Chapter 12

Human Rights and Australia's Indigenous People

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INTRODUCTION

[12.10] In Australia, many people take human rights for granted. An assessment of political rights and civil liberties by Freedom House, a non-governmental organisation (NGO), ranks Australia with the highest possible score for the attainment of these rights and liberties.[1] The lived reality for many Australians is that their civil and political rights can be taken for granted; they are not subjected to cruel and inhumane treatment; there is an independent judicial system, freedom of speech and a free press. All of these rights help promote a functioning and stable democratic society.

Many Australians can also take economic, social and cultural rights as given. Australia has functional health and social security systems. There is access to education and housing services and protections against discrimination in employment. Again, it is the realisation of these rights that helps to make Australia a successful and prospering nation.

Aboriginal and Torres Strait Islander peoples on the other hand cannot take their human rights for granted. This chapter begins by briefly analysing the human rights situation of Aboriginal and Torres Strait Islander peoples. This is followed by an outline of the history of Indigenous peoples' engagement with the United Nations and the international human rights sphere. Despite historical marginalisation, there is a burgeoning international movement promoting the rights of Indigenous peoples. Next, the chapter explores the current high point of the Indigenous international human rights system, the adoption of the *United Nations Declaration on the Rights of Indigenous*

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1 Freedom House, *Freedom of the World 2020* (2020), available at: https://freedomhouse.org/country/australia/freedom-world/2020 (accessed 5 December 2020). This chapter has been retained in its 2011 version, please see the Editors' Postscript, and Chapters 13 and 14 that follow in this book.

Peoples (the Declaration).[2] The Declaration provides authoritative guidance regarding how human rights standards apply to Indigenous peoples. In order to assess the extent to which Australia is complying with its international human rights obligations, this chapter examines three key human rights issues confronting Aboriginal and Torres Strait Islander peoples in Australia, namely:

- constitutional recognition of Aboriginal and Torres Strait Islander Peoples;
- health equality; and
- the Northern Territory intervention.

The conclusion reached is that Australia's needs to respond to these and other challenges faced by Aboriginal and Torres Strait Islander peoples by using a principled human rights-based framework.

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES AND HUMAN RIGHTS IN AUSTRALIA

[12.20] One of the major differences between Indigenous and non-Indigenous Australians has been the historical and contemporary obstacles that Aboriginal and Torres Strait Islander peoples face when endeavouring to realise their human rights. For instance, Aboriginal and Torres Strait Islander peoples were not counted in the 'reckoning of the numbers of the people of the Commonwealth, of a State or other part of the Commonwealth' until after 1967.[3] Aboriginal and Torres Strait Islander peoples were subjected to a series of discriminatory and oppressive laws for most of the 20th century, including the laws and policies that facilitated the forcible removal of children in what is known as the Stolen Generations.[4] At the most fundamental and foundational level, the Australian territory was colonised under the legal myth of *terra nullius*. In contrast with other British colonies, Aboriginal and Torres Strait Islander peoples were not afforded the same degree of protection and recognition of their rights to lands, territories and resources.[5] This was belatedly overturned by the High Court in the landmark decision of *Mabo v Queensland (No 2)*, which rejected *terra nullius* and recognised the native title of the people of Mer.[6] The *Native Title Act 1993* (Cth) (*Native Title Act*) was enacted in response to the decision. It created a statutory regime for the recognition of Aboriginal and Torres Strait Islander peoples' native title

2 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007).

3 *Commonwealth Constitution*, s 127. This section was repealed by the 1967 referendum.

4 See Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, April 1997), available at: https://humanrights.gov.au/our-work/bringing-them-home-report-1997.

5 See Heather McRae et al, *Indigenous Legal Issues, Commentary and Materials* (4th ed, Thomson Reuters, 2009) 199.

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

rights. Unfortunately, the *Native Title Act* does not yet create a fair process for recognising and adjudicating these rights.[7]

In addition to laws and policies that overtly diminished Aboriginal and Torres Strait Islander peoples' human rights, the manner in which institutional systems have operated has further impeded the realisation of human rights. For example, the latest available data indicate that:

- Aboriginal and Torres Strait Islander men and women have an estimated life expectancy approximately 12 years and 10 years less than the broader Australian population;[8]
- mortality rates in Aboriginal and Torres Strait Islander children under four are between 1.8 and 3.8 times greater than the broader Australian population;[9] and
- only 66.2% of year five Aboriginal and Torres Strait Islander students are achieving the national minimum standard for reading compared with 92.7% of non-Indigenous students – this is a gap of 26.5% points.[10]

It is a sad reality that all of the issues and challenges that Aboriginal and Torres Strait Islander communities confront on a day-to-day basis – including effective engagement, poverty, education, health, protection of culture and languages, incarceration rates and the protection of women and children – are human rights issues. Former Social Justice Commissioner and member of the United Nations Permanent Forum on Indigenous Issues, Professor Mick Dodson, has eloquently stated:

> The existence of human rights standards is not the source of Indigenous disadvantage. Human rights do not dispossess Indigenous peoples, they do

7 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Native Title Amendment (Reform) Bill 2011* (2011) paras 6, 11-17. Treaty bodies have also noted concern regarding Aboriginal and Torres Strait Islander peoples inability to realise their rights to lands, territories and resources: see, for example, Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005) para 16; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009) para 16.

8 For more information, see Australian Bureau of Statistics, *Discussion Paper: Assessment of Methods for Developing Life Tables for Aboriginal and Torres Strait Islander Australians, 2006*, Catalogue Number 3302.0.55.002 (2008); Australian Bureau of Statistics, *Experimental Life Tables for Aboriginal and Torres Strait Islander Australians, 2005-2007*, Catalogue Number 3302.0.55.003 (2009). Prior to 2009, the life expectancy gap was estimated in the order of 17 years: see Australian Institute of Health and Welfare and Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2005*, ABS Catalogue Number 4704.0, AIHW Catalogue Number IHW14 (2005) 148. Note Aboriginal and Torres Strait Islander life expectancy is currently estimated using a methodology adopted by the ABS in 2009. This methodology is contested by the Close the Gap Campaign for Health Equality. See [12.110]-[12.130] for more details on the Campaign.

9 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission (2011) 4.14.

10 See n 9, 4.41.

> not marginalise them, they do not cause their poverty, and they do not cause gaps in life expectancy and life outcomes. It is the denial of rights that is a large contributor to these things. The value of human rights is not in their existence; it is in their implementation.[11]

As is alluded to by Professor Dodson, human rights can have a transformative power. By articulating the issues and aspirations of Aboriginal and Torres Strait Islander peoples and communities in the language of human rights, it is possible to objectively assess the performance of governments in relation to laws and policies that impact on Aboriginal and Torres Strait Islander peoples. By adopting this system of accountability, human rights standards can guide the development of effectively targeted law reform and policy making from the design through to implementation.

INDIGENOUS PEOPLES AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM

[12.30] The human rights situation of Australia's Indigenous peoples is not unique. Across the world, Indigenous peoples are recognised as among the most vulnerable, disadvantaged and marginalised peoples. There are approximately 370 million Indigenous peoples around the globe which constitutes around 5% of the world's population. Yet Indigenous peoples make up 15% of the world's poor and one-third of the world's extremely poor.[12]

Historically, the international sphere has excluded Indigenous peoples from voicing their human rights concerns and has failed to address these concerns.[13] However, this has not prevented Indigenous leaders from seeking recognition and redress at an international level in the face of domestic violations of their rights.[14]

In the 1960s and 1970s, a large number of NGOs, including Indigenous peoples organisations, were established nationally and internationally. These organisations have helped shed light on the systemic discrimination and human rights violations faced by Indigenous peoples all over the world. Aboriginal and Torres Strait Islander peoples were actively engaged as Indigenous peoples' voices began to be heard on the international stage and

11 Mick Dodson, 'Foreword', in Amnesty International Australia, *United Nations Declaration on the Rights of Indigenous Peoples* (2010) 3.

12 Joji Carino, 'Poverty and Wellbeing', in Secretariat of the United Nations Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2010) 13, 21.

