

WE STAND

**MOVING BEYOND RECOGNITION:
RESPECTING THE RIGHTS OF ABORIGINAL
AND TORRES STRAIT ISLANDER PEOPLES**

TOGETHER



OXFAM
Australia

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Aboriginal and Torres Strait Islander readers should be aware that this publication may contain images or names of people who have since passed away. Oxfam acknowledges the Wurundjeri people as the custodians of the country on which Oxfam's national office is based in Melbourne where this report was produced. We pay our respects to their elders; men and women; past, present and future. We also extend our respect to all Aboriginal and Torres Strait Islander nations who, for thousands of years, have preserved their culture and practices across their countries.



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FOREWORD

For close to 50 years, I been involved in advocating for the rights of Aboriginal and Torres Strait Islander peoples at a community, local, state, national and international level. As a

13 year old, I remember the 1967 referendum and the pride, confidence and optimism that flooded through our communities when we were finally recognised and acknowledged as equal citizens. My father would say; "We have finally broken through the colour bar".

For Aboriginal and Torres Strait Islander peoples, the subsequent decades have been filled with great hope, some advancement and many, many lost opportunities. While there have been significant achievements and developments, many opportunities for governments to work with our people and communities and advance the rights and realise the full potential of Aboriginal and Torres Strait Islander peoples, have been lost.

This report provides a valuable long term perspective on the state of human rights for Aboriginal and Torres Strait Islander peoples in Australia. It highlights that the complexities of Indigenous affairs are not intractable, that there is a clear way forward for Indigenous rights, and that the solutions lie with Aboriginal and Torres Strait Islander peoples ourselves and not with policy and funding structured around the whim of a minister or the life of a government. Governments and Oppositions must take a bipartisan approach to Aboriginal and Torres Strait Islander affairs and they must actively partner with us to realise enduring outcomes.

Over the years, the urgent need to respect the rights of Aboriginal and Torres Strait Islander peoples has been documented in far too many reports, reviews and inquiries – by royal commissions, parliamentary committees, government agencies, human rights and equal opportunity commissions, respected United Nations bodies, and indeed by Aboriginal and Torres Strait Islander peoples ourselves.

Yet these reports are consistently ignored by successive governments, while too many of my Indigenous brothers and sisters continue to experience the reality of these failures every day in our communities. Sadly, too many Aboriginal and Torres Strait Islander peoples still live shorter, less healthy lives with lower socioeconomic outcomes than non-Indigenous people.

On the eve of the 50th anniversary of the 1967 referendum, this report by Oxfam is timely. It provides both a historical and contemporary perspective on the rights of Aboriginal and Torres Strait Islander peoples. Importantly, it outlines ten clear steps to move beyond recognition and bring about real and meaningful change.

I call on all Australian governments to implement these recommendations in full, with all possible urgency, so that all Australians can enjoy equality of opportunity and equal socioeconomic outcomes and we can all reach our full potential. Partner with us and we will realise equality.

A handwritten signature in black ink, appearing to read "Tom Calma".

Professor Tom Calma AO

1. EXECUTIVE SUMMARY

The year 2017 is a year of anniversaries of significant milestones for the rights of Aboriginal and Torres Strait Islander peoples, including the 50th anniversary of the historic 1967 referendum, the 25th anniversary of the landmark Mabo decision and the 10th anniversary of the adoption of the UN Declaration on the Rights of Indigenous Peoples. Yet, despite some major achievements, far too many Aboriginal and Torres Strait Islander peoples live in circumstances akin to those in developing countries.

Over the years, countless reports from inquiries, reviews and royal commissions have gathered dust on shelves. These reports call time and time again for better resourcing of Aboriginal and Torres Strait Islander organisations and services, and for Indigenous Australians to be directly involved in decisions about matters that affect them — to respect the right of self-determination. Yet the Aboriginal Family Violence Prevention and Legal Services are having to turn away vulnerable women and their children who are in desperate need of help. Some services report that up to 30-40% of women contacting them seeking assistance are turned away because they don't have the capacity to support them.

This report by Oxfam, an international development organisation that works with communities to tackle poverty, finds that, over the longer term, many of the fundamental rights of Aboriginal and Torres Strait Islander peoples have not progressed. The principle failure of successive governments has been the failure to listen to and effectively include Aboriginal and Torres Strait Islander peoples in decision-making about matters which affect their lives.

In Oxfam's experience, directly affected people must be involved in decisions about their own lives.

As a founding member of the Close the Gap campaign — the nation's largest campaign to improve Indigenous health — we know that without the effective involvement of Aboriginal and Torres Strait Islander peoples, governments will continue to struggle to improve health and wellbeing outcomes. The latest Closing the Gap report tabled in Federal Parliament by Prime Minister Malcolm Turnbull demonstrates this, highlighting yet again that progress towards most targets is failing.

The direct involvement of Aboriginal and Torres Strait Islander peoples in decision-making about matters that affect them is something called for in the Redfern Statement. This call for better engagement to address the appalling disadvantage gap between Australia's First Peoples and non-Indigenous Australians was developed by Australia's leading Aboriginal and Torres Strait Islander peak bodies in June 2016 and delivered to the Prime Minister in Parliament in February this year.

This report highlights the importance of Aboriginal and Torres Strait Islander peoples having control over developing solutions to the issues they face, in areas from health to education, land rights and the protection of language and culture. It argues that more funding needs to be invested directly in Aboriginal and Torres Strait Islander organisations to support them to provide the services and develop the solutions for their communities.

The report includes analysis on the widely criticised Indigenous Advancement Strategy (IAS), the Federal Government's funding model for programs targeting Indigenous Australians, which started in 2014.

It finds a worrying lack of transparency around the IAS, and points to indications that the Federal Government is increasingly looking to mainstream services and programs to meet Indigenous Australians' needs, even though these are often lacking in cultural competency and safety.

Key figures:

- Only 55% of IAS funding goes to Indigenous organisations.
- Our analysis indicates that mainstream services from both federal and state and territory governments accounted for 81.4% of all direct Indigenous expenditure in 2012-13, with Indigenous-specific services receiving just 18.6% of funds.
- Between 2008-09 and 2012-13, funding to mainstream services increased by 26%, while Indigenous-specific funding suffered a real decrease of 1.2%.
- In 2014-15, Aboriginal and Torres Strait Islander community controlled health organisations suffered a reduction of \$1.2 million overall to essential frontline services, including alcohol and drugs, social and emotional wellbeing, and youth.

Respecting the rights of Aboriginal and Torres Strait Islander peoples must go beyond recognition in the Australian Constitution.

This report outlines 10 steps the government must take for progressing the rights of Aboriginal and Torres Strait Islander peoples and towards achieving full participation and equality for Australia's First Peoples.

Ten steps to progress the rights of Aboriginal and Torres Strait Islander peoples:

1. Legislate human rights standards
2. Fund an independent national representative body
3. Formally respond to the Social Justice Commissioner's reports
4. Act on recommendations from past government reports
5. Increase representation of Aboriginal and Torres Strait Islander peoples in the Federal Parliament and policy development
6. Increase and prioritise funding for Aboriginal and Torres Strait Islander organisations
7. Change the native title system
8. Protect language and cultural rights
9. Reform the Australian Constitution
10. Right past wrongs and retain present protections against racial vilification

2. TEN STEPS TO BRING ABOUT CHANGE

| RECOMMENDATIONS | ACTIONS |
|--|--|
| 1. Legislate human rights standards | <ul style="list-style-type: none"> The Federal Government should develop an action plan to implement the provisions contained in the UN Declaration on the Rights of Indigenous Peoples. This plan should be developed with the active participation of, and in full partnership with, Aboriginal and Torres Strait Islander peoples and their representative organisations. The Federal Government should introduce comprehensive legislative protection of human rights, such as a Human Rights Act. The rights protected in legislation should include the right to self-determination, respect for and protection of cultural rights and the right to equality and non-discrimination. |
| 2. Fund an independent national representative body | <ul style="list-style-type: none"> An independent and sustainable national representative body is a fundamental component to achieving positive change. The Federal Government must provide adequate and secure funding for an independent national representative body that is directly elected by Aboriginal and Torres Strait Islander peoples. All Australian parliaments should enact legislative requirements or adopt other mechanisms such as parliamentary committees to ensure that federal and state and territory governments properly consider the recommendations of the national representative body. Representative bodies and structures need to be based on a stronger adoption of the principle of self-determination that fully devolves decision-making power over policy and programs and their implementation to the local level. Some examples of how this might work already exist in regional governance structures such as the Torres Strait Regional Authority, Aboriginal land councils, various types of local community governance structures and community controlled service delivery organisations. All Australian governments through the Council of Australian Governments (COAG) should engage with the Redfern Statement to develop policy responses to many of the challenges facing Aboriginal and Torres Strait Islander peoples. |
| 3. Formally respond to the Social Justice Commissioner's reports | <ul style="list-style-type: none"> The Federal Parliament should enact a legislative requirement or adopt other mechanisms such as parliamentary committees requiring the Federal Government to provide a formal response to the Social Justice Report and Native Title Report on their tabling in parliament each year. |
| 4. Act on recommendations from past government reports | <ul style="list-style-type: none"> All Australian governments should develop appropriate mechanisms to oversee the implementation of recommendations contained in government reviews, commissions and inquiries. These mechanisms must be constituted by Aboriginal and Torres Strait Islander peoples. Recommendations from past major reviews and royal commissions should be reviewed so that those that remain relevant are implemented. The Federal Government, through COAG, must set targets for reducing incarceration of Aboriginal and Torres Strait Islander peoples and improving community safety, and develop plans that are culturally appropriate and relevant. |
| 5. Increase representation of Aboriginal and Torres Strait Islander peoples in Federal Parliament and policy development | <ul style="list-style-type: none"> All Australian governments should implement the recommendations contained in the NSW Legislative Council Standing Committee on Social Issues report, Enhancing Aboriginal political representation. These include consultation with Aboriginal and Torres Strait Islander peoples; the development of action plans by political parties to increase participation by Aboriginal and Torres Strait Islander peoples; and support for and expansion of mentoring programs for Aboriginal and Torres Strait Islander peoples involved in local government. All Australian governments must recognise that Aboriginal and Torres Strait Islander peoples are best placed to understand the challenges they face, the solutions that are needed and to implement those solutions. To do this government must consult widely, listen, act on the advice it is receiving and empower Aboriginal and Torres Strait Islander peoples to act. All Australian governments must ensure that Aboriginal and Torres Strait Islander peoples and their organisations are directly involved in decision-making about matters that directly affect them. This could be achieved, for example, by including requirements for an "Indigenous Impact Statement" and genuine consultation with Aboriginal and Torres Strait Islander peoples in Regulatory Impact Statements. |

