC Resolution 2000/22, which established the Permanent Forum, states:

> *Stressing* that the establishment of the permanent forum should lead to careful consideration of the future of the Working Group on Indigenous Populations of the Subcommission on the Promotion and Protection of Human Rights… [The Economic and Social Council] *decides*, once the Permanent Forum has been established and has held its first annual session, to review, without prejudging any outcome, all existing mechanisms, procedures and programmes within the United Nations concerning Indigenous issues, including the Working Group on Indigenous Populations, with a view to rationalising activities, avoiding duplication and overlap and promoting effectiveness.[117]

As was noted earlier, various nations such as Australia and the United States have indicated their expectation that the creation of the Special Rapporteur alongside the Permanent Forum would obviate the need for the continuation of the Working Group on Indigenous Populations (WGIP). In accordance with this position Australia has indicated that it will not provide funding to any of the mechanisms dealing with Indigenous issues in the United Nations until such 'rationalisation' has occurred. It is notable, however, that the Australian Government has in fact *never* provided funding to Indigenous mechanisms in the UN (although ATSIC has contributed modest amounts).

117 ECOSOC Resolution 2000/22, preamble and para 8.

In the Third Committee of the General Assembly in October 2002, the Australian Government representative stated that:

> Australia believed that all United Nations mechanisms, including those dealing with Indigenous issues, should be efficient and effective. In that context, his delegation remained concerned about the clear overlap between various existing mechanisms dealing with Indigenous issues. At a time when the budget was tight, Australia believed those mechanisms should be streamlined.[118]

No one would disagree with the suggestion that all United Nations mechanisms should be efficient and effective and that they should avoid duplication and overlap. The lack of coordination of UN mechanisms, which gives rise to the possibility of such duplication and inefficiency, was one of the primary reasons for the establishment of the Permanent Forum on Indigenous Issues. What is contentious about the Government's statement, however, is the suggestion that there currently exists 'clear overlap' between the various UN mechanisms dealing with Indigenous issues.

The ECOSOC mandated review, commenced in September 2002 by the Office of the High Commissioner for Human Rights,[119] is to be of 'all existing mechanisms, procedures and programmes within the United Nations concerning Indigenous issues'. This is akin to the 1996 review by the Secretary-General of the United Nations referred to earlier. A sample of the extensive number of relevant mechanisms and agencies that address Indigenous issues is discussed above in relation to the Permanent Forum.

It can be expected, however, that in light of the views of governments like Australia and the USA that a significant focus of discussion about potential duplication will be on the human rights mechanisms. We can assume from comments expressed by the Australian Government in various forums that the reference to 'clear overlap' between mechanisms refers to those procedures that exist in the human rights field – namely the Special Rapporteur, the Working Group on Indigenous Populations, the inter-sessional, open-ended working group on the Draft Declaration, as well as the Permanent Forum. An overview of the functions of each of these four mechanisms is provided in Table 1 below.

118 United Nations General Assembly, *Third committee delegates say completion of draft on Indigenous rights is critical by 2004, as discussion of Indigenous people concludes*, media release GA/SHC/3704, 21 October 2002, p5.

119 Note: Australia, Canada and New Zealand have requested that the review not be conducted by the High Commissioner's Office but by the UN Department of Internal Audit in New York.

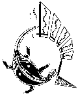


Table 1 – Comparison of functions of UN mechanisms relating to promotion and protection of the human rights of Indigenous peoples

Function / Mechanism	WGIP	Special Rapporteur	Permanent Forum	CHR Working Group
Review developments in the promotion and protection of Indigenous human rights	✓	✓		
Elaborate human rights standards concerning Indigenous peoples	✓			
Elaborate a Draft Declaration on the rights of Indigenous peoples, by reference to the WGIP draft				✓
Gather information and communications from all sources (inc governments and Indigenous peoples) on human rights violations		✓		
Formulate recommendations / proposals on measures / activities to prevent and remedy violations of Indigenous peoples human rights	✓	✓		
Provide expert advice and recommendations on Indigenous issues (economic and social development, culture, health, education, human rights and the environment) to the ECOSOC and UN agencies, funds and programmes			✓	
Raise awareness / promote the integration and coordination of activities relevant to Indigenous issues within the UN system			✓	
Act as a coordination point and disseminate information on Indigenous issues			✓	

The following observations can be made based on the functions of these mechanisms, as summarised in this table.[120]

In relation to the working group on the Draft Declaration, it is clear that its mandate does not overlap with those of the other mechanisms. It was created for the sole purpose of elaborating a Draft Declaration on the Rights of Indigenous Peoples, based on the draft elaborated by the WGIP under its standard setting function. The functions of the working group on the Draft Declaration are therefore consequential to those of the WGIP, and not in conflict. The working group on the Draft Declaration will also cease to exist once it has approved a Draft Declaration for adoption by the General Assembly.

In relation to the functions of the Permanent Forum on Indigenous Issues, they have the potential to overlap with those of the other mechanisms in a residual

120 Note: the table is provided for ease of reference. All comments are based on an analysis of the mandates for each mechanism as set out in resolutions of the Sub-Commission, Commission on Human Rights, and ECOSOC.

manner. The Permanent Forum's primary tasks of coordination of the UN system and advising the ECOSOC and UN agencies on Indigenous issues will involve the application of existing standards, including but not limited to those in the field of human rights. The application of such standards is with the aim of creating institutional innovation at the UN level, and to ensure transparency and accountability of UN agencies.

The Permanent Forum's role is not the elaboration of new standards *per se*. It is also not to review human rights issues that exist at the national and local level or to investigate individual complaints of human rights violations. These factors clearly differentiate the role and mandate of the Permanent Forum from those of the Special Rapporteur and the WGIP. They also indicate that the Permanent Forum, of itself, does not have the capacity to cover the field on Indigenous human rights issues within the UN.