13 See Stephen James Anaya, *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, 2004) Ch 1.

14 As early as 1923, Chief Deskaheh representing the Six Nations of the Iroquois, travelled to Geneva to urge the League of Nations to consider the Iroquois grievances with Canada. The League determined these complaints were a Canadian domestic issue, and the Indigenous delegation was ignored: Secretariat of the United Nations Permanent Forum on Indigenous Issues, n 12, 2; Anaya, n 13, 57.

have played a key role in the development of the international Indigenous human rights movement. Many Aboriginal and Torres Strait Islander leaders have believed that the international human rights system can be utilised as an effective mechanism for making human rights advances at the domestic level.[15]

As a result of this advocacy, over time the UN has evolved to become increasingly accommodating of Indigenous peoples' voices and concerns.[16] Today, the international sphere has been transformed, and there is now:

> a vigorous and dynamic interface between indigenous peoples … and the United Nations, an interface which, difficult as it is, has produced at least three results: a) a new awareness of indigenous peoples' concerns and human rights; b) recognition of indigenous peoples' invaluable contribution to humanity's cultural diversity and heritage, not least through their traditional knowledge; and c) an awareness of the need to address the issues of indigenous peoples through policies, legislation and budgets. Along with the movements for decolonization and human rights, as well as the women's and environmental movements, the indigenous movement has been one of the most active civil society interlocutors of the United Nations since 1945.[17]

The adoption of the Declaration by United Nations General Assembly on 13 September 2007, after over 20 years of negotiations, marks the current highpoint of this evolution.[18] The Declaration is also the most authoritative articulation of how human rights standards apply to Indigenous peoples.[19]

It should be noted that the Declaration contains no definition of 'Indigenous peoples'. Nevertheless, considerable thinking has been dedicated to the

15 As outlined by Megan Davis, member of the Permanent Forum on Indigenous Issues, Aboriginal and Torres Strait Islander peoples have 'relied on international law to close the protection gap in human rights pertaining to indigenous peoples': Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples', (2008) 9(2) *Melbourne Journal of International Law* 439, 441-442. See also Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2006*, Human Rights and Equal Opportunity Commission (2007) 249-256.

16 In 1972, the UN system belatedly began to address this issue, when the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities announced the undertaking of the *Study on the Problem of Discrimination Against Indigenous Populations* (commonly known as the Cobo Study after the name of the report's Special Rapporteur): José R Matinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of the Problem of Discrimination Against Indigenous Populations, *Study of the Problem of Discrimination Against Indigenous Populations*, *Vols 1-5*, UN DOCs E/CN.4/Sub.2/1986/7, E/CN.4/Sub.2/1986/7/add1, E/CN.4/Sub.2/1986/7/add2, E/CN.4/Sub.2/1986/7/add3, E/CN.4/Sub.2/1986/7/add4 (1981-1983 reprinted in 1986).

17 Secretariat of the United Nations Permanent Forum on Indigenous Issues, n 12, 1.

18 For a more detailed history, see Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009), Parts One and Two, available at: https://www.iwgia.org/images/documents/popular-publications/making-the-declaration-work.pdf.

19 *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya*, Report to GA, 64th sess, UN Doc A/64/338 (2009) para 68.

question of defining 'Indigenous peoples' in the international arena. In the ground-breaking study by Jose Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* (also known as the Cobo Study), a 'working definition' was adopted:

> 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.[20]

A 'modern understanding' of the term 'Indigenous peoples' has been used in the international arena including by the United Nations Permanent Forum on Indigenous Issues. This includes some key criteria or characteristics:

- self-identification – both as indigenous and as peoples;
- historical continuity – continuing connection to pre-colonial society;
- special relationship with ancestral lands – this can form the cultural distinctiveness of indigenous peoples;
- distinctiveness – including cultural, legal, linguistic systems and knowledge;
- non-dominance – generally forming non-dominant groups within society; and
- perpetuation of their cultural/identity.[21]

However, no formal definition has been adopted in international law. A strict definition is seen as unnecessary and undesirable.[22] It is non-controversial to assert that Aboriginal and Torres Strait Islander peoples are the Indigenous peoples of Australia.

As it currently stands, the UN system has a number of mechanisms and special procedures with a specific focus on the rights of Indigenous peoples. These include the:

- Permanent Forum on Indigenous Issues;
- Expert Mechanism on the Rights of Indigenous Peoples; and
- Special Rapporteur on the Rights of Indigenous Peoples.

20 Martinez Cobo, *Study on the Problem of Discrimination Against Indigenous Populations – Volume 5*, n 16, para 379.

21 See International Law Association, Rights of Indigenous Peoples Committee, *The Rights of Indigenous Peoples: Interim Report*, Report to the Hague Conference (2010) 7-8.

22 See Working Group on Indigenous Populations, *Note by the Chairperson-Rapporteur of the Working Group on Indigenous Populations, Ms Erica-Irene Daes, on Criteria Which Might Be Applied When Considering the Concept of Indigenous Peoples*, 13th sess, UN Doc E/CN.4/Sub.2/AC.4/1995/3/ (1995) 4; International Law Association, n 21, 6-7.

Notwithstanding the progress, Indigenous peoples were making at the international arena, the Australian Government, for a long time, effectively ignored recommendations from UN committees and experts about improving the human rights situation of Aboriginal and Torres Strait Islander peoples. However, since 2007, the Australian Government has taken steps to improve Australia's engagement with international human rights standards relating to Indigenous peoples, including:

- formally endorsing the Declaration;[23]
- extending an open invitation to all the UN Special procedures. The Special Rapporteur on the Rights of Indigenous Peoples conducted an official country visit to Australia in August 2009;[24] and
- the positive engagement in the Human Rights Council's Universal Periodic Review (UPR) process.[25]

This shift provides a platform from which to build an overarching framework, using the Declaration, to guide the realisation of Aboriginal and Torres Strait Islander peoples' human rights.

THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

[12.40] The UN High Commissioner for Human Rights has identified the Declaration as the 'United Nations' key tool for advancing the rights of Indigenous Peoples'.[26] The Declaration also provides the most authoritative reference point to assess the human rights situation of Aboriginal and Torres Strait Islander peoples in Australia.

The Declaration contains the 'minimum [international] standards for the survival, dignity and well-being of the indigenous peoples of the world'.[27] It reaffirms that Indigenous people are entitled to all human rights recognised in international law, without discrimination. It also acknowledges that, without recognising the collective rights of Indigenous peoples and ensuring the protection of cultures, these rights cannot be fully realised. Therefore, the Declaration catalogues existing human rights standards, and interprets

23 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Statement on the United Nations Declaration on the Rights of Indigenous Peoples' (Speech delivered at Parliament House, Canberra, 3 April 2009).

24 See Office of the High Commissioner for Human Rights, *Standing Invitations*, available at: https://spinternet.ohchr.org/StandingInvitations.aspx (accessed 14 May 2012).

25 See Office of the High Commissioner for Human Rights, *Universal Periodic Review – Australia*, available at: https://www.ohchr.org/EN/HRBodies/UPR/Pages/AUIndex.aspx (accessed 14 May 2012).

26 *Report of the United Nations High Commissioner for Human Rights on the Rights of Indigenous Peoples, James Anaya*, Report to Human Rights Council, 15th sess, UN Doc A/HRC/15/34 (2010) para 92.

27 *United Nations Declaration on the Rights of Indigenous Peoples*, n 2, Art 43.

them, giving full consideration to Indigenous peoples' unique historical, cultural and social circumstances.

The passage of the Declaration was slow and arduous. Drafting began in 1985. Progress stalled numerous times as a result of seemingly intractable deadlocks between states and Indigenous peoples and their organisations. Finally, in September 2007, over 20 years since the process began, the General Assembly overwhelmingly adopted the Declaration. One hundred and forty-four states voted for its adoption, only four states (Australia, United States of America, Canada and New Zealand) voted against it and 11 states abstained.[28] The four states who voted against the Declaration have since reversed their position, making opposition to it a thing of the past.

Legal status of the Declaration

[12.50] The Declaration was adopted by a resolution of the UN General Assembly. Under international law, this type of instrument does not ordinarily impose binding legal obligations on states. Such legal obligations are generally created by treaties or conventions like the *International Convention on the Elimination of All Forms Racial Discrimination*. Declarations are statements adopted by states that outline agreed principles or aspirations. However, this Declaration is a unique instrument. Not only was it the result of 20 years of negotiation between states and Indigenous peoples, but it also contains no new rights or standards. Rather, as already noted, it interprets how existing human rights obligations under international law apply to Indigenous peoples. This was acknowledged by the Minister for Families, Housing, Community Services and Indigenous Affairs in her speech marking Australia's formal endorsement of the Declaration – 'Australia's existing international obligations are mirrored in the Declaration'.[29] Thus, the Declaration was drafted to elaborate on the rights already set out in binding human rights instruments, including treaties to which Australia is a party.