| RECOMMENDATIONS | ACTIONS |
|--|--|
| 6. Increase and prioritise funding for Aboriginal and Torres Strait Islander organisations | <ul style="list-style-type: none"> • All Australian governments, led by the Federal Government, must provide adequate and guaranteed long-term funding to Aboriginal and Torres Strait Islander peak sector organisations to address the complex and long-term issues that their communities face. Funding agreements should be for at least five years. • Funding provided by all Australian governments for Aboriginal and Torres Strait Islander services and programs should preference funding for Aboriginal and Torres Strait Islander organisations. Where no suitable Aboriginal and Torres Strait Islander organisations exist, funding should prioritise partnerships between Aboriginal and Torres Strait Islander organisations and non-Indigenous organisations to build capacity. • Allocations of funding for Aboriginal and Torres Strait Islander organisations, programs and services must be based on the level of need and recognise the disproportionate rates of socio-economic disadvantage within Aboriginal and Torres Strait Islander communities. • All Australian governments must establish mechanisms to ensure that decisions about government funding for Aboriginal and Torres Strait Islander services and programs are made by Aboriginal and Torres Strait Islander peoples. • All Australian governments must enshrine the importance of Aboriginal and Torres Strait Islander community controlled organisations, including their freedom to advocate, into public service codes of conduct and principles that guide funding decisions. |
| 7. Change the native title system | <ul style="list-style-type: none"> • Native title should be simpler to prove, including reversing the onus of proof placed on claimants and reducing the high burden of proof currently required to demonstrate ongoing connection. • Native title should provide a more meaningful cultural and economic asset once recognised. |
| 8. Protect language and cultural rights | <ul style="list-style-type: none"> • The Federal Government must provide stronger legislative protection for the right of communal ownership of Aboriginal and Torres Strait Islander cultural heritage, which encompasses the full range of cultural heritage including traditional knowledge, traditional and cultural expressions (such as dance, music, song, writings and ceremonies), tangible cultural property (such as sacred sites and burial grounds) and intangible cultural property (such as oral stories). • The Federal Government must introduce increased penalties for contravening cultural heritage laws, including the provision of compensation to affected Aboriginal and Torres Strait Islander community members. • Institutions such as AIATSIS should be broadened and strengthened to recognise the special importance of preserving Aboriginal and Torres Strait Islander collections and the unique value of traditional knowledge and practices within Australia. • Primary and secondary schools should be resourced and supported to deliver bilingual education programs and to develop appropriately skilled bilingual education teachers and aides. |
| 9. Reform the Australian Constitution | <ul style="list-style-type: none"> • The Federal Government should take appropriate steps to implement the recommendations made by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. |
| 10. Right past wrongs and retain present protections against racial vilification | <ul style="list-style-type: none"> • The Federal Government should establish a national scheme to provide comprehensive reparations, including compensation, to the Stolen Generations. • The Federal Government, in consultation with Aboriginal and Torres Strait Islander peoples, audit and implement the recommendations contained in the Australian Human Rights Commission's Bringing Them Home report on the forcible removal of children. • The Federal Government, in consultation with Aboriginal and Torres Strait Islander peoples, reviews and implements the recommendations contained in the Unfinished Business: Indigenous Stolen Wages report, including to establish a national compensation scheme. • The Racial Discrimination Act should be retained in its current form to ensure strong and effective protections against racial vilification. |



*Actor Shareena Clanton addresses the crowd during a protest on Australia Day in Melbourne, 26 January 2017.
Photo: Asanka Brendon Ratnayake.*

3. INTRODUCTION

“It is said that ‘the greatest tragedy of failure is failing to learn from it’. But that seems to be the predominant history of Indigenous policies and programs.”

– Gary Banks, 2012, then Chairman of the Productivity Commission¹

This report comes as numerous anniversaries of significant milestones for the rights of Aboriginal and Torres Strait Islander peoples pass. Last year, 2016, marked the 50th anniversary of the 1966 Wave Hill “walk off”, the 40th anniversary of the *Northern Territory Aboriginal Land Rights Act*, and the 20th anniversary of the Wik native title determination. This year, 2017, will see the 50th anniversary of the historic 1967 referendum, the 25th anniversary of the landmark Mabo decision and, on the international stage, the 10th anniversary of the adoption of the United Nations (UN) Declaration on the Rights of Indigenous Peoples.

As these historical milestones pass and are acknowledged by Aboriginal and Torres Strait Islander peoples and their supporters, there is a widespread feeling that the current trend in Indigenous Affairs provides few reasons for celebration. Despite some significant achievements over the years, Aboriginal and Torres Strait Islander peoples remain frustrated at the lack of genuine engagement by successive Australian governments and the lack of real progress on key issues such as health and wellbeing outcomes, economic opportunities, respect for culture and safe communities.

Half a century after the 1967 referendum that gave the Federal Parliament the power to make laws for Aboriginal and Torres Strait Islander peoples, our Australian Constitution still fails to recognise the First Peoples of our nation. More than 25 years after the Royal Commission into Aboriginal Deaths in Custody, imprisonment rates of Aboriginal and Torres Strait Islander peoples have more than doubled. Twenty years since the *Bringing Them Home* report, and nearly a decade on from the formal Apology to the Stolen Generations, Aboriginal and Torres Strait Islander children are being removed from their families in numbers more than ever before. A decade on from the commitment by all Australian governments to “Close the Gap” in equality between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians, progress on nearly every single indicator is not meeting the targets.

Fifty years after the 1967 referendum we should be celebrating how this moment in our nation’s history ensured Indigenous Australians live lives on par with other Australians in one of the most economically prosperous nations in the world. Instead, in 2017 we have far too many Indigenous Australians living in circumstances akin to those in developing countries.

¹ Gary Banks, Speech to the Productivity Commission roundtable on *Better Indigenous Policies: The Role of Evaluation* on 22–23 October 2012, available at <http://www.pc.gov.au/research/supporting/better-indigenous-policies>.

The principle failure of successive governments has been the failure to listen to and effectively include Aboriginal and Torres Strait Islander peoples in decision-making about matters which affect their lives.

In compiling this report, Oxfam canvassed the thoughts and opinions of Indigenous and non-Indigenous Australians who have pushed for the rights of Aboriginal and Torres Strait Islander peoples to be recognised. They reflected on policies that have been tried and failed and the various ministers and prime ministers who have genuinely tried to make a difference in Indigenous Affairs. They also outlined the many, many administrative structures that have been put in place only to be dismantled to make way for yet another change in the way Indigenous Affairs is managed. One shining light in all this turmoil has been the perseverance of Aboriginal and Torres Strait Islander peoples demanding to have control over developing solutions.

Countless reports from inquiries, reviews and royal commissions are gathering dust on shelves. These reports call time and time again for Aboriginal and Torres Strait Islander peoples to be directly involved in decisions about matters that affect them — to respect the right of self-determination. Without the effective involvement of Aboriginal and Torres Strait Islander peoples, governments will continue to struggle to improve health and wellbeing outcomes — highlighted yet again in the latest *Close the Gap* report tabled in Federal Parliament by Prime Minister Malcolm Turnbull.²

In this report, we look at how Indigenous programs are funded and administered. The roll out of the Indigenous Advancement Strategy (IAS) has been widely criticised as the most recent example of political leaders failing to engage with Aboriginal and Torres Strait Islander peoples on a major policy reform. Despite the intentions of the then Prime Minister Tony Abbott and Minister for Indigenous Affairs Nigel Scullion, the IAS has been labelled as disastrous for Indigenous Australians and their organisations and communities. It has been the subject of a Senate inquiry and was the focus of an Australian National Audit Office report. Both were highly critical of the IAS, listing a raft of recommendations to fix the largest pool of funding for Indigenous programs. Just 55% of the IAS funding went to Indigenous organisations.