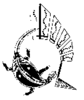
On initial inspection, it would appear that there is some level of overlap in the roles of the WGIP and the Special Rapporteur on Indigenous issues. The Working Group's role of reviewing developments in the promotion and protection of Indigenous human rights has broad commonalities with the function of the Special Rapporteur of gathering information on human rights violations. Both mechanisms also have the ability to make recommendations, although you would naturally expect that every UN mechanism will come equipped with a process for following up an issue of significance that has been identified.

The roles of the two mechanisms are, however, quite distinct. The significant differences between the roles of these two mechanisms are demonstrated in the comparison of working methods in Table 2 below.

Table 2 – Comparison of working methods of WGIP and Special Rapporteur

Method of work / mechanism	WGIP	Special Rapporteur
Request information and conduct research		✓
Conduct country visits		✓
Receive or initiate formal complaints / communications		✓
Provide immediate / short term response to information about human rights violations		✓
Convene annual meetings attended by Indigenous organisations	✓	
Make recommendations to Sub-Commission or CHR on conduct of further research or studies	✓	✓

The role of the WGIP is to study and review developments pertaining to the promotion and protection of human rights, and to develop standards based on such review. By comparison, the Special Rapporteur can investigate human rights complaints and seek their resolution. This is a role that the Working Group has never had. Indeed, as Alberto Saldamando notes, 'Many of us who have attended the WGIP have grown accustomed to its excellent Chairwoman



interrupting oral interventions, warning Indigenous speakers that the WGIP cannot address their specific case of human rights violations'.[121]

The Special Rapporteur's mandate provides a specific complaint mechanism for Indigenous peoples where one has not existed previously. As the Special Rapporteur notes in his inaugural report, issues of duplication are more likely to arise with the complaints / communications procedures under the various human rights treaties and other thematic special rapporteurs of the Commission on Human Rights.[122] The Rapporteur's functions, however, require him 'to work in close relation with other special rapporteurs, special representatives, working groups and independent experts of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights' in this regard.

The Special Rapporteur's mandate allows him to respond to allegations of violations of Indigenous peoples' human rights through investigating complaints and conducting country visits (again, something that the Working Group cannot do). Recommendations on the steps necessary to remedy violations of rights can also be made to the country or to the Commission on Human Rights for follow up – this is also a significantly stronger process than those at the disposal of the Working Group for addressing violations.

The Special Rapporteur also has potential benefits over the human rights treaty committees, aside from the requirement for the country alleged to have violated Indigenous rights to be a party to the relevant treaty and having recognised the competence of the committee to hear communications. Unlike the human rights treaty committees, such complaints do not necessarily have to be individual complaints and may relate to broader systemic issues being faced by 'communities, specific groups or entire peoples'[123] in a country.

Another main area of difference between the Special Rapporteur and the WGIP is the ability of the Special Rapporteur to request information and conduct research of his own volition. As indicated, in his first report the Special Rapporteur has already identified a range of issues requiring further study due to his concern at their potentially serious impact on Indigenous human rights. The WGIP can, through reviewing developments, make recommendations to the Sub-Commission for further research or studies to be completed. But such recommendations require approval of the Sub-Commission and the appointment of a member of the Working Group or an independent expert to conduct the research. This provides a safeguard to ensure that the WGIP does not initiate research that duplicates the work of the Special Rapporteur.

There are two features of the Working Group's functions and method of work that are distinct from those of the Special Rapporteur. Of prime significance to the recognition of Indigenous rights is the openness and accessibility of the WGIP to Indigenous participation. The significance of this feature of the Working Group was discussed earlier in this chapter. It can never be matched by the Special Rapporteur. It would be an immeasurable loss for the cause of

121 Saldamando, A, 'The United Nations Special Rapporteur on Indigenous Human Rights' (2002) 1 *Indigenous Affairs* 32, p33.

122 Stavenhagen, R, *op cit*, paras 110-112.

123 *ibid*, para 111.

Indigenous rights to lose this access and visibility within the United Nations system.

Related to this is the distinct contribution of the Working Group through its standard setting role. The capacity of the Working Group to facilitate widespread Indigenous participation has been a vital factor in the successful elaboration of standards by the Working Group under this function.

Overall, there are significant differences and distinct advantages to the roles of both the Working Group and the Special Rapporteur. Both mechanisms are necessary for the adequate protection of Indigenous rights at the international level. The Australian Government's suggestion that there is a 'clear overlap' in functions does not withstand scrutiny.

Each of the mechanisms – the Working Group, Permanent Forum and Special Rapporteur – has also made clear that they are concerned to ensure that there is in fact no duplication of work between them. Each has addressed this issue and made recommendations to maximise coordination and consultation between them in their most recent reports.[124]

It is also notable that on 14 August 2002, the Sub-Commission (the parent body of the Working Group on Indigenous Populations) adopted resolution 2002/17 which:

- reaffirmed the 'urgent need to recognise, promote and protect more effectively the rights of Indigenous peoples';
- noted that the mandates of the WGIP, Permanent Forum and Special Rapporteur 'are complementary and do not give rise to duplication';
- expressed 'its full support for the continuing need and therefore for the continuation of' the WGIP; and
- recommended that the Commission on Human Rights, at its next session in March-April 2003, adopt a decision supporting the continuation of the WGIP and noting its complementarity with the other mechanisms.[125]

In my view, there are two further reasons why the human rights mechanisms should not be 'rationalised' by discontinuing the Working Group. Each indicates that such a decision would be premature.