Further, the language of the Declaration is not the type of language ordinarily contained in a declaration. For example, Art 38 stipulates:

> States, in consultation with indigenous peoples, shall take appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 42 stipulates that:

> … States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

In this context, it is important to recognise that the Declaration was drafted through an extensive process of what was mutually recognised as

28 For the voting record for the adoption of the Declaration, see https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

29 See Macklin, n 23.

'negotiations' between representatives of Indigenous peoples and of states.[30] The content of the Declaration, including the use of obligatory language, reflects the 'international consensus' about the rights of Indigenous peoples previously existing in international human rights law.[31] As such, the language used is the type of language ordinarily found in treaties or conventions; 'States … shall take appropriate measures' and 'States shall promote … [the] full application … of this Declaration'.[32]

The Declaration and the Australian context

[12.60] As noted above, Australia was one of four states to vote against the adoption of the Declaration. The Australian Government reversed its position and formally endorsed the Declaration on 3 April 2009.[33] Since this formal endorsement, progress on implementing the Declaration has been slow, despite the strong legal and moral arguments to do so.

Australia is a party to seven of the major human rights treaties.[34] As such, it has already made a commitment to the international community to respect, protect and fulfil its human rights obligations in Australian law and practice.[35] The Declaration provides guidance as to how these human rights obligations apply to Aboriginal and Torres Strait Islander peoples. To ensure these human rights obligations are met in relation to the Indigenous peoples of Australia, it is imperative that the Government takes real and concrete action on the Declaration.

Calls for implementation of the Declaration are coalescing within Australia and internationally. In 2011, the Permanent Forum on Indigenous Issues called on:

30 See Permanent Forum on Indigenous Issues, *Report on the Eighth Session*, UN Doc E/C.19/2009/14 (2009) Annex, para 9.

31 *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms, James Anaya*, Report to Human Rights Council, 9th sess, UN Doc A/HRC/9/9 (2008) paras 18, 43.

32 For a discussion of the legal status of the Declaration, see Paul Joffe, 'Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?', in Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (UBC Press, 2010) 70, 85-93; Permanent Forum on Indigenous Issues, *Report on the Eighth Session*, n 30, Annex, paras 6-13.

33 See Macklin, n 23.

34 The human rights treaties that Australia is a party to are as follows: *International Convention on the Elimination of All Forms of Racial Discrimination* (1965); *International Covenant on Civil and Political Rights* (1966); *International Covenant on Economic and Cultural and Social Rights* (1966); *Convention on the Elimination of All Forms of Discrimination against Women* (1979); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984); *Convention on the Rights of the Child* (1989); *Convention on the Rights of Persons with Disabilities* (2006).

35 For a discussion of the international obligations assumed by Australia in entering into human rights treaties, see Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009) 13-15.

> States, in conjunction with indigenous peoples, to establish national initiatives, programmes and plans of work to implement the Declaration with clear timelines and priorities. States and indigenous peoples should report regularly to their national legislative bodies and to the Forum on the progress and shortcomings in implementing the Declaration.[36]

The Special Rapporteur on the Rights of Indigenous Peoples, in his report on his mission to Australia, recommended that:

> The Commonwealth and State governments should review all legislation, policies and programmes that affect Aboriginal and Torres Strait Islanders, in light of the Declaration.
>
> The Government should pursue constitutional or other effective legal recognition and protection of the rights of Aboriginal and Torres Strait Islander peoples in a manner that would provide long-term security for these rights.[37]

It is possible to argue that there is a lack of understanding about how to implement the Declaration within the Australian context.[38] In many ways, it is easy to appreciate why there might be such a lack of understanding. The Declaration is drafted in international legalese – technical language that is broad enough to reflect the diversity of the world's Indigenous peoples and capable of being translated into the five official UN languages.

Australia, like all countries, is at the formative stages of the post-Declaration era. A body of expert commentary on the Declaration and its content is still in its infancy.[39] The Declaration is extremely comprehensive, containing 46 articles, as well as 24 preambular paragraphs. However, the difficulty of implementation should not impede action. It is the time to start serious thinking and serious planning to turn fine words into action. As articulated by the then Prime Minister Kevin Rudd in the National Apology to Indigenous Australians:

> Australians are a passionate lot. We are also a very practical lot.
>
> For us, symbolism is important but, unless the great symbolism of reconciliation is accompanied by an even greater substance, it is little more than a clanging gong.

36 Permanent Forum on Indigenous Issues, *Report on the Tenth Session*, UN Doc E/C.19/2011/14 (2011) para 47.

37 *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms, Addendum: The Situation of Indigenous Peoples in Australia, James Anaya*, UN Doc A/HRC/15/37/Add.4 (2010) paras 74-75.

38 This was argued in Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011) 22.

39 See, for example, the reports of the Expert Mechanism on the Rights of Indigenous Peoples (https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx) and the reports of the Special Rapporteur on the Rights of Indigenous Peoples (https://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx). See also Charters and Stavenhagen, n 18.

> It is not sentiment that makes history; it is our actions that make history.[40]

The UPR is a new process undertaken by the UN Human Rights Council. It involves review, by fellow states, of the human rights records of all 192 UN member states once every four years. The ultimate aim of the Review is to improve the human rights situation in all countries and address human rights violations wherever they occur.[41] During the UPR process, the Australian Government stated at the international level that Australia's laws and policies are consistent with the spirit of the Declaration.[42] It is time to turn this commitment into action.

In Australia, rather than looking at the Declaration as 46 separate articles, a more holistic and integrated approach is required; one that looks to use the key principles that underpin the Declaration.[43] These are:

- self-determination and to freely determine political status and development priorities;
- free, prior and informed consent and participation in decision-making;
- non-discrimination and equality; and
- respect for and protection of culture.[44]

These principles provide a useful lens through which to examine the human rights challenges confronting Aboriginal and Torres Strait Islander peoples in Australia. This approach provides a useful framework in which to generate responses to the diversity of challenges and the aspirations of Aboriginal and Torres Strait Islander communities.

The principles reflect how universal human rights apply to the unique circumstances Indigenous peoples who have been marginalised from the organs of power, subject to discrimination and denials of their cultures. This approach imposes a duty on governments to develop systems, be they education, health or in any other area, that accommodate difference.[45] It is not up Aboriginal and Torres Strait Islander peoples to navigate their way through systems that are imposed on them and do not take into account their particular needs and circumstances. To achieve circumstances of equality and to be consistent with the Declaration, the structures of society must be reoriented to account for and be guided by the voices, aspirations

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

41 For more information on the UPR process, see Office of the High Commissioner for Human Rights, *Universal Periodic Review*, available at: www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (accessed 15 May 2012).

42 Australian Government, *Australia's Formal Response to the Universal Review Process* (2011) Recommendation 24.

43 This is the view of the Australian Human Rights Commission.

44 For a more detailed analysis of these principles, see Gooda, n 38, Chs 1 and 3.

45 See *United Nations Declaration on the Rights of Indigenous Peoples*, n 2, preambular, para 2.

and choices of Aboriginal and Torres Strait Islander peoples.[46] The following sections explore three key human rights issues that impact on Aboriginal and Torres Strait Islander peoples: the need for constitutional reform, health inequality and the Northern Territory Intervention. These three issues have been chosen as case studies because they provide a practical illustration of the importance of the Declarations' underlying principles in promoting human rights outcomes.

CONSTITUTIONAL RECOGNITION

[12.70]

> A century ago, the Australian people engaged in a debate about creating a nation. They held meetings … They wrote articles and letters in newspapers. Many views were canvassed and voices were heard. The separate colonies, having divided up the land between them, discussed ways of sharing powers in order to achieve a vision of a united Australia. The result was the Australian Constitution, establishing the Commonwealth of Australia in 1901.
>
> A century ago our Constitution was drafted in the spirit of terra nullius. Land was divided, power was shared, structures were established, on the illusion of vacant land. When Aboriginal people showed up – which they inevitably did – they had to be subjugated, incarcerated or eradicated: to keep the myth of terra nullius alive.
>
> A century after the original constitutional debate we have an opportunity to remake our Constitution to recognise and accommodate the prior ownership of the continent by Aboriginal and Torres Strait Islander people.[47]

The Australian Constitution is contained in cl 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp) and is a statute of the United Kingdom Parliament. The Constitution is notable for its pragmatism. It is in essence a negotiated power-sharing arrangement between the former colonies and the newly formed Commonwealth Parliament. It is equally notable for its exclusion of Aboriginal and Torres Strait Islander peoples. This exclusion was based on the false premise that the Indigenous peoples of Australia were a 'dying race'.[48]

Aboriginal and Torres Strait Islander peoples were excluded from the constitutional convention debates and the drafting process. They are excluded from the text as a result of s 127 preventing Aboriginal and Torres Strait Islanders from being counted as among the numbers of the new nation. Further, the 'races power' contained in s 51(xxvi) enabled the Australian

46 See Gooda, n 38, 113-114.

47 Patrick Dodson, 'Welcoming Speech' (Speech delivered at the Position of Indigenous People in National Constitutions Conference, Canberra, 4 June 1993) quoted in Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (2nd ed, Aboriginal Studies Press, 2007) 146-147.