Oxfam engaged Dr Lesley Russell, an Adjunct Associate Professor at the University of Sydney, to look deeper into how much funding is available for Aboriginal and Torres Strait Islander programs. The *2014 Indigenous Expenditure Report* from the Productivity Commission found that mainstream

² Available at <https://www.pm.gov.au/media/2017-02-14/closing-gap-report-statement-parliament>.

services (from both federal and state and territory governments) accounted for 81.4% of direct Indigenous expenditure in 2012–13 with Indigenous-specific services receiving just 18.6% of funds. Between 2008–09 and 2012–13, mainstream funding increased 26% while Indigenous-specific funding suffered a real decrease of 1.2%. This is not a funding model that will empower Indigenous organisations and communities.

The 2014–15 federal budget cut \$534 million from Indigenous programs, the 2015–16 federal budget cut more than \$145 million from Indigenous programs and services, while the 2016–17 federal budget had new spending of just \$60.7 million over four years on programs specifically for Indigenous Australians. There were also several examples over this period where cuts to existing programs were made to fund new program spending.

In the opinion of Dr Russell, who provided the funding analysis, the Federal Government has not only mishandled the IAS but is also making the task of tracking where funding goes and what impact it is having much harder. This situation should not have occurred but is symptomatic of the business as usual approach by governments.

As a human rights-based organisation, Oxfam's mission is to speak out on human rights and to advocate for the rights of marginalised groups around the world. Within Australia, Oxfam has worked alongside Aboriginal and Torres Strait Islander leaders, organisations and communities for almost 40 years. Right now, we are involved in several Indigenous-led campaigns — Close the Gap, Change the Record and the Redfern Statement — all of which are calling on governments to listen to and engage with Indigenous Australians. So, while progress has been made, it is clear that as a country we have not come far enough.

This report identifies that over the longer term, many of the fundamental rights of Aboriginal and Torres Strait Islander peoples have not progressed, despite some important successes. Unacceptable gaps in social and economic disadvantage persist. Racism and discrimination remain pervasive. Cultural rights continue to be eroded. Aboriginal and Torres Strait Islander peoples still do not have a seat at the table as equal partners. It would appear that every step forwards is followed by two steps back.

It is Oxfam's view that the frustration, despair and lack of trust in politicians for Aboriginal and Torres Strait Islander peoples has never been greater. In this report, we set out a 10 step plan to put Indigenous policy on track. This plan provides a clear path forward, recognises Indigenous rights and would accelerate progress towards equality for Aboriginal and Torres Strait Islander peoples.

The time for government rhetoric about setting a new relationship with Aboriginal and Torres Strait Islander peoples is long over. Words must be translated into urgent and concrete action.

All Australian governments must learn from the mistakes of the past — and build on the successes — by handing power over to Aboriginal and Torres Strait Islander peoples to determine their own lives. Responses to the challenges they face need to be led by Aboriginal and Torres Strait Islander peoples themselves. And their organisations and leaders need to be supported and empowered to forge a new direction for their communities.

4. TIMELINE OF DEVELOPMENTS ON THE RIGHTS OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

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| Pre-1770 | For some 40,000 to 60,000 years, Aboriginal and Torres Strait Islander peoples operated a network of diverse cultures with their own languages, laws, traditions and customs. Aboriginal and Torres Strait Islander peoples are estimated to have comprised some 700 different cultural groups speaking 250 different languages. |
| 1770 | Captain James Cook claims possession of Australia for the British Crown, declaring the land to be <i>terra nullius</i> (land belonging to no-one). |
| 1788 | Arrival of the First Fleet. |
| 1901 | The Commonwealth of Australia is formed. |
| 1962 | The right to vote in federal elections is extended to all Aboriginal and Torres Strait Islander peoples. |
| 1966 | Aboriginal workers walk off the Wave Hill cattle station in protest against poor working conditions and wages. |
| 1967 | Australians vote “yes” in a referendum to give the Australian Parliament the power to make laws for Aboriginal and Torres Strait Islander peoples and to be included in the national census. |
| 1967 | The Council for Aboriginal Affairs established, but is comprised of three government-appointed non-Indigenous men. |
| 1970 | The “outstations” movement begins, with many Aboriginal people returning to their traditional lands. |
| 1971 | Neville Bonner becomes the first Aboriginal member of Federal Parliament. |
| 1972 | The Aboriginal Tent Embassy is established outside Parliament House in Canberra. |
| 1972 | The Australian Government introduces a policy of self-determination and establishes the first ever Department of Aboriginal Affairs. |
| 1972 | The first community controlled Aboriginal medical service is established in Redfern, Sydney. |
| 1973 | The National Aboriginal Consultative Committee, elected by Aboriginal and Torres Strait Islander peoples, is established as an advisory body. |
| 1975 | The Federal Parliament passes the Racial Discrimination Act providing legal protection against racial discrimination. |
| 1975 | Prime Minister Gough Whitlam hands back title of traditional lands to the Gurindji people in the Northern Territory. |
| 1976 | The Northern Territory Aboriginal Land Rights Act is passed. |
| 1985 | Uluru is handed back to its traditional owners. |
| 1990 | The Aboriginal and Torres Strait Islander Commission (ATSIC) is established as the main Commonwealth agency for Aboriginal Affairs. |
| 1991 | The Royal Commission into Aboriginal Deaths in Custody presents its final report containing 339 recommendations to prevent the over-imprisonment of Aboriginal and Torres Strait Islander peoples and deaths in custody. |
| 1992 | The Council for Aboriginal Reconciliation is established. |
| 1992 | The High Court hands down the historic Mabo decision, which overturns the fiction of <i>terra nullius</i> and recognises native title rights of Aboriginal and Torres Strait Islander peoples. |
| 1992 | Prime Minister Paul Keating delivers the “Redfern Speech” and acknowledges past wrongs against Aboriginal and Torres Strait Islander peoples. |
| 1992 | The position of Aboriginal and Torres Strait Islander Social Justice Commissioner is established within the Australian Human Rights Commission. |
| 1993 | The Federal Parliament passes the Native Title Act, which allows Aboriginal and Torres Strait Islander peoples to make land claims in certain circumstances. |
| 1997 | The <i>Bringing Them Home</i> report on the forcible removal of children known as the “Stolen Generations” is tabled in Federal Parliament. |
| 1998 | One year on from the <i>Bringing Them Home</i> report, National Sorry Day is commemorated for the first time. |
| 2000 | Reconciliation Australia is established and approximately 300,000 people walk across Sydney Harbour Bridge as part of National Reconciliation Week. |

| | |
|------|--|
| 2005 | ATSIC is abolished and replaced by a government-appointed advisory board. |
| 2007 | The Federal Government launches an "Emergency Response" intervention into Northern Territory Aboriginal communities. |
| 2007 | The United Nations General Assembly adopts the UN Declaration on the Rights of Indigenous Peoples. Australia is one of only four countries to vote against its adoption. |
| 2008 | Prime Minister Kevin Rudd issues a formal Apology to the Stolen Generations on behalf of the Australian Parliament. |
| 2008 | All Australian governments commit to <i>Closing the gap on Indigenous disadvantage</i> , a national strategy to achieve Aboriginal and Torres Strait Islander health equality within 25 years. |
| 2009 | Australia reverses its opposition and formally endorses the UN Declaration on the Rights of Indigenous Peoples. |
| 2010 | The Federal Government announces plans to recognise Aboriginal and Torres Strait Islander peoples in the Australian Constitution. |
| 2010 | The National Congress of Australia's First Peoples is established as the new national representative body for Aboriginal and Torres Strait Islander peoples. |
| 2016 | Aboriginal and Torres Strait Islander leaders come together to launch the Redfern Statement calling for a more just approach to Aboriginal Affairs and government action. |
| 2016 | A Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory is announced following revelations of mistreatment of young people in youth detention. |

5. MEANING AND CONTENT OF INDIGENOUS RIGHTS

The UN Declaration on the Rights of Indigenous Peoples establishes a universal framework of minimum standards for the survival, dignity, wellbeing and rights of the world's indigenous peoples. The Declaration does not create any new rights but rather elaborates on existing international human rights norms and principles as they apply to indigenous peoples.

In addition to the full range of political, civil, economic, social and cultural rights that belong to indigenous peoples, several key "guiding principles" of the Declaration have been identified which underpin the rights contained within it:³

- (a) self-determination;
- (b) participation in decision-making and free, prior and informed consent;
- (c) respect for and protection of culture; and
- (d) non-discrimination and equality.

These guiding principles are discussed throughout this report and outlined briefly below.

5.1 Self-determination and participation in decision-making

The principle of self-determination has been described as the most fundamental of all human rights for indigenous peoples.⁴ Self-determination has particular significance for indigenous peoples around the world given their historic exclusion from decision-making through the experiences of colonisation, dispossession and paternalism. The UN Special Rapporteur on the Rights of Indigenous Peoples has stated that the right of self-determination reflects the "aspirations of indigenous peoples worldwide to be in control of their own destinies under conditions of equality, and to participate effectively in decision-making that affects them".⁵ Without self-determination it is not possible for indigenous peoples to fully overcome the legacy and impacts of colonisation and dispossession.

The essence of the right of self-determination is the notion that a group of people must have control over their own lives. The right to self-determination may be expressed in various ways, including through full and effective participation of indigenous peoples at every stage of any action that may affect them directly or indirectly. As this report highlights, this sadly has not always been the case in Australia.

"Indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights ... Without this foundational right, indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."

Expert Mechanism on the Rights of Indigenous Peoples, 2010⁶

Australian context

The push for self-determination for Aboriginal and Torres Strait Islander peoples in Australia has its origins in the 1920s, but a formal government policy of self-determination was not introduced until the 1970s. Institutional reforms that were introduced included the establishment of a federal Department of Aboriginal Affairs, the development of Aboriginal and Torres Strait Islander community controlled organisations, a commitment to national land rights, and the establishment of a national elected body, the National Aboriginal Consultative Committee in 1973. These developments represented a radical shift from the assimilationist policies of the previous decades, and culminated in 1992 with COAG establishing "the empowerment, self-determination and self-management" of Aboriginal and Torres Strait Islander peoples as a guiding principle for service delivery at all levels of government.⁷

While the period of self-determination throughout the 1970s, 1980s and early 1990s was a time of significant progress in the recognition and implementation of rights for Aboriginal and Torres Strait Islander peoples across Australia, the concept of self-determination that was implemented was "a government agenda that weakly promoted Indigenous participation but fell far short of Indigenous aspirations for self-determination".⁸ It was largely a bureaucratic notion imposed on communities that did not give Aboriginal and Torres Strait Islander peoples decision-making power at the local level. Funding was often short term, which led to inefficiencies and uncoordinated service delivery. Consequently, the ability of Aboriginal and Torres Strait Islander peoples to achieve genuine self-determination was substantially undermined and compromised, resulting in the concept of self-determination ultimately coming to be labelled as a "failed experiment".

³ These principles have been identified by Australia's Aboriginal and Torres Strait Islander Social Justice Commissioner in his *Social Justice Report 2011*, available at http://www.hreoc.gov.au/social_justice/sj_report/sjreport11/index.html.

⁴ See, for example, Jill Webb, 'Indigenous Peoples and the Right to Self Determination', *Journal of Indigenous Policy*, Issue 13, 75.

⁵ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UN Doc A/HRC/12/34 (2009) [41].

⁶ UN Human Rights Council, *Progress report on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2 (2010), para 2, available at http://ap.ohchr.org/documents/alldocs.aspx?doc_id=17360.

⁷ COAG, National Commitment to improved outcomes in the delivery of programs and services for Aboriginal and Torres Strait Islanders (1992).

⁸ Larissa Behrendt, *As Good as it Gets or as Good as Could Be? Benchmarking Human rights in Australia*, 11.

This led to a policy shift by the Federal Government away from self-determination and towards the concept of “practical reconciliation”, which seeks to focus on overcoming disadvantage through Aboriginal and Torres Strait Islander peoples taking responsibility themselves for improving their own situation. The result has been an increasing return to paternalism as governments have increased their control over services and decision-making.

This policy shift in the early 2000s has remained in place and has had significant consequences for the right of self-determination and the ability of Aboriginal and Torres Strait Islander peoples to participate meaningfully in the development of policies and decision-making on matters that directly affect them. The right of self-determination and participation in decision-making is explored throughout this report, particularly in the context of Aboriginal and Torres Strait Islander representative bodies and community controlled organisations.

5.2 Respect for and protection of cultural rights

Recognition of the distinctive cultures, histories, languages, laws and traditional lands is central to the identity of Aboriginal and Torres Strait Islander peoples. Culture is deeply rooted in tradition, knowledge and the land and is the foundation of individual and collective identity for Aboriginal and Torres Strait Islander peoples.⁹ Respect for and protection of cultural rights is therefore at the heart of Indigenous rights.

Australian context

Australia is home to hundreds of nations of Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander peoples maintain a profound connection to their land that forms an essential part of their cultural and spiritual life and material wellbeing. However, the history of dispossession of Aboriginal and Torres Strait Islander peoples has involved a long struggle to retain language, ceremony, traditional knowledge and land.

5.3 Equality and non-discrimination

The right to equality and non-discrimination is recognised in every major international human rights treaty, convention and declaration.¹⁰ The particular meaning and content of the right

⁹ Australian Human Rights Commission, Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series – Discussion Paper 4: Ensuring the ongoing survival of the oldest living culture in the world (2013), 6.

¹⁰ Australia is a party to the following standards containing the principles of non-discrimination and equality: International Covenant on Civil and Political Rights (ICCPR), Article 2 & 26; International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), Article 2; Convention on the Rights of the Child, Article 2; International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2.

to equality and non-discrimination as it relates to indigenous peoples is enshrined in article 15(2) of the Declaration:

“States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.”

Given the experiences and ongoing impacts of colonisation and dispossession, the right to equality and non-discrimination has a particular significance for Aboriginal and Torres Strait Islander peoples. Equality and non-discrimination for Aboriginal and Torres Strait Islander peoples is inherently linked with the enjoyment of other rights.

Oxfam firmly believes policies and processes that are underpinned by the principles of self-determination, participation in decision-making, and respect for and protection of culture provide a solid foundation to achieving equality for Aboriginal and Torres Strait Islander peoples.

Australian context

In Australia, the introduction of the *Racial Discrimination Act 1975* (Cwlth) was a significant development in protections against racial discrimination. The Racial Discrimination Act represents Australia’s incorporation into domestic law of obligations contained in the UN Convention on the Elimination of All Forms of Racial Discrimination. There is also anti-discrimination legislation that operates in each state and territory that provides protections from racial discrimination.

Despite these important protections, there continues to be a significant gap between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians in the realisation of human rights and fundamental freedoms. Aboriginal and Torres Strait Islander peoples face a comparative disadvantage and discrimination across a range of social and economic indicators, including life expectancy and health, housing and homelessness, education, welfare and employment. As discussed further in this report, while progress has been made on some of these indicators over the last decade, in many aspects of life the significant gaps continue to increase for Aboriginal and Torres Strait Islander peoples, particularly in relation to rates of family violence, imprisonment and child removal. Aboriginal and Torres Strait Islander women also often experience multiple and intersectional forms of discrimination on the basis of both race and gender. Ensuring equality of outcomes for Aboriginal and Torres Strait Islander peoples is essential for achieving positive human rights change.

5.4 Significance of Indigenous rights

Indigenous peoples all around the world have long suffered from historic injustices, principally as a result of colonisation and the dispossession of their traditional lands. This has prevented many indigenous peoples from exercising, in particular, their right to development according to their own needs and interests.¹¹

In responding to the challenges they have faced, Indigenous peoples around the world turned to the international community and international law seeking to increase government accountability for Indigenous rights.

Australian context

It is not possible to understand the current issues and difficulties facing Australia's Aboriginal and Torres Strait Islander peoples without an understanding of the history of colonisation and dispossession. Aboriginal and Torres Strait Islander peoples have inhabited the territory of Australia for at least 40,000 years. Since the arrival of the British, Aboriginal and Torres Strait Islander peoples have systematically been deprived of their lands, their culture, their rights and in many cases their lives.¹²

Despite this history of oppression and racial discrimination, Aboriginal and Torres Strait Islander peoples demonstrate strong, resilient and vibrant cultures. Whether in an urban or remote context, communities are determined to achieve a better future. In Oxfam's experience, a move away from paternalism to a rights-based approach that empowers people through agency is central to achieving health and wellbeing for Aboriginal and Torres Strait Islander peoples. This is highlighted in the Close the Gap campaign for Indigenous health equality, which Oxfam has been associated with since its inception. While the campaign is backed by a broad cross section of Indigenous and non-Indigenous organisations, it has been held together and driven by Aboriginal and Torres Strait Islander leaders, organisations and communities for more than a decade in their determination to bring about change.

IN FOCUS: CLOSE THE GAP

Aboriginal and Torres Strait Islander peoples experience lower health, education, employment and housing outcomes than non-Indigenous Australians. Over the last decade, the Close the Gap Coalition -- a group of Indigenous and non-Indigenous health and community organisations -- have been campaigning for health equality for Aboriginal and Torres Strait Islander peoples.¹³

Despite bipartisan support and some important progress, Australian governments are failing to meet the Close the Gap targets set by COAG to achieve Aboriginal and Torres Strait Islander life expectancy equality by 2030. Closing the gap requires a renewed, genuine commitment by all Australian governments and the direct involvement of Aboriginal and Torres Strait Islander peoples so that they can own the challenges they face -- and the solutions.

5.5 Development of international standards and principles

Work on the development of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration) initially began in the 1980s by the Working Group on Indigenous Populations, an independent mechanism of the UN Economic and Social Council. The Declaration was adopted by the UN General Assembly in September 2007. The Declaration was the culmination of more than 20 years of negotiation between the Indigenous peoples and governments of the world. Its development is a clear manifestation of an indigenous-led movement and has increased international understanding and concern about the rights of the world's Indigenous peoples.¹⁴

Aboriginal and Torres Strait Islander peoples were actively engaged throughout the development of the Declaration. However, at the time of the vote by the UN General Assembly, Australia was one of only four countries to vote against its adoption.¹⁵ Concerns about the right of self-determination and free, prior and informed consent were put forward as critical

11 See, generally, Department of Economic and Social Affairs, Division for Social Policy Development, Secretariat of the Permanent Forum on Indigenous Issues, *UN Report on the State of the World's Indigenous Peoples* (2009), UN Doc ST/ESA/328, available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf.