First, as previously noted, there is currently a crisis in the UN human rights mechanisms dealing with Indigenous issues because they are under-resourced. It is a great irony, perhaps even offence, that mechanisms as seriously under-funded as the Indigenous mechanisms in the UN are to be reviewed in order to be 'streamlined'. This under-resourcing is most notable in relation to the Permanent Forum and Special Rapporteur. Put simply, these mechanisms have

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124 Recommendation B.3 (iii) of the Permanent Forum's first report recommends to the ECOSOC that a technical seminar be organised with the members of the Permanent Forum, the members of the WGIP and the Special Rappporteur 'in order to ensure that these UN bodies can efficiently interface in their undertaking and to avoid duplication': Permanent Forum on Indigenous Issues, *Report of the First session of the Permanent Forum on Indigenous Issues, op cit*, p7; Working Group on Indigenous Populations, *Report on 20th session*, *op cit*, paras 34-40, 82-86; Stavenhagen, R, *op cit*, paras 110-112.

125 Sub-Commission on the Protection and Promotion of Human Rights, Resolution 2002/17, 14 August 2002.

not as yet been provided with sufficient resources – human, technical and financial – to ensure that they can appropriately acquit their mandates and be fully operational. It would be disingenuous to abolish an established, functioning mechanism (like the WGIP) when the mechanisms which theoretically would take its place do not have full operational capacity (although I have argued that they in fact fulfill a different role in any event).

Second, any perception that the activities of the Working Group have stalled or run their course has to be considered in light of the progress of governments in considering the Draft Declaration. Earlier in the chapter I quoted text from the Vienna World Conference in 1993 which recommended that the Working Group's mandate be updated upon completion of the Draft Declaration. Ideally, such a reformed role would provide the Working Group with some sort of oversight or review mechanism on the implementation of the Draft Declaration. This is in fact the operational structure of the Working Group on Minorities, established by the ECOSOC in 1995.[126]

The Working Group on Minorities has been entrusted with the task of promoting the rights as set out in the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[127] and in particular to:

- review the promotion and practical realisation of the Declaration;
- examine possible solutions to problems involving minorities, including the promotion of mutual understanding between and among minorities and Governments; and
- recommend further measures, as appropriate, for the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities.[128]

While the recent activities of the Working Group on Indigenous Populations indicate that it remains a vibrant mechanism and that it has not exhausted its standard setting role, the example of the Minorities working group indicates the potential for re-invigorating and strengthening further the protection of Indigenous human rights at the international level through the Working Group. The main obstacle to such strengthened protection is not any inherent factor in the Working Group's structure or mandate, it is the tardiness and inflexibility of States and their failure to finalise negotiations and approve a Draft Declaration on the Rights of Indigenous Peoples.

Conclusion and recommendations – Meeting the objectives of the International Decade

At the time of writing, there were still more than two years remaining in the International Decade for the World's Indigenous People. There have been some significant achievements in the Decade to date, most importantly the establishment of the Permanent Forum on Indigenous Issues and the appointment of a Special Rapporteur on the situation and fundamental freedoms

126 Economic and Social Council resolution 1995/31, 25 July 1995

127 General Assembly Resolution 47/135, 18 December 1992.

128 For information about the Working Group on Minorities see further the United Nations Guide for Minorities at: http://www.unhchr.ch/html/racism/01-minoritiesguide.html.

of Indigenous people. These mechanisms, however, continue to face serious issues relating to their capacity and budget.

There remains much work to be undertaken in order to meet the objectives of the International Decade. Indigenous peoples remain greatly concerned at the overall lack of achievement during the Decade to date and at the fragile status of those measures that have been realised.

This chapter is intended to contribute to an understanding in Australia of what has been achieved so far in the International Decade, what remains to be done, and what is at stake. It is written with an appreciation that the Australian Government plays an active and vital role at the United Nations on issues related to the protection and promotion of Indigenous human rights. For this reason, and in accordance with my statutory obligations, I conclude this chapter with the following recommendations to the federal Government.

Recommendations

That, in accordance with the objectives of the International Decade of the World's Indigenous People and the Programme of Activities for the International Decade, the Federal Government:

1) Continue to support the provision of adequate resourcing from the United Nation's Regular Budget to the Permanent Forum on Indigenous Issues.
2) Contribute to the Voluntary Fund for the Permanent Forum[129] in order to fund, or partially fund, at least one recommended activity from the Permanent Forum's first report. The Aboriginal and Torres Strait Islander Commission should match the contribution of the Government to the Voluntary Fund.
3) In recognition of the importance of the Working Group's ongoing role in facilitating the elaboration of standards on Indigenous human rights, support the continued existence of the Working Group on Indigenous Populations and seek to strengthen the mandate of the Working Group by providing it with an oversight role on the Declaration on the Rights of Indigenous Peoples once it is finalised by the Inter-sessional ad-hoc working group of the Commission on Human Rights on the Draft Declaration and approved by the General Assembly.

129 At the time of writing the ECOSOC had requested the Secretary-General of the United Nations to establish such a fund: UN Doc: E/2202/L.16.

Appendix I

Partnerships and agreements between Indigenous organisations and state or territory governments

This appendix contains an overview of the main framework agreements and partnerships made between Indigenous representative organisations, the Aboriginal and Torres Strait Islander Commission, and state or territory governments.[1]

Aboriginal and Torres Strait Islander Commission

The Aboriginal and Torres Strait Islander Commission has placed particular emphasis on forming partnerships and entering into agreements within and outside government. ATSIC has engaged with Premiers and Chief Minister's throughout all state and territories as a means to progressing relationships and alliances between governments and Indigenous peoples.