48 See Geoffrey Sawer, 'The Australian Constitution and the Australian Aboriginal', (1966) 2 *Federal Law Review* 17, 18.

Government to 'make special laws for people of any race other than the aboriginal race'. It should be noted that the races power was not inserted into the Constitution out of benevolence. To the contrary, as Chief Justice of the High Court Hon Robert French observed, the races power was designed to ensure the 'control, restriction, protection and possible repatriation of "coloured races" living in Australia'.[49] Indeed, the Constitution was drafted reflecting the discriminatory and now out-dated idea of racial superiority.[50]

The 1967 Referendum

[12.80] Following a long campaign by Aboriginal and Torres Strait Islander and non-Indigenous activists, a successful referendum was held in 1967 to remove the explicit exclusion contained within the Constitution; the referendum resulted in the removal of s 127 and the reference to the 'aboriginal race' in s 51(xxvi). This meant that Aboriginal and Torres Strait Islanders were now to be counted in the numbers of the nation and enabled the Australian Government to make special laws for them. However, these changes did not recognise the unique position of Aboriginal and Torres Strait Islanders as the first peoples of the land:

> The original Constitution of 1901 established a negative citizenship of the country's original peoples. The reforms undertaken in 1967, which resulted in the counting of Indigenous Australians in the national census and the extension of the races power to Indigenous Australians, can be viewed as providing a neutral citizenship for the original Australians. What is still needed is a positive recognition of our status as the country's Indigenous peoples, and yet sharing a common citizenship with all other Australians.[51]

The 1967 referendum also failed to address the racially discriminatory legacy of the races power. French CJ has argued that the weight of High Court jurisprudence on the races power, including the infamous Hindmarsh Bridge case,[52] means that there is:

> Little likelihood of any reversal of the now reasonably established proposition that the [races] power may be used to discriminate against or for the benefit of the people of any race.[53]

That the races power can be used to discriminate against the people of any race is particularly problematic for Aboriginal and Torres Strait Islander peoples. The federal Racial Discrimination Act, the Act that makes discrimination on the basis of race unlawful, has been compromised on three occasions since

49 Robert French, 'The Races Power: A Constitutional Chimera', in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 181.

50 Note s 25 contemplated the disqualification of people from voting in State election on the basis of race.

51 Noel Pearson, 'Aboriginal Referendum a Test of National Maturity', *The Australian* (26 January 2011) cited in *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (2012) 32.

52 *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

53 See French, n 49, 206.

its enactment in 1975. On each of these occasions, it was the Aboriginal and Torres Strait Islander peoples who were discriminated against.[54]

As noted above, non-discrimination is a key principle that underpins the Declaration. The Declaration reflects Australia's obligations under international human rights law to ensure non-discrimination on the basis of race.[55] Indeed, the Committee on the Elimination of Racial Discrimination has expressed concern at the:

> absence of any entrenched protection against racial discrimination in the federal Constitution and that sections 25 and 51 (xxvi) of the *Constitution* in themselves raise issues of racial discrimination.[56]

As a consequence, the Constitution did not – and still does not – make adequate provision for Aboriginal and Torres Strait Islander peoples and it fails to protect their rights as first peoples of Australia. Former Chief Justice of the High Court, Sir Anthony Mason, has referred to this as a 'glaring omission'.[57]

A legacy of advocacy

[12.90] This legacy of exclusion and the racially discriminatory undertones in the Constitution have reverberated down the generations and have marginalised Aboriginal and Torres Strait Islander peoples from the organs of power.[58] The result has been outcomes that are inconsistent with the key principles in the Declaration; disempowerment, systemic discrimination, isolation from decision-making and the enactment of laws that fail to account for, value or protect Aboriginal and Torres Strait Islander peoples' cultures. In the face of these ongoing negative impacts, Aboriginal and Torres Strait Islander peoples have consistently fought to have their rights recognised and acknowledged by the Australian Government and the Australian people. There is a long history of advocacy for the recognition of Aboriginal and Torres Strait Islander peoples' rights and status as the First peoples of Australia in the Constitution:[59]

54 The three occasions *Kartinyeri v Commonwealth* (1998) 195 CLR 337, the *Native Title Act (1993)* (Cth) and the Northern Territory Intervention (2007).

55 *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), Arts 2(1), 5(a); *International Covenant on Civil and Political Rights* (1966), Arts 2(1), 26; *International Covenant on Economic and Cultural and Social Rights* (1966), Arts 2(2), 3; *United Nations* Declaration on the Rights of Indigenous Peoples, n 2, Arts 1 and 2.

56 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010) para 10.

57 Anthony Mason, 'The Australian Constitution in Retrospect and Prospect', in Geoffrey Lindell (ed), *The Sir Anthony Mason Papers* (The Federation Press, 2007) 144, 148.

58 *Report of the Expert Panel*, n 51, 19.

59 For a detailed history of Aboriginal and Torres Strait Islander peoples' advocacy for recognition in the Constitution, see *Report of the Expert Panel*, n 51, Ch 1. See also Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1995*, Human Rights and Equal Opportunity Commission (1995) Ch 4; Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*,

> Since the days of the Bark Petition, Aboriginal people have been aware that the protection offered by legislation – ranging from the Aboriginal protection ordinances to the Land Rights Act – is only as secure as the government of the day … We have long believed that the protection of our rights deserves a higher level of recognition and protection.[60]

It is upon this historical foundation that Australians are increasingly accepting the need for further constitutional reform. In 2000, the Council for Aboriginal Reconciliation identified constitutional reform as unfinished business of the reconciliation agenda, calling for the Commonwealth Parliament to prepare legislation for a referendum.[61]

There have been some positive developments with Aboriginal and Torres Strait Islander peoples being formally recognised in several state constitutions:

- The Queensland Constitutional Convention, held in June 1999, recommended that the Constitutions of each state should recognise the custodianship of the land by Aboriginal and Torres Strait Islander peoples.[62] Queensland's Constitution was formally changed in 2010.[63]
- In 2004, Victoria became the first state to incorporate constitutional recognition of Aboriginal people.[64]
- In 2010, New South Wales passed legislation to recognise Aboriginal peoples in the state Constitution.[65]

Australian Human Rights Commission (2009) 62-76; Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011) Ch 2.

60 J Daley on behalf of G Yunupingu, *Northern Territory Statehood and Constitutional Protections: Issues and Implications for Future Aboriginal Governance* (Speech delivered at the Indigenous Governance Conference, Jabiru, 4-7 November 2003) 1.

61 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (2000) Recommendation 3, available at: www.austlii.edu.au/au/other/IndigLRes/car/2000/16/text10.htm (accessed 20 May 2012).

62 Gareth Griffith, 'Constitutional Recognition of Aboriginal People', e-*brief 11/2010*, NSW Parliamentary Service (2010) 5.

63 *Constitution (Preamble) Amendment Act 2010* (Qld). This Act inserted a new preamble and s 3A into the *Constitution of Queensland 2001* (Qld). The new preamble recognised Aboriginal and Torres Strait Islander peoples as the First peoples of Australia and paid 'tribute to their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community'. Section 3A stipulated that the preamble does not create any new legal rights or affect the interpretation of the Constitution or any other laws in force in Queensland.

64 *Constitution (Recognition of Aboriginal People) Act 2004* (Vic). This Act inserted a new s 1A into the *Constitution Act 1975* (Vic). Similar to the Queensland provision, this recognised Aboriginal and Torres Strait Islander peoples as the First peoples of Australia and their cultures. It also stipulated that this recognition does not create any new legal rights or affect the interpretation of the Constitution or any other laws in force in Victoria.