12 Webb, above n 4, 91.

13 See <https://www.oxfam.org.au/what-we-do/indigenous-australia/close-the-gap/>.

14 Webb, above n 4, 83.

15 Australia along with Canada, New Zealand and the United States of America voted against the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in the General Assembly in New York on 13 September 2007. United Nations Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward Towards Human Rights for All, Says President', Sixty-first General Assembly Meeting, GA/10612, (Media Release 13 September 2007). At <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

issues in Australia's decision to vote no.¹⁶ Subsequently, Australia reversed its opposition and formally endorsed the Declaration on the Rights of Indigenous Peoples on 3 April 2009.¹⁷

IN FOCUS: AUSTRALIA ENDORSES THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

On 3 April 2009, the Australian Government officially endorsed the United Nations Declaration on the Rights of Indigenous Peoples. The then Minister for Indigenous Affairs, Jenny Macklin, delivered a statement in support of the document at Parliament House, saying that the move was a step forward in "re-setting" the relationship between Indigenous and non-Indigenous Australians. "The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians," Ms Macklin said.

In indicating its support for the Declaration on the Rights of Indigenous Peoples, the Australian Government acknowledged that the Declaration "recognises the legitimate entitlement of Indigenous people to all human rights — based on principles of equality, partnership, good faith and mutual benefit".¹⁸

The Declaration on the Rights of Indigenous Peoples provides an important framework for the realisation of Indigenous peoples' human rights, as well as a benchmark for government accountability. The Declaration does not contain any new human rights or international standards but rather reflects existing legal obligations contained in international human rights treaties.

5.6 Implementation of international human rights standards

The Declaration on the Rights of Indigenous Peoples has slowly become more prominent in Australia's legal and policy landscape, with references to the Declaration being made in parliament, parliamentary committee reports, court decisions and in policy submissions made by Aboriginal and Torres Strait Islander

16 United Nations Department of Public Information, 'General Assembly Adopts Declaration on Rights of Indigenous Peoples; Major Step Forward Towards Human Rights For All, Says President', Press Release 13 September 2007, available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

17 J Macklin MP, Minister for Families, 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), available at http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf.

18 Ibid.

organisations. However, little action has been taken by Australian governments to incorporate the Declaration into legal and policy frameworks in Australia. This is despite the imperatives for all Australian governments to take urgent and concrete action to redress the persistent human rights violations experienced by many Aboriginal and Torres Strait Islander peoples.

Oxfam shares with Aboriginal and Torres Strait Islander peoples major concerns at the failures of successive federal governments to comply with the key international human rights treaties to which Australia is a party. In recent years, several highly respected UN human rights bodies and experts have made a large number of specific recommendations regarding concerns about the rights of Aboriginal and Torres Strait Islander peoples. Since 2000, more than 100 recommendations have been made to Australia specifically on Indigenous rights.¹⁹ However, these recommendations are rarely implemented. Responses to UN criticism by various federal governments have ranged from polite disengagement to outright disdain. In 2000, in response to UN criticism over Australia's treatment of Aboriginal and Torres Strait Islander peoples, the then Foreign Affairs Minister Alexander Downer told a UN committee that if they meddled in Australian domestic affairs they could expect a "bloodied nose".²⁰

Recommendations from UN bodies contain detailed, expert guidance for governments on how to protect and promote compliance with human rights. Australia's repeated failure to constructively engage with and implement UN recommendations substantially limits the ability of governments to promote respect for the rights of Aboriginal and Torres Strait Islander peoples and the ability of Aboriginal and Torres Strait Islander peoples to assert their rights.

| RECOMMENDATIONS | ACTIONS |
|----------------------------------|--|
| Legislate human rights standards | <ul style="list-style-type: none"> The Federal Government should develop an action plan to implement the provisions contained in the UN Declaration on the Rights of Indigenous Peoples. This plan should be developed with the active participation of, and in full partnership with, Aboriginal and Torres Strait Islander peoples and their representative organisations. The Federal Government should introduce comprehensive legislative protection of human rights, such as a Human Rights Act. The rights protected in legislation should include the right to self-determination, respect for and protection of cultural rights and the right to equality and non-discrimination. |

19 See Annex 1.

20 See 7.30 Report, 'Govt call for UN overhaul', ABC TV, available at <http://www.abc.net.au/7.30/stories/s168960.htm>.

6. STRONG, INDEPENDENT AND EFFECTIVE REPRESENTATIVE BODIES

The establishment of Aboriginal and Torres Strait Islander representative bodies is a clear expression of the right to self-determination. In the 1970s, Aboriginal and Torres Strait Islander peoples became tired of the inability of Government to provide appropriate levels of service and took matters into their own hands.²¹ This saw the emergence of national, state and local Aboriginal and Torres Strait Islander representative bodies and community controlled organisations across a broad range of sectors, including health, law and justice, housing, land, and women's and children's rights.

The operation of strong, independent and effective representative organisations is vitally important in the context of the historic dispossession and disenfranchisement of Aboriginal and Torres Strait Islander peoples. Particularly given the ongoing impacts of colonisation, representative bodies play a central role in giving a voice to Aboriginal and Torres Strait Islander peoples and ensuring that laws, policies and programs are culturally appropriate and responsive to the issues they face.

Oxfam has been and remains a strong advocate for the meaningful involvement of Aboriginal and Torres Strait Islander peoples to identify, design, implement and evaluate policies and programs. The direct involvement of Aboriginal and Torres Strait Islander peoples results in more responsive and effective public policy and the empowerment of affected communities. This most important point is at the heart of the Redfern Statement²² and has been a constant demand from Indigenous Australians. Yet this key issue has been the source of much promise but too little follow through by successive governments.

However, since they were established, many of these representative bodies and organisations have faced significant and ongoing challenges to their effectiveness and survival. These challenges diminish the rights of Aboriginal and Torres Strait Islander peoples to political participation, which substantially limits the ability of communities to have control over decisions about how their issues and priorities are progressed.

6.1 An independent, elected national representative body

Aboriginal and Torres Strait Islander peoples have demanded an independent, elected national representative body for many decades.²³ The National Aboriginal Consultative Committee

was established in 1973 as the first national representative body elected by Aboriginal and Torres Strait Islander peoples. Previously, the Council for Aboriginal Affairs established in 1967 had comprised three government-appointed non-Indigenous men. In 1990, the Aboriginal and Torres Strait Islander Commission (ATSIC) was formed and was seen to represent a significant shift in power away from government and to an elected body with decision-making power.

ATSIC was established as an independent statutory agency and was composed of elected Aboriginal and Torres Strait Islander representatives. The powers and functions of ATSIC included advising the Commonwealth on policy matters and administering and delivering a range of government-funded programs for Aboriginal and Torres Strait Islander peoples. ATSIC could engage with and support Aboriginal and Torres Strait Islander organisations and communities in a way that understood and was responsive to their rights and priorities.²⁴ ATSIC also provided a voice for the rights of Aboriginal and Torres Strait Islander peoples both domestically and internationally.

While ATSIC was criticised by Indigenous and non-Indigenous Australians alike, there was a strong sense that it played a valuable role in formally involving Aboriginal and Torres Strait Islander peoples in the processes of government and in decisions that affected their lives. Many have observed that perhaps the greatest problem that ATSIC faced was that it was blamed for the lack of progress in addressing Aboriginal and Torres Strait Islander disadvantage.²⁵ A review undertaken in 2003 identified that ATSIC had few responsibilities for service delivery that could contribute to achieving this goal. The review "did not recommend the abolition of ATSIC but instead proposed a restructure and close adherence to a series of key principles".²⁶ Following a series of national board scandals, ATSIC was abolished with bi-partisan support in 2005 and responsibility for services was transferred to government departments and mainstream organisations.

Following the abolition of ATSIC, Aboriginal and Torres Strait Islander peoples had no national representative body for five years and, as a result, no authoritative national voice on issues relevant to them and to hold government to account. In 2010, the National Congress of Australia's First Peoples (National Congress) was formed, made up of Aboriginal and Torres Strait Islander

21 Australian Human Rights Commission, Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series – Discussion Paper 2: Self-determination – the fundamental right of Aboriginal and Torres Strait Islander peoples to shape our own lives (2013), 10.

22 See <http://nationalcongress.com.au/about-us/redfern-statement/>.

23 For an historical overview, see Human Rights and Equal Opportunity Commission, *Building a sustainable National Indigenous Representative Body – Issues for consideration* (2008), 11–22.

24 Patrick Sullivan, 'Disenchantment, normalisation and public value: Taking the long view in Australian Indigenous affairs', *The Asia Pacific Journal of Anthropology*, 14(4), 2013, 357.

25 See, for example, Human Rights and Equal Opportunity Commission, *Building a sustainable National Indigenous Representative Body – Issues for consideration: Issues Paper* (2008), available at <https://www.humanrights.gov.au/publications/building-sustainable-national-indigenous-representative-body-issues-consideration>.

26 Ibid 10.

individuals and organisations. National Congress has gone some way to fill the gap in national representation and independent advocacy since the demise of ATSIC, though it does not have the same powers and functions that ATSIC had, particularly in relation to the administration and delivery of programs.