This has set the platform for Aboriginal and Torres Strait Islander communities to enter into dialogue with state and territory Governments.

The recent agreement between ATSIC and the Government of Victoria signed in June 2002 has seen key members of the elected arm and public servants from both ATSIC and state agencies now comprise an Aboriginal Advisory Council to the Premier.

The newly elected Northern Territory Government revived an ATSIC-NT Government forum which had not met in two years, and now recognises ATSIC both as a key representative body for Indigenous peoples in the Territory and as a vital contributor to the Territory's economy.

Throughout 2001-2002, formal agreements were signed with three states and the Australian Capital Territory (ACT). In June 2001, a Communiqué was signed between ATSIC and the South Australian Government which set the platform for a Partnership Agreement concluded in December 2001, which provided for a range of specific initiatives.

1 For an overview of recent partnerships between Indigenous organisations and local governments see Ross, J, 'Address by the Australian Local Government Association', ATSIC National Treaty Conference, 28 August 2002, online at: www.treatynow.org/conference.asp.

A Statement of Commitment for a New and Just Relationship with Aboriginal Western Australians was developed between ATSIC and the Government of Western Australia in October 2001. As a result an Indigenous Affairs Advisory Committee was established that brings together the Directors-General of state agencies together with the ATSIC State Council.

In Tasmania, a communiqué which was signed with the Premier in November 2001 is being developed into a formal partnership agreement. In February 2002, a similar communiqué was signed with the ACT. In July 2002, ATSIC and the Queensland Government signed a Statement of Commitment.

The collective vision behind these agreements is for a whole-of-government approach to servicing Aboriginal and Torres Strait Islander peoples. It is envisaged that the open dialogue between Indigenous peoples and governments will set the platform for greater decision-making and coordination of policies, programs and services by Aboriginal and Torres Strait Islander peoples.

Australian Capital Territory

In February 2002, the Government of the Australian Capital Territory (ACT) and the Aboriginal and Torres Strait Islander Commission (ATSIC) signed a statement of intent committing both parties to work together to improve public policy and program outcomes for Aboriginal and Torres Strait Islander peoples in the Australian Capital Territory.

The parties have agreed to negotiate a partnership agreement (Regional Agreement) aimed at improving outcomes in the following key priority areas:

- Improving access to ACT Government services by Aboriginal and Torres Strait Islander peoples;
- Improving partnerships between ATSIC and ACT Government agencies;
- Increasing the involvement of Aboriginal and Torres Strait Islander peoples in decision-making processes;
- Improving the social, cultural and economic status of Aboriginal and Torres Strait Islander residents in the ACT;
- Building partnerships between government and the Indigenous business and private sector community,
- Recognising the vital role of Aboriginal and Torres Strait Islander community structures and institutions;
- Recognising the need to coordinate cross border activity and funded programs of the Commonwealth, state and territory government agencies through greater clarity of roles and responsibilities;
- Endorsing policies that have an impact on Aboriginal and Torres Strait Islander Affairs in the Australian Capital Region, and that are derived from national reports such as the Royal Commission into Aboriginal Deaths in Custody, the *Bringing them home*, Aboriginal Health strategies and Heritage & Culture Initiatives; and
- Supporting the need for joint leadership in progressing the process of Reconciliation within the ACT community.

The development of the Regional Agreement will be preceded by a planning process involving the ATSIC Queanbeyan Regional Council and all relevant ACT Government agencies and advisory bodies. The Regional Agreement is intended to:

- Be consistent with the planning framework outlined in the *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal peoples and Torres Strait Islanders*;
- Align ATSIC and ACT Government service delivery planning processes;
- Examine opportunities to increase access to funded programs for Aboriginal and Torres Strait Islander residents of the ACT;
- Promote consistent and coordinated application of policies, operations and funding at the local level;
- Increase dialogue and cooperation between ATSIC and the ACT Government;
- Identify benchmarks for achieving priority outcomes; and
- Acknowledge and recognise the requirement to develop plans and services which respond to the needs and outcomes as determined by Aboriginal and Torres Strait Islander people at the local level.

New South Wales

On 2 November 2002, the New South Wales Government, ATSIC and the New South Wales Aboriginal Land Council entered into the NSW Service Delivery Partnership Agreement.

The purpose of the agreement is to improve the social, economic and cultural outcomes for Aboriginal and Torres Strait Islander peoples in NSW through greater coordination of, and collaboration between the NSW Government, ATSIC and NSW Aboriginal Land Council. The agreement focuses on improving existing structures, relationships and governance, in order to achieve better outcomes for Aboriginal and Torres Strait Islander peoples in NSW.

It aims to ensure that Aboriginal and Torres Strait Islander peoples have the capacity to play a lead role in setting directions and developing solutions and approaches to address issues affecting Aboriginal and Torres Strait Islander communities.

Complementing this overall vision, the agreement has established the following as priorities for the next three years:

- Building on the existing capacity of Aboriginal and Torres Strait Islander peoples, their organisations and their community representative structures to make decisions about issues that affect their wellbeing;
- Establishing appropriate arrangements at the statewide, regional and local levels that enhance the cooperation and coordination of the activities of the parties;
- Improving the effectiveness of existing programs and services; and
- Establishing transparent accountability mechanisms for programs and services for Aboriginal and Torres Strait Islander peoples in NSW.