65 *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW). This Act inserted a new s 2 into the *Constitution Act 1902* (NSW). In effect has the same operation as the Queensland and Victorian provisions; it recognises Aboriginal and Torres Strait Islander

This recognition provides a good basis on which to build the necessary consensus within the Australian community that Aboriginal and Torres Strait Islander peoples should be acknowledged in the nation's foundational legal instrument.

At the federal level, bipartisan support for amending the Constitution to recognise Aboriginal and Torres Strait Islander peoples has been maintained since 2007.[66] Bipartisan support was reaffirmed by both major parties as election commitments in the federal election held in August 2010.[67] There is also increasing emphasis in the international sphere on the need for state constitutions to be reformed to reflect the rights, and recognise the first peoples' status, of Indigenous peoples.[68] It is against this backdrop that a process to reform the Constitution to adequately recognise Aboriginal and Torres Strait Islander peoples is currently underway.

Progress to a successful referendum

[12.100] The Australian Constitution can only be altered by referendum. Section 128 of the *Constitution* and the *Referendum (Machinery Provisions) Act 1984* (Cth) set out the procedure for amending the Constitution by referendum. The stringent requirements of a 'double majority'[69] indicate that the drafters did not intend the Constitution to be easily amended. And this has proven to be the case, with only 8 of the 44 referendums being

peoples and similarly stipulates that the recognition does not create any new rights or affect the interpretation of any law in New South Wales.

66 In his 2007 pre-election commitments, former Prime Minister John Howard committed to a referendum to recognise Aboriginal and Torres Strait Islander peoples: The Hon J Howard MP, Prime Minister, *The Right Time: Constitutional Recognition for Indigenous Australians* (Speech delivered at the Sydney Institute, Sydney, 11 October 2007). His successor Kevin Rudd referred to the need to work on constitutional recognition in the National Apology: Commonwealth, *Parliamentary Debates*, n 40. This position was further affirmed at the Community Cabinet meeting in Yirrkala, July 2008: Lindsay Murdoch, 'Place for Aborigines in the Constitution', *Sydney Morning Herald* (24 July 2008).

67 The Australian Labor Party, *The Australian Greens & the Australian Labor Party Agreement* (2010) 2; Coalition, *Coalition Election Policy 2010: The Coalition's Plan for Real Action for Indigenous Australians* (2010) 4.

68 See Expert Mechanism on the Rights of Indigenous Peoples, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, UN Doc A/HRC/18/42 (2011) paras 20-21, 28, Annex para 31. As part of its work on the special theme of its 11th session 'The Doctrine of Discovery' the Permanent Forum on Indigenous Issues conducted a study on constitutions, Indigenous peoples human rights and the Declaration, see Permanent Forum on Indigenous Issues, *Proposed Organization of Work*, 11th sess, UN Doc E/C.19/2012/L.1 (2012).

69 A double majority requires that for a referendum to be successful: (1) the majority of electors Australia wide have to vote in favour of the referendum; and (2) the majority of the electors in the majority of States (ie, four of the six states) also have to vote in favour of the referendum: *Commonwealth Constitution*, s 128.

successful.[70] Analysis of previous referenda identifies critical factors that are essential for successful referendum. These include:

- bipartisan support;
- popular ownership; and
- popular education.[71]

To address these factors, the Australian Government announced, in December 2010, the establishment of an Expert Panel on Constitutional Recognition of Indigenous Australians (Expert Panel).[72] The Expert Panel was empowered to report to the Australian Government on potential options for constitutional recognition of Aboriginal and Torres Strait Islander peoples, and it did this in January 2012. The Expert Panel was made up of Indigenous and community leaders, legal experts and parliamentary members.[73] Reflecting the key principle within the Declaration of participation in decision-making, the Expert Panel determined that its recommendations would 'benefit and accord with the wishes of Aboriginal and Torres Strait Islander peoples'.[74] Therefore, in undertaking its task, the Expert Panel consulted widely, particularly with Aboriginal and Torres Strait Islander communities.

The Expert Panel recommended the repeal of the provisions that permit or anticipate racial discrimination, namely ss 25 and 51(xxvi). In place of the races power, it recommended a new s 51A which recognises Aboriginal and Torres Strait Islander peoples as the first peoples of Australia and empowers Parliament to make laws with respect to Aboriginal and Torres Strait Islander peoples. It further recommended a provision that recognises that Aboriginal and Torres Strait Islander languages are part of the national heritage. It recommended the enactment of a provision that prohibits discrimination on the basis of race. Finally, it made a number of recommendations on the process for the referendum including that the Government should consult with Aboriginal and Torres Strait Islander peoples to ascertain their views, should the Government wish to put a different proposal to referendum.[75]

The Expert Panel's recommendations, both in content and process, are consistent with the principles in the Declaration.

70 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (5th ed, 2010) 1340, 1399-1404.

71 For more detail, see Gooda, *Social Justice Report 2010*, n 59, 46-63. See also George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) Ch 7.

72 Department of Families, Housing, Community Services and Indigenous Affairs, *Expert Panel Terms of Reference* (2010), available at: www.fahcsia.gov.au/sa/indigenous/progserv/engagement/Pages/ExpertPanel.aspx (accessed 26 May 2012).

73 *Report of the Expert Panel*, n 51, 234-239.

74 *Report of the Expert Panel*, n 51, 4.

75 *Report of the Expert Panel*, n 51, xvii-xix.

CLOSE THE GAP

[12.110] In the *Social Justice Report 2005*, the then Social Justice Commissioner first articulated a human rights-based approach to 'closing the gap' in life expectancy between Indigenous and non-Indigenous Australians.[76] The Report also called on the 'governments of Australia to commit to achieving equality of health status and life expectation between Aboriginal and Torres Strait Islander peoples and non-Indigenous people within 25 years'.[77] This report led to the formation of the Close the Gap Campaign for Indigenous Health Equality (the Campaign) which called for a national effort to close the gap between the health and life expectancy of Indigenous and non-Indigenous Australians within one generation. The Campaign comprises of Australia's peak Aboriginal and Torres Strait Islander and non-Indigenous health bodies, health professional bodies and human rights organisations.[78] The Campaign reflects Aboriginal and Torres Strait Islander peoples' right to participate in decision-making and how this manifests itself through a partnership approach. The Campaign is led by its Indigenous member organisations who work collaboratively with non-Indigenous organisations under the banner of 'Close the Gap'. The Campaign first met in March 2006 and was officially launched in April 2007.[79]

A campaign for health equality

[12.120] The *Social Justice Report 2005* provided the intellectual foundation for the Campaign. It analysed how the right to health as encapsulated in Art 12 of the *International Covenant on Economic, Social and Cultural Rights* applies to the situation of Aboriginal and Torres Strait Islander peoples.[80] A human rights–based approach to health within this context champions the concept of non-discrimination, meaning that Aboriginal and Torres Strait Islander peoples should have equal opportunities with non-Indigenous Australians to be healthy. In circumstances where equality in the enjoyment of a human right does not exist, governments have obligations to take concrete steps to ensure this is overcome. This is known as the progressive realisation principle.[81] In relation to Aboriginal and Torres Strait Islander peoples' health, the Australian Government's obligation is to overcome health inequality.

76 Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (2005) Ch 2.

77 See Calma, *Social Justice Report 2005*, n 76, 16.

78 Close the Gap Campaign Steering Committee, *Shadow Report on Australian Governments' Progress towards Closing the Gap in Life Expectancy between Indigenous and Non-Indigenous Australians* (2010) 2.

79 See Calma, *Social Justice Report 2008*, n 59, Ch 5.

80 See also *United Nations Declaration on the Rights of Indigenous Peoples*, n 2, Arts 21, 23, 24; Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000).

81 *International Covenant on Economic and Cultural and Social Rights* (1966), Art 2; see also Calma, *Social Justice Report 2005*, n 76, 48-51.