Funding for National Congress was withdrawn by the Federal Government in the May 2014 Federal Budget, resulting in serious concerns about its ongoing survival. In its place, the Federal Government established the Indigenous Advisory Council, which consists of several hand-picked and unelected Aboriginal and Torres Strait Islander (and non-Indigenous) members. While some short-term funding has recently been provided to National Congress, there remains no long-term commitment to support an independent and sustainable national body.

“A national Indigenous representative body has to be a fundamental component of the Indigenous policy landscape if we are to make lasting progress in improving the conditions of Indigenous people and our communities.”

Tom Calma AO, 2008, then Aboriginal and Torres Strait Islander Social Justice Commissioner²⁷

The absence of an effective, independent, elected national representative body deprives Aboriginal and Torres Strait Islander peoples of the right to participate meaningfully in policy formulation and public debate and the right to be involved in decision-making on issues that affect them. This limits the ability of Australian governments to address the full range of issues affecting Aboriginal and Torres Strait Islander peoples in the most effective and appropriate ways. Oxfam believes the lack of an independent and effective national representative body is compounded by the various challenges faced by Aboriginal and Torres Strait Islander community controlled organisations (discussed further in section 8).

| RECOMMENDATIONS | ACTIONS |
|----------------------------------|---|
| Legislate human rights standards | <ul style="list-style-type: none"> An independent and sustainable national representative body is a fundamental component to achieving positive change. The Federal Government must provide adequate and secure funding for an independent national representative body that is directly elected by Aboriginal and Torres Strait Islander peoples. The Federal Parliament should enact legislative requirements or adopt other mechanisms such as parliamentary committees to ensure that the recommendations of the national representative body are properly considered by the Federal Parliament and Government. Representative bodies and structures need to be based on a stronger adoption of the principle of self-determination that fully devolves decision-making power over policy and programs and their implementation to the local level. Some examples of how this might work already exist in regional governance structures such as the Torres Strait Regional Authority, Aboriginal land councils, various types of local community governance structures, and community controlled service delivery organisations. All Australian governments through the Council of Australian Governments (COAG) engage with the Redfern Statement to develop policy responses to many of the challenges facing Aboriginal and Torres Strait Islander peoples. |

6.2 Aboriginal and Torres Strait Islander Social Justice Commissioner

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner within the Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) was established in 1992, largely in response to the findings of the Royal Commission into Aboriginal Deaths in Custody. The Social Justice Commissioner has several important functions, including preparing an annual *Social Justice Report* and *Native Title Report*, which are tabled in the Federal Parliament.

The Social Justice Commissioner position is unique in the world. The legislative requirement to table in the Federal Parliament two major annual reports plays a valuable role to place the consideration of human rights in the hands of parliament. Since the first *Social Justice Report* was tabled in 1993, reports have focused on several important issues relating to the rights of Aboriginal and Torres Strait Islander peoples, including self-

²⁷ Speech to the Native Title Conference in Perth in June 2008, available at <https://www.humanrights.gov.au/news/speeches/sustainable-options-australia-s-new-national-indigenous-representative-body>.

determination and a national representative body, engagement by governments, reconciliation, welfare reform, the criminal justice system, family violence and child protection, among many others. Concern is expressed in successive social justice reports about the failure of Australian governments to respect the right of self-determination and the need for more effective participation of Aboriginal and Torres Strait Islander peoples in decision-making.²⁸

However, as discussed later in this report, the lack of political will among governments and lack of engagement by parliament on issues raised by the Social Justice Commissioner have been significant limitations in ensuring the protection and realisation of rights for Aboriginal and Torres Strait Islander peoples. Ultimately, the vast majority of recommendations made by successive Social Justice Commissioners remain largely unimplemented.

| RECOMMENDATIONS | ACTIONS |
|---|---|
| Formally respond to the Social Justice Commissioner's reports | <ul style="list-style-type: none"> The Federal Parliament should enact a legislative requirement or adopt other mechanisms such as parliamentary committees requiring the Federal Government to provide a formal response to the <i>Social Justice Report</i> and <i>Native Title Report</i> on their tabling in parliament each year. |

IN FOCUS: OVER-IMPRISONMENT OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES

The rates at which Aboriginal and Torres Strait Islander people are experiencing violence and being put in prison has reached a crisis point. In the past 10 years we there has been an 88% increase in the number of Aboriginal and Torres Strait Islander people ending up in prison, with Aboriginal and Torres Strait Islander people now 13 times more likely to be imprisoned than non-Indigenous people. Imprisonment rates are even worse for Aboriginal and Torres Strait Islander women who comprise one-third of all female prisoners, and Aboriginal and Torres Strait Islander young people who comprise half of all young people in detention.

There have been increasing calls from groups such as Change the Record for action by all Australian governments to address this crisis and invest in early intervention, prevention and diversion strategies designed and implemented by Aboriginal and Torres Strait Islander peoples, communities and organisations.

²⁸ A full list of the social justice reports since 1993 is contained at <http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-reports#02>.

7. MEANINGFUL ENGAGEMENT BY AUSTRALIAN GOVERNMENTS

7.1 Good faith and political will of governments

Aboriginal and Torres Strait Islander peoples and organisations are consistently disappointed by the lack of good faith and political will demonstrated by successive Australian governments to ensure their active engagement and participation in policy and legislative developments.²⁹ There are countless examples of Aboriginal and Torres Strait Islander peoples being excluded from decisions about their future, ranging from the abolition of ATSIC, to the introduction of the Northern Territory Emergency Response, to the allocation of funding for Aboriginal and Torres Strait Islander programs under the Indigenous Advancement Strategy.

“Addressing inequality in health status is not insurmountable, although it will require long term action and commitment. It is not credible to suggest that one of the wealthiest nations in the world cannot solve a health crisis affecting less than three per cent of its citizens.”

Tom Calma AO, 2006, then Aboriginal and Torres Strait Islander Social Justice Commissioner³⁰

Oxfam shares with Aboriginal and Torres Strait Islander peoples the deep sense of disillusionment built over many years, that far too many reviews, commissions and inquiries have been undertaken that have not resulted in governments implementing the recommendations contained in the reports. This comprehensive failure to adopt repeated recommendations reflects a consistent lack of goodwill by successive governments towards Aboriginal and Torres Strait Islander peoples. Many Indigenous Australians feel cynical about government, which they feel continues to deny the voice of Aboriginal and Torres Strait Islander peoples and their participation in matters that directly affect them. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) is perhaps the most glaring example, where to this day only a handful of the more than 300 recommendations has ever been implemented.

IN FOCUS: ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY IN 1991

The Royal Commission was held in response to a growing public concern that deaths in custody of Aboriginal and Torres Strait Islander peoples were occurring too frequently and without explanation. The Royal Commission made 339 recommendations to improve the criminal justice system and reduce the number of Aboriginal and Torres Strait Islander peoples coming into contact with the system. The Royal Commission also reported on the complex effects of dispossession, colonisation and institutional racism on Aboriginal and Torres Strait Islander peoples. The principal thrust of the recommendations was to eliminate disadvantage and empower Aboriginal and Torres Strait Islander peoples. However, the vast majority of those recommendations remain unimplemented, or only partially implemented.³¹

Almost exactly 25 years later, a Royal Commission has been announced into child detention and protection in the Northern Territory, a strong indication of the ongoing failure of successive governments to pay sufficient attention to the recommendations contained in the RCIADIC report. This follows a long list of deaths in custody of Aboriginal and Torres Strait Islander peoples, including notable high profile cases such as Mr Doomadgee who died in police custody on Palm Island in 2004;³² Mr Ward whose death in a police van in 2006 was “wholly avoidable”;³³ and Ms Dhu who endured “inhumane treatment” and died in police custody after being arrested for unpaid fines in 2014.³⁴ One wonders if successive governments had implemented the recommendations of the Royal Commission 25 years ago, whether the situation would be different today for Aboriginal and Torres Strait Islander peoples.

31 For a comprehensive assessment of the implementation of the Royal Commission recommendations, see research commissioned by Amnesty International Australia and undertaken by Clayton Utz lawyers, available at <https://changetherecord.org.au/RCIADIC>.

32 See Queensland Office of the State Coroner Finding of Inquest, available at www.courts.qld.gov.au/___data/assets/pdf_file/0008/86858/cif-doomadgee-mutrunji-20100514.pdf.

33 See Western Australia’s Coronial Record of Investigation into Death, available at www.abc.net.au/4corners/special_edits/20090615/ward/ward_finding.pdf.

34 See Western Australia’s Coronial Record of Investigation into Death, available at http://www.coronerscourt.wa.gov.au/_files/Dhu%20finding.pdf.

29 Australian Human Rights Commission, Discussion Paper 2, above n 21 10.

30 Tom Calma, ‘Setting the Challenge: Achieving Health Equality in a Generation’ (2006) 6(21) *Indigenous Law Bulletin* 2.

“As we wait for the Western Australian coroner to decide whether to accede to Ms Dhu’s family’s request to release the footage of her final hours, we think about the longstanding silence, inattention and disremembering in regard to the RCIADIC recommendations.”