A key priority area of the partnership agreement is facilitating statewide partnerships between the parties in specific program and service areas. Some examples of statewide partnerships in specific program areas already exist, for example:

- The tripartite housing agreement between the NSW Aboriginal Housing Office, ATSIC and the Commonwealth Government has led to better co-ordination of housing and infrastructure maintenance and construction programs in NSW;
- The NSW Health Aboriginal Partnership Agreement between the Aboriginal health and Medical Research Council and NSW Health establishes joint agreement on all NSW Aboriginal health policies and broad resource allocation decisions; and
- The Aboriginal Justice Agreement between the NSW Aboriginal Justice Advisory Council and the NSW Attorney-General which seeks to reduce Aboriginal people's involvement in the criminal justice system, improving community safety for Aboriginal people and leading the development of the NSW Aboriginal Justice Plan.

Another key priority area is strengthening community governance by encouraging and facilitating community representative structures. Currently, the parties to the agreement are co-operating on the development of the Community Working Party model that was introduced with the Aboriginal Communities Development Program. The Attorney-General, through the NSW Aboriginal Justice Advisory Group, is currently establishing Community Justice Groups throughout NSW. These groups will provide support and work collaboratively with the criminal justice system and communities to address justice matters impacting on the community. ATSIC (Murdi Paaki region) is presently developing a resource package to guide the establishment and operation of Community Working Parties.

The partnership also recognises the importance of providing active support to Aboriginal and Torres Strait Islander-owned businesses. It seeks to ensure that parties will actively collaborate on a variety of economic development initiatives aimed to improve the long-term sustainability of community service sector enterprises and Aboriginal and Torres Strait Islander-owned businesses. The proposed outcome is to increase the range and long term sustainability of Aboriginal and Torres Strait Islander owned businesses and service providers.

The partnership will focus on improved accountability of service delivery and outcomes for Aboriginal and Torres Strait Islander peoples. The parties have agreed to develop an annual statewide statistical report designed to monitor changes in outcomes related to the programs and services for Aboriginal and Torres Strait Islander peoples in NSW. The Report will comprise indicators which are consistent with national approaches to reporting on outcomes for Aboriginal and Torres Strait Islander peoples.

Other recent examples of partnerships and agreement-making in NSW include:

- **Aboriginal Ownership of National Parks – Aboriginal Negotiating Panels**: NSW DAA will work in partnership with Aboriginal communities involved in the hand back of National Parks to Aboriginal owners under the scheme provided for in the *National Parks and Wildlife Act 1974.*

The Department also provides support and assistance to Aboriginal Communities to facilitate traditional and culturally appropriate decision-making processes.

- **Aboriginal Economic Development Working Groups (AEDWG):** The AEDWG has developed a draft NSW Aboriginal Economic Development Policy and Action Plan which builds on existing programs and initiatives across Government to establish successful partnerships between Government, Aboriginal people and mainstream business to create economic opportunities.

  The working group is a multi-agency forum chaired by DAA which brings together representatives of Commonwealth, state and local government with peak Aboriginal bodies and the NSW Reconciliation Council. The primary goal of the working group is to enhance coordination of economic development programs and activities and to develop policy and further initiatives aimed at facilitating and empowering Aboriginal people and communities towards greater involvement and success in all fields of economic activity in NSW.

- **Memorandum of Understanding between DAA and TAFE NSW:** An MOU has been entered into with TAFE NSW to provide flexible, appropriate and relevant training in construction and relevant disciplines through the Aboriginal Communities Development Program (ACDP). The main focus of the MOU is to promote the development and delivery of quality education and training for Aboriginal people who undertake construction and maintenance of houses and community facilities in Aboriginal communities across the state.

Northern Territory

In July 2002 the Northern Territory Government signed the 1997 *Outcomes statement for the Ministerial Summit on Indigenous Deaths in Custody* at the Standing Council of Attorneys-General. The agreement was previously signed by all state and territories as part of the 1997 Ministerial Summit on Indigenous Deaths in Custody.

The communiqué commits the Government to work in partnership with peak Indigenous organisations and communities through the development of an Aboriginal justice plan to reduce over-representation in the criminal justice system. The justice action plan is to address the following objectives:

- Preventing crime;
- Improving community safety;
- Improving access to justice related services, including services for victims of crime;
- Improving access to bail;
- Improving access to diversionary programs;
- Increasing community based sentencing options and non-custodial sentencing options; and
- Increasing the rate of participation of Indigenous people in the justice system.

As part of the Communique's commitment to addressing underlying social, economic and cultural issues, the NT Government is seeking to develop good governance and community capacity in Indigenous communities, as well as economic partnerships with Indigenous people. To this end, the Government has recently announced the following initiatives:

- Improvements in Indigenous housing and infrastructure;
- The establishment of on-line Indigenous knowledge centres in Aboriginal communities; and
- The commitment of $600,000 for community capacity building.

In response to the Communique's requirement that all governments look at the role of customary law, the NT Government has established an inquiry titled 'Toward Mutual Benefit – An inquiry into Aboriginal Customary Law in the Northern Territory'. The Inquiry has been asked to inquire into the strength of Aboriginal customary law in the Northern Territory and to report and make recommendations on:

- the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social wellbeing, law and justice, economic independence, land management and scientific knowledge; and
- the extent to which Aboriginal customary law might achieve formal or informal recognition within the Northern Territory.

Queensland

The overarching framework for addressing Indigenous issues in Queensland is the Ten Year Partnership. It commits the Government to work with Aboriginal and Torres Strait Islander peoples to improve standards of living over the next ten years. The partnership is being implemented through the Department of Aboriginal and Torres Strait Islander Policy (DATSIP) and the Aboriginal and Torres Strait Islander Advisory Board (ATSIAB).

The Queensland Government has given a commitment to coordinating its activities more effectively as well as put in place ways of measuring progress. This aims to reduce duplication and confusion for Aboriginal and Torres Strait Islander communities in dealing with a variety of different government departments.