A human rights' articulation of Indigenous health equality requires an examination of the processes which the Government is undertaking to achieve health equality. This analysis enlivens the key principles of the Declaration outlined above. As the former Social Justice Commissioner Tom Calma put it, this enables a strategic approach to addressing health equality:

> It is focused on determining the *suitability* of the steps being taken … . Are programs and services accessible, available, appropriate and of sufficient quality? Do they involve the full participation of Aboriginal and Torres Strait Islander peoples? Do they target the systemic barriers faced by Aboriginal and Torres Strait Islander peoples?
>
> It is also focused on the adequacy of steps being taken. For example, are they meeting core minimum obligations? Are they resulting in a progressive improvement in the realisation of the right to health of Aboriginal and Torres Strait Islander peoples? Is the rate of progress sufficient, given the extent of inequality? Do data collection, performance monitoring and evaluation processes exist which enable progress to be monitored? Are programs targeted, delivered and finalised at a level that is capable of addressing inequality?[82]

Since its inception, the Campaign has recorded some significant achievements in the Aboriginal and Torres Strait Islander political landscape. The first major achievement was the signing of the Close the Gap Statement of Intent (SOI) by the Prime Minister, Leader of the Opposition and Senior Government officials in 2008.[83] Subsequently, most state and territory governments and oppositions have also signed the SOI.[84]

Tom Calma suggested that the SOI is:

> one of the most significant compacts between Australian governments and civil society in Australian history. It should be seen as a foundation document for a national effort to achieve Indigenous health equality.[85]

The SOI commitments provide a blueprint for action based on human rights standards to close the health equality gap between Indigenous and non-Indigenous Australians. Key commitments include:

- the development of a comprehensive, long-term plan of action;
- ensuring the full participation of Aboriginal and Torres Strait Islander peoples and their representatives;
- addressing the social determinants of health; and

82 See Calma, *Social Justice Report 2005*, n 76, 60.

83 *Close the Gap Statement of Intent* (signed at the Indigenous Health Equality Summit, Canberra, 20 March 2008).

84 Close the Gap Campaign Steering Committee, *Shadow Report 2012: On Australian Governments' Progress towards Closing the Gap in Life Expectancy between Indigenous and Non-Indigenous Australians* (2012).

85 See Calma, *Social Justice Report 2008*, n 59, 208.

- supporting and developing Aboriginal and Torres Strait Islander community-controlled health services.[86]

The SOI commitments extrapolate the human rights articulation of health equality consistent with the key principles of the Declaration. Partnership and community control are expressions of self-determination as they emphasise choice, participation and control.[87] The social determinants of health are the socio-economic and cultural factors that impact on the realisation of health. This includes poverty, housing and education but also, importantly, extends to addressing cultural loss, social exclusion and powerlessness.[88] Self-determination can operate as an antidote; it enables a sense of control that is strongly correlated with positive health and well-being outcomes.[89] The SOI commitments also conceive of a broad definition of health that includes 'spiritual, cultural, emotional and social well-being as well as physical health'.[90] To address the social determinants of health, policy can neither ignore the impacts of culture on the health of Aboriginal and Torres Strait Islander peoples, nor the ongoing impacts of discrimination.

The Campaign's influence on the policy agenda

[12.130] In August 2007, the then Opposition broadly adopted the Campaign's approach in its Indigenous affairs election platform. As a consequence, the term 'closing the gap' has entered the policy lexicon and is used to tag the Council of Australian Governments (COAG) and Australian Government policy aimed at reducing Indigenous disadvantage.[91] Prime Minister Rudd in the *National Apology to Australia's Indigenous Peoples* also committed to working in a new partnership with Aboriginal and Torres Strait Islander peoples and flagged that an annual report would be tabled in Parliament on the efforts to close the gap.[92]

86 *Close the Gap Statement of Intent*, n 83.

87 See UNESCO, 'Conclusions and Recommendations of the Conferences', in M van Walt van Praag (ed), *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Centre UNESCO de Catalunya, 1999) 19; Anaya, n 13, Ch 3.

88 David Cooper, *Closing the Gap in Cultural Understanding: Social Determinants of Health in Indigenous Policy in Australia*, Aboriginal Medical Services Alliance of the Northern Territory (2011) 8-14.

89 Muriel Bamblett, Howard Bath and Rob Roseby, *Growing Them Strong, Together: Promoting the Safety and Wellbeing of the Northern Territory's Children*, Report of the Board of Inquiry into the Child Protection System in the North Territory (2010) 116.

90 See National Aboriginal and Torres Strait Islander Health Council, *National Strategic Framework for Aboriginal and Torres Strait Islander Health: Context* (2003) 4.

91 Close the Gap Campaign Steering Committee, *Shadow Report 2012*, n 84, 2.

92 Commonwealth, *Parliamentary Debates*, n 40. For the Prime Minister's Reports and address to Parliament on tabling the report, see Department of Families, Housing, Community Services and Indigenous Affairs, *Closing the Gap*, available at: www.fahcsia.gov.au/sa/indigenous/pubs/closing_the_gap/Pages/default.aspx (accessed 26 May 2012).

These developments occurred alongside a process of health and governmental reform. COAG adopted six 'closing the gap' targets including achieving Aboriginal and Torres Strait Islander life expectancy equality within a generation, and to halving the under-five Indigenous mortality rate within 10 years.[93]

Crucially, in November 2011, the Ministers of Health and Ageing and Indigenous Health announced a process for the development of Aboriginal and Torres Strait Islander Health Plan to achieve health equality by 2030.[94] Based on the SOI, the Campaign has developed a list of criteria to assess a health plan to ensure that it is consistent with human rights, which importantly includes that the plan must be developed and implemented on the basis of partnership between Aboriginal and Torres Strait Islander peoples, their representatives and Australian governments.[95]

The Campaign calls for the government approach to partnership to enable Aboriginal and Torres Strait Islander peoples and their representatives to drive the health plan. Developing a health plan in partnership reflects the right to participate and self-determination, but it also recognises that Aboriginal and Torres Strait Islander peoples are best placed to know what their communities need to be healthy. Seizing the initiative, the Aboriginal and Torres Strait Islander representative organisations of the Campaign established the National Health Leadership Forum (NHLF) as the national representative body for Indigenous health peak bodies. It is based in the National Congress of Australia's First Peoples (Congress).[96] It is the Congress' partnership interface for health matters.[97] It is pleasing that the Government has committed to developing the health plan in partnership with Aboriginal and Torres Strait Islander peoples and organisations, specifically through the NHLF.[98]

93 In November 2008, the National Indigenous Reform Agreement (NIRA) was agreed to by COAG. It provides the framework for all Australian governments' Indigenous related policy and programs, commits all governments to achieving the closing the gap targets and defines responsibilities and promotes accountabilities within governments: Council of Australian Governments, *National Indigenous Reform Agreement* (2008).

94 The Hon N Roxon MP, The Minister for Health and The Hon W Snowdon MP, The Minister for Indigenous Health, 'New National and Aboriginal and Torres Strait Islander Health Plan', Media Release (3 November 2011).

95 For more information, see Close the Gap Campaign Steering Committee, *Shadow Report 2011: On Australian Governments' Progress towards Closing the Gap in Life Expectancy between Indigenous and Non-Indigenous Australians* (2011) 9.

96 The National Congress of Australia's First Peoples was a representative body for Aboriginal and Torres Strait Islander peoples from 2009-2019.

97 For more information, see Close the Gap Campaign Steering Committee, *Shadow Report 2012*, n 84, 15-19.

98 See Close the Gap Campaign Steering Committee, *Shadow Report 2012*, n 84, 15-19.

THE NORTHERN TERRITORY INTERVENTION

[12.140] In June 2007, the Australian Government announced the Northern Territory Emergency Response (NTER also known as 'the Intervention') 'to protect Aboriginal children in the Northern Territory' from physical and sexual abuse.[99] This announcement was in response to the release of the *Little Children Are Sacred Report (Little Children)* which documented widespread child sexual abuse in the Northern Territory.[100] The NTER measures 'constitute a governmental intervention unmatched by any other policy declaration in Aboriginal affairs in the last 40 years'.[101] The Government described these measures as:

- introducing widespread alcohol restrictions on Northern Territory Aboriginal land;
- introducing welfare reforms to stem the flow of cash going toward substance abuse and to ensure funds meant for children's welfare are used for that purpose;
- enforcing school attendance by linking income support and family assistance payments to school attendance for all people living on Aboriginal land and providing meals for children at school at parents' cost;
- introducing compulsory health checks for all Aboriginal children to identify and treat health problems and any effects of abuse;
- acquiring townships prescribed by the Australian Government through five year leases including payment of compensation on just terms;
- as part of the immediate emergency response, increasing policing levels in prescribed communities, including requesting secondments from other jurisdictions to supplement NT resources, funded by the Australian Government;
- requiring intensified on-ground clean up and repair of communities to make them safer and healthier by marshalling local workforces through work-for-the-dole;
- improving housing and reforming community living arrangements in prescribed communities including the introduction of market-based rents and normal tenancy arrangements;
- banning the possession of X-rated pornography and introducing audits of all publicly funded computers to identify illegal material;

99 The Hon M Brough MP, Minister for Families, Community Services and Indigenous Affairs, 'National Emergency Response to Protect Children in the NT', Media Release (21 June 2007).