Foreword, Social Justice and Native Title Report, 2016

As long ago as 1979, Philip Ruddock as the chairman of the then House of Representatives Standing Committee on Aboriginal Affairs stated:

*“When innumerable reports on the poor state of Aboriginal health are released there are expressions of shock or surprise and outraged cries for immediate action. However, the reports appear to have had no real impact; the appalling state of Aboriginal health is soon forgotten until another report is released.”*³⁵

Repeated reviews, commissions and inquiries into issues faced by Aboriginal and Torres Strait Islander peoples will continue to amount to no meaningful change until all Australian governments develop the political will and a significantly better track record of implementing the recommendations contained in these important reports.

| RECOMMENDATIONS | ACTIONS |
|---|--|
| Act on recommendations from past government reports | <ul style="list-style-type: none"> All Australian governments should develop appropriate mechanisms to oversee the implementation of recommendations contained in government reviews, commissions and inquiries. These mechanisms must be constituted by Aboriginal and Torres Strait Islander peoples. Recommendations from past major reviews and royal commissions should be reviewed so that those that remain relevant are implemented. The Federal Government, through COAG, must set targets for reducing incarceration of Aboriginal and Torres Strait Islander peoples and improving community safety, and develop plans that are culturally appropriate and relevant. |

35 Phillip Ruddock, Hansard, 20 March 1979, Standing Committee on Aboriginal Affairs, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansardr80%2F1979-03-20%2F0110%22;src1=sm1>.

7.2 Representation in the Federal Parliament

Historically, there has been a significant imbalance in the parliamentary representation of Aboriginal and Torres Strait Islander peoples across all Australian parliaments. This has led to discussions at various points in time about the need for national representative bodies or consideration of appointing dedicated seats in parliament for Aboriginal and Torres Strait Islander representatives.³⁶

Presently, the Federal Parliament has the highest ever representation of Aboriginal and Torres Strait Islander peoples, with five parliamentarians. This includes the first female Aboriginal or Torres Strait Islander member of the House of Representatives in Australia’s history, Linda Burney MP. In January 2017, Ken Wyatt MP became the first Aboriginal or Torres Strait Islander person appointed as a Federal Cabinet Minister. Prior to the 2016 federal election, since 1901 only three Senators and one member of the House of Representatives had been an Aboriginal or Torres Strait Islander person.³⁷

This increased political representation has already seen an evident change in the political and public discussions of the rights of Aboriginal and Torres Strait Islander peoples, in particular through increased media coverage of Aboriginal and Torres Strait Islander politicians speaking out on issues.³⁸ This demonstrates the crucial importance of promoting equal rights of political participation for Aboriginal and Torres Strait Islander peoples. In Oxfam’s experience, democracy benefits, as do Aboriginal and Torres Strait Islander peoples, when more Indigenous Australians are engaged in the political system, whether at a local, state or national level. This is why for eight years Oxfam has run Straight Talk, a program for Aboriginal and Torres Strait Islander women to gain an introductory understanding of the political process at the Federal Government level. For many of the women it is their first experience in understanding how policies are developed and the impact they have on their communities. It is also a great way to break down the barrier many Aboriginal and Torres Strait Islander peoples feel exists between them and policymakers.

36 See, for example, Parliament of Australia Research Paper on Dedicated Indigenous Representation in the Australian Parliament, available at http://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/rp/rp0809/09rp23.

37 Neville Bonner, Senator for Queensland from 1971 to 1983; Aden Ridgeway, Senator for New South Wales from 1999 to 2005; Nova Peris, Senator for the Northern Territory from 2013 to 2016; and Ken Wyatt, Member for Hasluck from 2010 until present.

38 See, for example, media coverage such as Fergus Hunter, ‘In historic gathering, nation’s Indigenous MPs reject hate and vow to work together’, Sydney Morning Herald (16 September 2016) and Larissa Behrendt, ‘The Impact of Indigenous MPs’, Speaking Out, ABC Radio, 30 October 2016.

While strong arguments exist both for and against having dedicated seats in parliament for Aboriginal and Torres Strait Islander representatives, several reports and discussions in recent years have proposed various approaches to contribute to higher levels of representation within the mainstream parliamentary process.³⁹ A NSW parliamentary committee identified a number of approaches that could be adopted to achieve this.⁴⁰

7.3 Participation in legislative and policy development

Aboriginal and Torres Strait Islander communities must own the solutions to the challenges they face. The Federal Government's own *Overcoming Indigenous Disadvantage Report* and the UN Special Rapporteur Indigenous Peoples both acknowledge that "[w]hen [Aboriginal and Torres Strait Islander peoples] make their own decisions about what approaches to take and what resources to develop, they consistently out-perform [non-Indigenous] decision makers".⁴¹ Despite this evidence of the benefits of being directly involved in legislative and policy development, Aboriginal and Torres Strait Islander peoples have consistently struggled to maintain meaningful and effective participation.

It is this lack of engagement in developing policy and implementing solutions that is at the heart of the Redfern Statement — the policy agenda developed and put forward during the 2016 federal election by a coalition of Indigenous leaders and organisations. They were frustrated that governments were simply not listening to their concerns on a range of issues such as health, justice, family violence and people with disabilities.

A long list of government frameworks, strategies and approaches have been imposed on Aboriginal and Torres Strait Islander peoples over recent decades, which has caused constant and significant changes in the policy environment. Over the past two decades, Federal Government policies have shifted from a focus on "reconciliation" and "social justice", to "practical reconciliation" and "emergency response", to "closing the gap", and "partnerships"

39 See, for example, Legal, Constitutional and Administrative Review Committee, *Hands on Parliament: a parliamentary committee inquiry into Aboriginal and Torres Strait Islander peoples' participation in Queensland's democratic processes*, Queensland Legislative Assembly, 2003; *Australia 2020 Summit*, 2008, Chapter 7: *Options for the future of indigenous Australia*, Commonwealth of Australia.

40 See NSW Legislative Council Standing Committee on Social Issues, *Enhancing Aboriginal political representation: inquiry into dedicated seats in the New South Wales Parliament*, (1998), 104–109.

41 Commonwealth Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (2005) page 653, citing the Harvard Project on American Indian Economic Development 2003–04 (referring to the case of indigenous peoples in the United States of America), cited in James Anaya, *The Statement of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (27 August 2009) para [55].

and more recently "empowering communities". The changing rhetoric has consistently involved building and dismantling (and at times re-establishing) many different administrative and consultative mechanisms.

Despite the constantly changing political landscape, what has remained largely consistent over that same time is the severely limited ability of Aboriginal and Torres Strait Islander peoples to participate meaningfully in legislative and policy development. Oxfam believes this constant "churn" in the machinery of government needs to stabilise if the government's Closing the Gap agenda has any chance of success. This stabilisation includes not just the delivery mechanisms but also funding to Indigenous organisations to be guaranteed for a period of five to 10 years rather than the one to three years, which is more typical. Critical momentum is lost when governments suddenly change priorities.

This has significant consequences for developing appropriate and effective policies and programs to promote the rights of Aboriginal and Torres Strait Islander peoples. In 2016, Professor Marcia Langton described the current situation in Indigenous Affairs as a "policy-free environment".⁴² Concerns have also been identified about the lack of evaluation by government in relation to Aboriginal and Torres Strait Islander programs, leading to resources being wasted and misdirected into programs that may not be delivering the best results for Aboriginal and Torres Strait Islander peoples.⁴³

DESPITE THE CONSTANTLY CHANGING POLITICAL LANDSCAPE, WHAT HAS REMAINED LARGELY CONSISTENT OVER THAT SAME TIME IS THE SEVERELY LIMITED ABILITY OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES TO PARTICIPATE MEANINGFULLY IN LEGISLATIVE AND POLICY DEVELOPMENT.

Governments often use strong language about consultation with Aboriginal and Torres Strait Islander peoples, however this is rarely matched in practice. The Aboriginal and Torres Strait Islander Social Justice Commissioner has observed that the experience in Australia suggests that "governments interpret their obligation to consult with Aboriginal and Torres Strait Islander peoples as a duty to tell us what has been developed on our behalf and what eventually will be imposed upon us".⁴⁴ There is still a strong perception by

42 National Press Club, 18 November 2016.

43 See David Donaldson, 'Parkinson: Indigenous funding has weak evidence base', *The Mandarin*, 26 August 2016, available at <http://www.themandarin.com.au/69432-martin-parkinson-indigenous-funding-has-weak-evidence-base/>.

44 Australian Human Rights Commission, *Implementation of the United Nations*

governments — and a practice — that they hold the solution to the so-called “Aboriginal problem”.⁴⁵

IN FOCUS: POSSIBLE FORCED CLOSURE OF REMOTE ABORIGINAL COMMUNITIES IN WESTERN AUSTRALIA

In September 2014, the Western Australian (WA) Government announced that up to 150 remote Aboriginal communities may be closed as a result of responsibility for essential and municipal services being transferred from the Federal Government to the WA Government. Approximately 12,000 Aboriginal people currently live in 274 remote communities in Western Australia.

This announcement occurred without any consultation with Aboriginal people living in affected communities and received significant national and international attention.⁴⁶ The WA Government subsequently backtracked and announced a consultation process to map out options for reform.