Under the partnership, there are eight key areas to be addressed. These include:

- Justice;
- Family violence;
- Reconciliation;
- Human services;
- Service delivery;
- Economic development;
- Community governance; and
- Land heritage and natural resources.

Eight working groups and a senior level steering committee have been formed to work on the Ten Year Partnership and its key areas. Under the partnership the following state-level agreements are nearing finalisation:

- The Safe and Strong Families Agreement;
- The Indigenous Economic Development Agreement; and
- The Looking After Country Together Agreement.

These partnerships are being achieved through the use of local and regional negotiation tables that form the primary interface between communities and Government. Currently there are four negotiation tables which are being processed. There are three local tables at Doomadgee, St George and Sarina. A regional-level table is being progressed in the Torres Strait in relation to justice.

The Department, along with ATSIAB and in conjunction with the Queensland Treasury and the Department of Premier and Cabinet, has developed a draft whole-of-government performance management framework for the Ten Year Partnership. This remains consistent with the performance framework prepared by the Ministerial Council for Aboriginal and Torres Strait Islander Affairs, and the Council of Australian Governments' Reconciliation Framework.

South Australia

An agreement was reached between the Government of South Australia and the Aboriginal and Torres Strait Islander Commission in December 2001. This commits the parties to improving conditions for Aboriginal and Torres Strait Islander peoples in the areas of:

- Health and emotional wellbeing;
- Essential services infrastructure;
- Economic development and employment;
- Education and training;
- Land and sea initiatives;
- Law and justice;
- Family Violence prevention;
- Youth participation;
- Heritage and culture; and
- Indigenous art initiatives.

The partnership agreement focuses on a whole-of-government approach to improving condition for Aboriginal and Torres Strait Islander peoples in a wide range of critical areas. The agreement is being implemented in a coordinated and integrated approach to policy processes and service delivery.

The South Australian Department of State Aboriginal Affairs (DOSAA) will play a monitoring role to ensure that improved community capacity for the management and administration of economic and social development is achieved through the partnership agreement.

The Whole-of-Government Reconciliation Implementation Reference Committee has been established to develop and implement practical initiatives across Government, with particular attention to improving the health, wellbeing and quality of life for Aboriginal people in South Australia. Recognising the importance of reconciliation, the Committee also has the role of overseeing, coordinating and monitoring each government agency to ensure that reconciliation forms an integral part of their strategic planning process.

Under the 1997 State/ATSIC Essential Services Agreement, the state Government maintains water, power and sewerage systems in eighteen Aboriginal communities in South Australia through DOSAA.

Strong emphasis is placed on the need for improved access to essential services in regional and remote Aboriginal communities in South Australia. Recent reforms to the level of regulatory advice in the areas of electricity, water supplies and sewerage disposal are ways in which the Government is furthering this commitment. It is envisaged that the reforms will provide a high level of reliability, safety and quality of electrical supplies to Aboriginal communities.

On 15 February 2002, ATSIC conducted a review into the current agreement entitled 'Aboriginal and Torres Strait Islander Commission – Review of Essential and Municipal Infrastructure Service Provision to Indigenous Communities in South Australia'. As a result, a working party of interested stakeholders has been formed to progress a bilateral renegotiation for a new essential services agreement.

In September 2001, members of the Ministerial Forum for the Prevention of Domestic Violence, the ATSIC Commissioner for South Australia, and key non-government agencies including the South Australian Council of Aboriginal Elders and the Aboriginal Women's Statewide Advisory Council signed off a document entitled 'Rekindling Family Relationships – Framework for Action 2001-2006'.

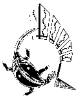
The Framework aims to develop a collaborative process to support and monitor the implementation of the National Indigenous Family Violence Strategy adopted by the Ministerial Council for Aboriginal and Torres Strait Islander Affairs.

The Framework links with and builds upon mainstream strategies including the State Collaborative Approach, the National Indigenous Family Violence Strategy, the South Australian Drug Strategic Framework, the Criminal Justice Strategic Framework and the State Strategy for Stopping Violent Behaviour.

It will develop and implement local community violence action plans, through consultation with Aboriginal communities. It aims to develop a whole-of-government approach to addressing this issue, with emphasis on community ownership of family violence strategies.

Recently in June 2002, a regional forum was held at Ceduna and Kooniba Aboriginal communities to develop local action plans to combat family violence. The plan allows for the local community to develop specific initiatives to address family violence in their own region. As follow-on, local agencies will then implement the recommendations contained within the action plan, which will reflect issues of priority for that area.

Tasmania



On 14 November 2001 ATSIC Chair Geoff Clark and the Tasmanian Premier, Mr Jim Bacon, and signed a communique which will form the basis of a partnership agreement to further strengthen and improve the economic, social and cultural outcomes for the state's Aboriginal population. The new partnership between the state Government and Aboriginal peoples in Tasmania is to be based on a multi-agency approach to achieving improved outcomes in identified priority areas such as education, health and well being, economic development and employment, and community consultation. Key principles for the partnership include:

- their ongoing commitment to the purpose, objectives, principles and frameworks contained in the National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders (1992);
- the November 2000 Council of Australian Governments (COAG) framework on Aboriginal Reconciliation that builds upon the 1992 National Commitment and looks to addressing disadvantage in, and improving service delivery to, the Aboriginal community as a central part of the reconciliation process; and
- the need for joint leadership in progressing the process of reconciliation within the Tasmanian community through working to achieve the benchmarks contained in Goal 10 of Tasmania Together.