100 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Makarle 'Little Children Are Sacred'* (2007).

101 See Melinda Hinkson, 'Introduction: In the Name of the Child', in Jon Altman and Melinda Hinkson (eds), *Coercive Reconciliation: Stablise, Normalise, Exit Aboriginal Australia* (Arena, 2007) 1.

- scrapping the permit system for common areas, road corridors and airstrips for prescribed communities on Aboriginal land; and
- improving governance by appointing managers of all government business in prescribed communities.[102]

These measures were to last five years, and specially targeted 73 Aboriginal communities in the Northern Territory.

The human rights concerns regarding the NTER

[12.150] Given their extraordinary nature, these measures raised significant human rights concerns both domestically and internationally.[103] Perhaps most significantly was their impact on the operation of the *Racial Discrimination Act 1975* (Cth) (RDA); the measures were deemed 'special measures' in accordance with s 8 of the RDA,[104] and the operation of Pt II of the RDA in relation to the NTER Acts was suspended. The consequent effect was the guaranteed suspension of protections from racial discrimination provided by the RDA.

The legislation was rushed through Parliament, with the entire legislative process being completed within ten days. This has been described as 'unusual if not unprecedented'.[105] Aboriginal people affected by the drastic measures were isolated from this process. The sad irony of the NTER is that it was instigated as a result of *Little Children*, yet it ignored a proper reading of the report's primary recommendation:

> That Aboriginal child sexual abuse in the Northern Territory should be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership … It is critical that both governments commit to genuine consultation with Aboriginal people in designing initiatives for Aboriginal Communities.[106]

102 See Brough, n 99.

103 See Human Rights Committee, n 7, para 14; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009) para 15; *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms, Addendum: The Situation of Indigenous Peoples in Australia*, n 37, Appendix B.

104 Section 8 of the RDA contains a very limited exception to the operation of the Act. Section 8(1) stipulates that measures that are 'special measures' do not constitute racial discrimination. The section refers to Art 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination* which outlines that special measures are to be undertaken for the sole purpose of securing adequate advancement of certain racial groups to ensure these groups can have equal enjoyment of human rights and fundamental freedoms. *Gerhardy v Brown* (1985) 159 CLR 70 is the leading authority on the meaning of s 8(1).

105 Parliament of Australia, Parliamentary Library, 'Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency response and Other Measures) Bill 2007', *Bills Digest No 21 2007-2008* (2007) 4.

106 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, n 100, 7.

The NTER may have designated child sexual abuse as an issue of national significance, but it was not developed in 'genuine consultation' with the Aboriginal people. In fact, the NTER was the antithesis. Clearly, this inhibited Aboriginal peoples' right to participate in decision-making but it also equated to bad policy.[107] When governments take unilateral control, Indigenous peoples are prevented from taking control and responsibility over the issues that confront them – undermining self-determination and disempowering communities.

A collaborative response to child abuse that engaged Indigenous people in decision-making as envisaged by *Little Children* would have been consistent with the Declaration and human rights principles. In this regard, the role of government is to facilitate and enable Aboriginal and Torres Strait Islander peoples to become the agents of their own change. This involves ongoing empowerment, autonomy and interdependence that should permeate through all prospective policies and initiatives. When Aboriginal and Torres Strait Islander communities are enabled to own their own challenges, appropriately supported by governments, they can address their most confronting and intractable issues.[108] Promoting community control and community-driven responses enlivens the principles in the Declaration. It facilitates the choice and control associated with self-determination and participation in decision-making. In turn, this promotes tailored solutions that accommodate and promote the culture of the community.

Reviewing the NTER

[12.160] In June 2008, the Australian Government commissioned an independent review of the NTER, and a report was finalised in October 2008. The review found that those affected by the NTER measures believed that they were targeted because of their race. Consequently, the NTER created a 'strong sense of injustice' which undermined the positive potential of some NTER measures.[109] Crucially, the failure to effectively engage with the Aboriginal people affected by the measures diminished the effectiveness of the NTER. Review of the NTER stated:

> Robust frameworks, adequate resources, functional governance and professional capabilities are necessary – but without the genuine engagement and active participation of the local community, deep seated change will not be achieved. It must be nurtured within the community. That is the lesson of the Intervention.[110]

107 Closing the Gap Clearinghouse, *What Works to Overcome Indigenous Disadvantage: Key Learnings and Gaps in the Evidence* (2011) 2.

108 For example, see the work by the communities of the Fitzroy Valley in confronting alcohol-related harm in the Fitzroy Valley: Gooda, *Social Justice Report 2010*, n 59, Ch 3. See also Closing the Gap Clearinghouse, n 107, 2.

109 Northern Territory Emergency Response Review Board, *Report of the Northern Territory Review Board*, Attorney-General's Department (2008) 9.

110 See Northern Territory Emergency Response Review Board, n 109, 11.

Following the review, the Government undertook a consultation process to reform the NTER, reinstate the RDA and redesign the measures so that they are non-discriminatory. The provisions of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) lifting the suspension of the RDA over the NTER legislation and actions commenced 31 December 2010.[111]

A number of the redesign measures were welcome, including lifting the suspension of the RDA, redesigning income management measures so that they are not applied on a racially discriminatory basis and enabling a shift from blanket alcohol bans to restrictions that are tailored to individual community needs.[112] However, other features of the legislation ensured that the human rights concerns regarding the NTER were not fully addressed. In particular, while the RDA had been reinstated, the absence of 'notwithstanding clause' cast the operation of the RDA in doubt.[113] There were further concerns with the Government intention, as outlined in the object clauses of the relevant parts of the legislation, that many of the NTER measures were to be special measures for the purposes of the RDA.[114]

With many of the NTER measures set to end in August 2012, the Australian Government undertook a further phase of consultations to inform the development of new legislation. This occurred under the policy banner of 'Stronger Futures in the Northern Territory'. Concerns were raised as to whether the consultation process was consistent with Indigenous peoples' right to participate in decisions that affect them as affirmed in the Declaration, including the inadequacy of timelines considering the breadth and complex nature of issues that have been raised.[115] The fact that the discussion papers were not provided in local language hindered the involvement of some communities.[116]

111 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of the Racial Discrimination Act) Act 2010* (Cth), s 1.

112 See Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and Other Bills* (2010) para 7.

113 It is a principle of statutory construction that where there is an inconsistency between two Acts, the later Act (here the NTER legislation) will prevail over the former Act (RDA). The inclusion of a 'notwithstanding clause' would ensure that the RDA applied to all acts authorised by the NTER legislation. Otherwise if the NTER measures were found to be discriminatory, they would not be impacted by the reinstatement of the RDA: see n 112, [34]-[49].

114 Note the Legislation removed existing provisions that deemed the measures of the NTER to be special measures, reference to special measures was made in the object clauses of the relevant parts of the legislation.

115 Gooda, *Social Justice Report 2011*, n 38, 27.

116 Gooda, *Social Justice Report 2011*, n 38, 27; Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (2011) 13.

On 23 November 2011, the Stronger Futures in the Northern Territory Bill 2011 (Cth) were introduced into Parliament.[117] The intent of the Stronger Futures Bills to address the critical situation facing Aboriginal peoples in the Northern Territory is welcome.[118] However, the Bills raise significant human rights concerns, and the measures contained within the Stronger Futures Bills are intrusive and limiting of individual freedoms and human rights. Where it is deemed appropriate to design interventions which infringe on individuals' human rights, then that intervention must be the least restrictive on the rights of individuals while trying to meet the purpose of the intervention.[119]

Furthermore, to be consistent with the Declaration, the accompanying policies that will drive the implementation of the Stronger Futures Bills should promote Aboriginal and Torres Strait Islander peoples participation and control over decisions that affect them. The NTER and other related policies have caused an erosion of community governance and disempowerment of the Aboriginal communities in the Northern Territory.[120] As such, a key priority of government policy must be to facilitate community governance mechanisms which enable Aboriginal communities in the Northern Territory to engage with and control decision-making about their development goals.

117 Note this Bill was accompanied by the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth) and the Social Security Legislative Amendment Bill 2011 (Cth).