Other Guiding Principles include:

- recognition and respect for the fact that Aboriginal people in Tasmania represent a distinct cultural group;
- recognition and respect for the inherent rights of Aboriginal peoples at common law;
- recognition that Aboriginal peoples represent one of the most disadvantaged groups in the community;
- recognition of the need to integrate the activities of the Commonwealth and state Governments within a partnership approach and to open discussions with local Government aimed at ensuring all levels of government work together towards the reconciliation objectives;
- recognition that true reconciliation will only be achieved through government and the wider community supporting policies and strategies that clearly identify the linkage between the recognition of Aboriginal rights and the measures that address disadvantage;
- recognition that only a true partnership at a state and local community level can achieve a healthy and self-determining Aboriginal community; and
- a commitment to achieve improved outcomes in the social, cultural and economic wellbeing of Aboriginal peoples in Tasmania.

To ensure the aspirations of the Aboriginal community in Tasmania are being addressed, the Board of Commissioners and the Tasmanian Government agree to establish a broad consultation process within the state's Aboriginal community on the issues covered by the partnership agreement. The process will also allow other issues – such as Aboriginal heritage and culture, land management and resource management – to be progressed. In addition, ATSIC and the state Government will look at ways in which the Aboriginal community can be more closely involved in government decision-making processes on issues that affect them.

To ensure that the partnership agreement achieves agreed objectives, it is important that progress be monitored against key performance indicators that will be developed during the detailed negotiation of the agreement. On completion, the agreement will contain provision for periodic review.

Torres Strait

In February 1999 the Torres Strait Regional Authority, Queensland Health and the Commonwealth Department of Health and Aged Care signed the Torres Strait Health Framework Agreement to improve health outcomes for the residents of the Torres Strait and Northern Peninsula Area (Torres Strait).

Key issues and goals include:

- Improving access to services;
- Community development and capacity-building;
- Integration and joint planning;
- Integrated Health Workforce Strategy;
- Improving data;
- Best practice and
- Improving partnership planning capacity.

The Torres Strait Housing and Infrastructure Agreement was developed between the Commonwealth Government, the Queensland Government, the Torres Strait Regional Authority and the Island Coordinating Council in order to maximise the housing and related infrastructure outcomes, and through these, improve environmental health outcomes for Torres Strait Islander and Aboriginal peoples in the Torres Strait region of Queensland. Related outcomes include: effective planning and coordination; economic development strategies; increased efficiency of delivery of housing and infrastructure assistance; increased home ownership; programs for ongoing management; greater public accountability standards; and increased Torres Strait Islander and Aboriginal involvement.

The following principles underpin this agreement:

- Maximisation of opportunities;
- Respect for social and cultural values;
- Maximisation of negotiation and participation;
- Improved co-ordination and efficiency;
- Recognition of respective roles and responsibilities;
- Achievement of equivalent housing and infrastructure outcomes; and
- Improved access to housing.

Victoria

On 22 June 2000 the Victorian Government and ATSIC signed a communiqué agreeing to the following principles:

- Their ongoing commitment to the purpose, objectives, principles and frameworks contained in the National Commitment;
- The need for a true partnership at a state, regional and local community level in pursuing healthy, self-determining Aboriginal and Torres Strait Islander communities;
- The need for joint leadership in progressing the process of Reconciliation within the Victorian community; and
- A commitment to work through Aboriginal and Torres Strait Islander community structures and institutions as appropriate to achieve improved outcome in the social, cultural and economic wellbeing of Aboriginal and Torres Strait Islander communities in Victoria.

The meeting agreed on a number of specific initiatives that have been generated through mutual agreement of Aboriginal Affairs Victoria, the Chairperson of Binjirru and Tumbukka Regional Councils and the ATSIC Commissioner for Victoria:

- Indigenous Economic Development;
- Joint Tourism Venture;
- Promoting Aboriginal Home Ownership;
- Aboriginal Cultural Heritage Management and Protection; and
- Youth Advisory Committee.

In addition to these initiatives the Victorian Government and ATSIC agreed to coordinate their efforts in the following areas:

- Improvement of health outcomes,
- Improvement of education outcomes;
- Development and implementation of strategies to enhance Indigenous vocational education and training and employment outcomes;
- Coordinated planning and delivery of state and Commonwealth rental housing programs; and
- Address issues arising from recommendations of the Bringing Them Home report and support expansion of the Link-up program.

Over the past five years, the Victorian Government has developed a range of large scale departmental and sectoral Indigenous affairs strategies, based on a 'whole of department' coordination model, which have been developed through a partnership approach focused on increasing Indigenous involvement in decision-making at all levels of government.

The partnership approach adopted above has been extended in most cases to the development of agreements between Government and the Indigenous community that:

- Set out the aims and strategic direction to be pursued;
- Identify agreed principles to guide action;
- Specify the roles and responsibilities of the signatories to the Agreement;
- Form the basis for achieving equity between the parties; and
- Identify the key results and milestones to be achieved.

The Premier of Victoria has assumed the role of Minister for Reconciliation and is responsible for coordinating a government-wide approach to advancing the national Reconciliation agenda. The Social Policy Branch of the Department of Premier and Cabinet co-ordinates a range of activities that are designed to promote Reconciliation.

Reconciliation between Indigenous and non-Indigenous Victorians is also listed as one of the state's ten key challenges in Growing Victoria Together, the Victoria Government's vision and key statement of priorities for the next decade. This is to ensure that all departments are held accountable for contributing to and improving outcomes in Victorian Indigenous communities.

Other examples of agreement-making and partnerships at a state department level are:

Aboriginal Affairs Victoria (AAV) seeks to improve Indigenous wellbeing through partnerships to achieve Indigenous aspirations for land, culture, heritage, family and community using a 'whole-of-government' approach to the provision of services and policy development.

These include:

- Indigenous Community Building – Working in partnership with Victorian Indigenous communities and their organisations to increase participation in partnerships with Government; and build their capacity to deliver programs and services which meet the needs of Indigenous Victorians;
- Reconciliation Through Partnerships with Government and Indigenous Communities – Improve outcomes for the Indigenous peoples of Victoria through the development of whole of Victorian Government policy promoting community led partnerships of Indigenous communities and government agencies; and
- Address Dispossession of Indigenous Land and Culture – Developing and delivering policy, programs and services that address Indigenous aspirations for land and culture resources, increase understanding and respect for Indigenous culture within the broader community and promote Indigenous community control of the protection and management of Indigenous heritage and cultural property.

Yalca: A Partnership in Education and Training for the New Millennium, Koori Education Policy 2001: This Department of Education document was launched by the Premier in October 2001. *Yalca* involves the Victorian Aboriginal Education Association Incorporated (VAEAI) and IT networks of Local Aboriginal Education Consultative Groups (LAECGs). It contains six major objectives:

- To place the Koori student at the centre of educational policy and decision-making;
- To maintain and strengthen the formal partnership between the VAEAI and the Victorian State Government;
- To recognise the central role of LAECGs in education and training;
- To formalise the protocols that inform all education related discussions and negotiations with the Koori community; and
- To strengthen the framework, at all levels of education and training.

The **Victorian Aboriginal Justice Agreement**, launched by the Department of Justice, represents Victoria's commitment to implementing the 1997 resolution of Commonwealth, state, and territory Ministers to develop jurisdictional plans aimed at enhancing existing responses to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

It is an ongoing policy initiative, containing approximately sixty initiatives and nine core principles, which was developed in true partnership with Koori communities from across Victoria. Communities participated at all stages of the Agreement's development with key stakeholders of the Justice Portfolio.

This ongoing partnership is reflected in the Aboriginal Justice Forum, where senior members of the Koori communities sit with the most senior Victorian Government agency representatives in monitoring, evaluating and steering the implementation of the Justice Agreement.

Indigenous Partnership Strategy: In September 2000, Department of Natural Resources and Energy (NRE) established a framework against which the Department could assess its current relationship with Victorian Indigenous communities; and which it could use as a set of overarching guidelines in the development and delivery of services to Indigenous people. NRE recognises that Victorian Indigenous communities, as the traditional custodians of Victoria's land and waters have a fundamental management role in Victoria's natural resources.

In developing and implementing its policies, programs and services NRE will:

- Recognise Victoria's unique Indigenous culture, society and history;
- Empower Indigenous communities to collaborate as partners in resource management;
- Establish clear lines of accountability for each initiative supported through this strategy;
- Recognise the impact of past policies on the role of Indigenous peoples as custodians of the land and waters;
- Require priorities and strategies for Indigenous involvement in NRE's operations to be developed and implemented primarily at the local level in consultation with Indigenous community organisations;
- Improve information and education about services provided by NRE to Indigenous communities;
- Support initiatives on the basis that they contribute to the achievement of agreed outcomes;

- Provide a framework in which overall gains are achieved and recognised; and
- Maintain and improve the effectiveness of current systems of planning, funding and providing services and programs.

The draft Indigenous Partnership Strategy outlines eight key strategic initiatives: Cultural Awareness; Community Partnerships; Capacity Building; Cultural Heritage, Land and Natural Resource Management; Indigenous Employment; Economic Development; Communication; and Community Profiling.

Western Australia

The *Statement of commitment to a new and just relationship between the Government of Western Australia and Aboriginal Western Australians* is a partnership agreement supported by the following bodies:

- Government of Western Australia;
- Western Australian ATSIC State Council; supported by the following Aboriginal peak bodies;
- Western Australian Aboriginal Native Title Working Group;
- Western Australian Aboriginal Community Controlled Health Organisation; and
- Aboriginal Legal Service of Western Australia.

The purpose of the statement is to agree on a set of principles and a process for the parties to negotiate a statewide framework that can facilitate negotiated agreements at the local and regional level.

The partnership aims to enhance negotiated outcomes that protect and respect the inherent rights of Aboriginal peoples and to significantly improve the health, education, living standards, and wealth of Aboriginal peoples.

The parties commit themselves to the following principles in pursuit of these objectives:

- Recognition of the continuing rights and responsibilities of Aboriginal peoples as the first peoples of Western Australia, including traditional ownership and connection to land and waters;
- Legislative protection of Aboriginal rights;
- Equity with respect to citizenship entitlements;
- Regional and local approaches to address issues that impact on Aboriginal communities, families and individuals;
- A commitment to democratic processes and structures;
- Inclusiveness;
- The need to address issues arising from past acts of displacement; and
- A commitment to improved governance, capacity building and economic independence.

All parties agree that the most effective approach to translating the principles into meaningful action and outcomes is by way of regional agreements, based on partnerships.

The parties agree that between Aboriginal peoples and the Western Australian Government there will be negotiated partnerships which are:

- based on shared responsibility and accountability of outcomes;
- formalised through agreement;
- based on realistic and measurable outcomes supported by agreed benchmarks and targets;
- able to set out the roles, responsibilities and liabilities of the parties; and
- involve an agreed accountability process to monitor negotiations and outcomes from agreements.

The Partnership Framework will incorporate and be informed by individual agreements in the health, housing, essential services, native title, justice and other issues that impact on Aboriginal peoples in the state.

It will address:

- A whole-of-government/community approach based on negotiated policy benchmarks and targets;
- Regional negotiated agreements incorporating integrated planning involving ATSIC, community organisations and state and local government;
- Agreed processes for audit and evaluation of negotiations and outcomes; and
- Reform of government and Aboriginal organisational infrastructure where required to ensure the implementation of the partnership agreement.