In summary, the Stronger Futures Bills will:

- repeal the NTER Act but contain savings and transitional provisions relating to many of the NTER measures;
- continue alcohol bans but allow for the introduction of alcohol management plans in prescribed Northern Territory communities and amended laws relating to alcohol abuse measures;
- amend sections of social security legislation to enable the suspension of welfare payments in cases of school non-attendance;
- amend the licensing regime for community stores, extending licencing requirements beyond stores who accept income-managed funds and allow greater assessment and more robust enforcement of measures;
- amend the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) to continue existing pornography bans and allow communities to opt in or out of bans;
- amend the *Crimes Act 1914* (Cth) to introduce exceptions to the rule preventing consideration of customary law or cultural practice in bail and sentencing for certain offences involving cultural heritage; and
- amend the operation of the income management scheme by allowing recognised state/territory authorities to refer people to income management.

See Australian Human Rights Commission, *Submission to the Senate Community Affairs Legislation Committee Inquiry into the Stronger Futures in the Northern Territory Bill 2011 and Two Related Bills* (2012) para 5.

118 See Australian Human Rights Commission, n 117, para 11.

119 See Australian Human Rights Commission, n 117, para 13. Note the Australian Human Rights Commission made 33 recommendations as to how the Bills could be improved to be more compatible with Australia's human rights obligations.

120 See Australian Human Rights Commission, n 117, para 71.

The facilitation of community governance requires resourcing and capacity building. There exists a worrying shortfall in community governance in remote communities. The feelings of disempowerment affecting these communities are symptomatic of a lack of control over issues directly affecting groups. Consequently there is a significant need for further efforts to facilitate community governance and foster partnerships between communities and government. Significant steps are required to address the extreme levels of disempowerment currently being experienced by Aboriginal peoples in the Northern Territory. Local governance processes and infrastructure which meet the principles of self-determination for Aboriginal peoples must be revisited.[121]

A significant further concern regarding the implementation of the proposed measures is the capacity of government to implement policy in a manner that reflects, promotes and values Indigenous cultures. This requires a culturally competent bureaucracy. Despite five years of effort under the NTER, it appears that the Australian and Northern Territory Governments lack the capacity to implement policy in a culturally competent manner.[122] To counter this, there is a need to foster environments of cultural resilience within Aboriginal and Torres Strait Islander communities and to develop the cultural competency of those who engage with these communities.[123]

As a consequence, it is essential that the implementation of Stronger Futures measures foster strong communities enable community members to feel safe and draw strength in their identity, culture and community. This is more than creating an awareness of cultural differences; it incorporates systems level change that:

- values diversity;
- has the capacity for cultural self-assessment;
- is conscious of the dynamics that occur when cultures interact;
- institutionalises cultural knowledge; and
- adapts service delivery so that it reflects an understanding of the diversity within cultures.[124]

This cannot be achieved formulaically; it requires a tailored, considered and deliberate approach. It must allow for capacity building over time in partnership with local communities. Such an approach is particularly important for the Stronger Futures programs to build respect for and protect Aboriginal and Torres Strait Islander peoples' cultures and would reflect the cultural components of the Declaration.

121 See Australian Human Rights Commission, n 117, para 66-84.

122 See Australian Human Rights Commission, n 117, para 85.

123 Gooda, *Social Justice Report 2011*, n 38, 122-123.

124 See National Health and Medical Research Council, *Cultural Competency in Health: A Guide for Policy, Partnerships and Participation* (2006) 7.

CONCLUSION

[12.170] The three case studies highlighted in this chapter illustrate the complexity of human rights challenges that confront Aboriginal and Torres Strait Islander peoples in Australia. They provide some evidence that Indigenous disadvantage in this country is a legacy of a complex interaction of various causal factors. The common thread is the damage caused by legacies of discrimination, disempowerment and denials of human rights.

Successful responses to Aboriginal and Torres Strait Islander disadvantage can unleash the potential that exists within Indigenous Australia and meet human rights standards outlined in this chapter and others in this book. This potential can be utilised by adopting a principled human rights-based approach to policy development and law reform. The Declaration provides authoritative guidance in this regard. Achieving the ends of the Declaration will lay the necessary foundations for Aboriginal and Torres Strait Islander communities to take control. It will foster an environment of non-discrimination, enable them to have an active role in developing and implementing responses and will ensure that government actions are culturally appropriate. In this way, the Declaration can be seen as a remedial instrument, designed to rectify a history of failings when it comes to protecting the rights of Indigenous peoples:

> Imagine the indigenous world as it was, for a moment [before colonisation]. Then think of the conditions that indigenous peoples currently face: encroachment, colonization, subjugation, exploitation, domination, leaving many of us in disarray. Now read the Declaration through from beginning to the end and dream of a world that 'might someday be'.[125]

The value of human rights is that they create a framework for reform that can empower the powerless, regulate the damaging excesses of the powerful and chart a clear path to address disadvantage. The human rights standards contained in the Declaration offer practical guidance in developing responses to the challenges confronting Aboriginal and Torres Strait Islander peoples and communities in Australia. Importantly, human rights standards provide both governments and communities with a set of minimum and objective standards which can be used to establish a framework for a society based on dignity and equality. Governments in Australia would do well to integrate the principles contained within the Declaration in their laws, policies and programs that are targeted to address the challenges faced by Aboriginal and Torres Strait Islander peoples.

EDITORS' POSTSCRIPT

[12.180] This chapter was originally published in *Contemporary Perspectives on Human Rights Law in Australia*. Since the publication of that book, debates

125 Dalee Sambo Dorough, 'The Significance of the Declaration on the Rights of Indigenous Peoples and Its Future Implementation', in Charters and Stavenhagen (eds), n 18, 264.

about the recognition of Indigenous people in the Australian Constitution have evolved through numerous public inquiries, consultations and political and legal proposals. Most recently, and probably most significantly has been the Indigenous conventions that issued *Uluru Statement from the Heart*, and its call for a Voice to Parliament, a Makarata Commission and a Treaty Process. These developments are explored in the next two chapters in this collection – 'Marrul (Changing Season)' by Inala Cooper and Shannan Dodson and 'Self-Determination and Treaty-Making in Australia' by Harry Hobbs. They are also comprehensively addressed in the work of Megan Davis, Shireen Morris and Anne Twomey, among others. Their works are included in the Additional Resources at the end of this chapter.

In 2019, the Federal Minister for Indigenous Affairs, Ken Wyatt, announced that a proposal for constitutional recognition of Indigenous people will be put to the people for approval within three years, but later announced it would not include a 'Voice to Parliament'. Soon after the 2019 Federal election, an executive order established the National Indigenous Australians Agency, an executive agency attached to the Office of the Prime Minister and Cabinet. This agency is charged with coordinating policy and advancing programs, such as, Closing the Gap, and other programs for Indigenous Australians. This agency is not constitutionally entrenched; it does not meet the criteria arising from the Declaration on the Rights of Indigenous Peoples that Gooda discusses in this chapter. At the time of publication, it is not known what the outcomes of the work of this new Agency will be.

Additional Resources

Stephen James Anaya, *Indigenous Peoples in International Law* (2nd ed, Oxford University Press, 2004).

Claire Charters and Rodolfo Stavenhagen (eds), *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (IWGIA, 2009).

Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples', (2008) 9(2) *Melbourne Journal of International Law* 439.

Megan Davis, 'The Long Road to Uluru: Walking Together: Truth before Justice', (2018) (60) *Griffith Review* [13]-32, 41-45.

Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (UBC Press, 2010).

Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011).

José R Matinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of the Problem of Discrimination Against Indigenous Populations, *Study of the Problem of Discrimination Against Indigenous Populations, Vols 1-5*, UN DOCs E/CN.4/Sub.2/1986/7, E/CN.4/Sub.2/1986/7/add1, E/CN.4/Sub.2/1986/7/add2, E/CN.4/Sub.2/1986/7/add3, E/CN.4/Sub.2/1986/7/add4 (1981-1983 reprinted in 1986).

Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs', (2018) 41(3) UNSW Law Journal 629.

Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel (2012).

Referendum Council, *Final Report* (30 July 2017), available at: https://www.referendumcouncil.org.au/final-report.html.

Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms, Addendum: The Situation of Indigenous Peoples in Australia, James Anaya, UN Doc A/HRC/15/37/Add.4 (2010).

Anne Twomey, 'Putting Words to the Tune of Indigenous Constitutional Recognition', *The Conversation* (20 May 2015), available at: https://theconversation.com/putting-words-to-the-tune-of-indigenous-constitutional-recognition-42038.