In July 2016, the WA Government released a report entitled *Resilient Families, Strong Communities*, which identified that funding for essential community services will cease in some remote Aboriginal communities and will instead focus on investment into 10 of the larger Aboriginal communities. Concerns remain about the nature of the consultation process and the fact that the outcome was essentially pre-determined, with the possibility that many Aboriginal communities will be forced to leave their traditional homelands closed “by stealth”.⁴⁷

The control exercised by governments over Aboriginal and Torres Strait Islander communities significantly hinders the voice, empowerment and opportunities of Aboriginal and Torres Strait Islander peoples. A critical step to achieving meaningful improvement in the lives of Aboriginal and Torres Strait Islander peoples is for governments to recognise and treat Aboriginal

Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series – Discussion Paper 3: We have a right to participate in decisions that affect us – effective participation, free, prior and informed consent, and good faith [2013], 13.

45 Ibid.

46 See, for example, Sarah Taillier and staff, ‘Rallies held to protest against threat of remote community closures in Western Australia’, *ABC News*, 2 May 2015, available at <http://www.abc.net.au/news/2015-05-01/rallies-protest-against-possible-closures-of-remote-communities/6437046>.

47 See Calla Wahlquist, ‘Fears Western Australia will close remote Indigenous communities ‘by stealth’’, *The Guardian*, 14 July 2016, available at <https://www.theguardian.com/australia-news/2016/jul/14/fears-western-australia-will-close-remote-indigenous-communities-by-stealth>.

and Torres Strait Islander peoples as substantive players and major stakeholders in the development, design, implementation, monitoring and evaluation of all policy and legislation that impacts their health and wellbeing.⁴⁸

“This level of expenditure’s been around now for 20 years, even longer. That coupled with a lack of any real progress is a real indictment on everybody, and it’s time that we had a real serious look at this, and actually started talking to each other. There’s no coordination, the agencies don’t talk to each other, the silos are still in place. There’s a maze, and the complexities enormous, and it doesn’t need to be that way. We have to focus on what people see as the real solutions to their own communities.”

Geoff Scott, 23 August 2016, National Congress⁴⁹

Aboriginal and Torres Strait Islander peoples and their communities are diverse — as such they must be effectively involved in developing policies and programs. A “one size fits all” approach has never been successful. Single level, “top down” interventions are unlikely to have sufficient impact by themselves, particularly when they don’t have buy-in and support at a local level.⁵⁰ The result is that initiatives are often disempowering to communities. Tailored consultation and engagement mechanisms are essential to ensure the right of Aboriginal and Torres Strait Islander peoples to participate meaningfully and effectively in decision-making.⁵¹

This approach to development is one that Oxfam adheres to both in Australia and in developing countries where we work. It is a fundamental element of community development theory that ground up, locally placed solutions have the best chance of creating impact and lasting success among affected communities.

The lack of participation in legislative and policy development reflects the consistent failure of successive Australian governments to respect and listen to Aboriginal and Torres Strait Islander peoples. Many of the policy initiatives have been developed and implemented without meaningful and

48 Australian Human Rights Commission, Discussion Paper 3, above n 44, 8.

49 Quoted in Ella Archibald-Binge, ‘Government spending fails to improve Indigenous outcomes: report’, *NITV News*, 23 August 2016, available at <http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/08/23/government-spending-fails-improve-indigenous-outcomes-report>.

50 The Australian Institute of Health and Welfare has identified a set of evidence-based criteria for what works, and what doesn’t work, for achieving the COAG building blocks, which are summarised at <http://www.aihw.gov.au/closingthegap/what-works/>.

51 Australian Human Rights Commission, Discussion Paper 3, above n 44, 14.

comprehensive engagement with affected communities. Addressing social policy issues requires the direct involvement of affected communities to be effective.

| RECOMMENDATIONS | ACTIONS |
|--|---|
| <p>Increase representation of Aboriginal and Torres Strait Islander peoples in Federal Parliament and policy development</p> | <ul style="list-style-type: none"> All Australian governments should implement the recommendations contained in the NSW Legislative Council Standing Committee on Social Issues report, Enhancing Aboriginal political representation. These include consultation with Aboriginal and Torres Strait Islander peoples; the development of action plans by political parties to increase participation by Aboriginal and Torres Strait Islander peoples; and support for and expansion of mentoring programs for Aboriginal and Torres Strait Islander peoples involved in local government. All Australian governments recognise that Aboriginal and Torres Strait Islander peoples are best placed to understand the challenges they face, the solutions that are needed and to implement those solutions. To do this government must consult widely, listen, act on the advice it is receiving and empower Aboriginal and Torres Strait Islander peoples to act. All Australian governments must ensure that Aboriginal and Torres Strait Islander peoples and their organisations are directly involved in decision-making about matters that directly affect them. This could be achieved, for example, by including requirements for an "Indigenous Impact Statement" and genuine consultation with Aboriginal and Torres Strait Islander peoples in Regulatory Impact Statements. |



Photo supplied by Aboriginal Family Violence Prevention and Legal Services

7.4 Case study: Aboriginal Family Violence Prevention and Legal Services

The statistics are tragic: Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised because of family violence and 10 times more likely to die because of a violent assault than a non-Indigenous woman.

Yet in the face of this unquestionable national crisis, the services at the forefront of tackling family violence against Aboriginal and Torres Strait Islander women are forced to do their work with funding that is persistently falling short and uncertain.

At times, it means those dedicated to working on the ground at Aboriginal Family Violence Prevention and Legal Services (FVPLSs) must deal with the painful reality of having to turn away vulnerable women and their children who are in desperate need of help. Some FVPLSs report that up to 30–40% of women contacting their service seeking assistance are turned away because they don't have the capacity to support them.

Chief Executive of the FVPLS in Victoria, Antoinette Braybrook, has been battling the family violence epidemic for more than 15 years. Sadly, she sees it is getting worse.

"We are starting to break the silence and help more of our women to feel comfortable to speak out, but I think the rates of family violence are also getting worse," Ms Braybrook said.

Ms Braybrook, a lawyer, was the Victorian service's first employee. She has been at the helm as it has grown from a small Aboriginal community controlled organisation to one at the forefront of family violence prevention across Victoria.

Over the years FVPLS Victoria has had to show the same resilience as the clients it represents — 93% of whom are Aboriginal women.

"Up until 2009 our core funding was only provided on

an annual basis. We were required to provide quarterly financial performance reports and had to reapply for our funding annually," Ms Braybrook said. "So, every year, we were looking down the barrel thinking 'Are we going to be here come 1st July?'

"We were worried about how we were going to be able to support the clients we had. We'd often have to not take on new clients for periods of time. We'd be asking questions about 'What if we're not going to get funding, will we have a wind down period, what will we do with our clients?' We found ourselves in situations where we couldn't sign leases for our offices, staff were leaving because there was no certainty."

Ms Braybrook is also the Convenor of the National FVPLS Forum, which consists of 14 FVPLSs around Australia. She said it had been a constant fight to maintain services in the face of ever-changing federal and state government funding agendas.

While many funding agreements are no longer so short term, the reality is that funding is significantly failing to meet demand.

"Our services across the country are just not able to meet the extremely high levels of unmet need in our communities," Ms Braybrook said. "Aboriginal and Torres Strait Islander women are the most legally disadvantaged group in the country."

FVPLSs across Australia are also only funded to service an area that covers about half of the Aboriginal and Torres Strait Islander population.

"Our services are restricted to providing services only to some rural and remote areas," said Ms Braybrook. "This means there are huge areas where Aboriginal and Torres Strait Islander women are left vulnerable and unsafe because they are not able to access the essential supports and services they require."

Shifting government priorities also make it difficult for services to run the programs and provide the supports that they know their communities need.

"One minute governments are saying to us that we have to focus on providing frontline services, then the next minute they are telling us that we need to prioritise community education or early intervention prevention work," Ms Braybrook said. "Then there's a change of government or policy approach and it all changes again."

The constant changing in approaches by governments limits the ability of community controlled organisations like FVPLSs to deliver the holistic, culturally safe services and programs they know their communities need.

"We have successful community education and prevention programs like Sisters Day Out and Dilly Bag, which have been independently evaluated and make a real difference to the lives of women in our communities. Our communities have the solutions and need to be in control," Ms Braybrook said.

Ms Braybrook said the battle against family violence could be better fought if organisations like hers were on more stable ground. Five-year funding agreements would help, as would a say in how funding can best be used and where.

"We need secure, long term and adequate funding that provides us with the ability and flexibility to deliver the prevention, early intervention and support services that the women in our communities need in order to be safe and free from violence," said Ms Braybrook.

IN FOCUS: FAMILY VIOLENCE

Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised from family violence and 10 times more likely to be killed as a result of violent assault. Violence against Aboriginal and Torres Strait Islander women devastates communities, destroys families and impacts children.

The Federal Government's *National Plan to Reduce Violence against Women and their Children* recognises the disproportionate experiences of family violence by Aboriginal and Torres Strait Islander women. However, organisations such as the National Family Violence Prevention Legal Services Forum say that increased funding and immediate and concrete action is required to turn the National Plan into tangible action that will make a difference in the lives of Aboriginal and Torres Strait Islander women and children.

8. FUNDING FOR ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITY CONTROLLED ORGANISATIONS

During the 1970s and 1980s, increasing desires by Aboriginal and Torres Strait Islander peoples for self-determination led to the establishment of many community controlled organisations, particularly in primary health and legal services. Many of these organisations continue to operate today and play a vital role in providing services and advocating on behalf of Aboriginal and Torres Strait Islander peoples.

Yet this legacy of a strong, Indigenous community controlled sector of dedicated professionals is being undermined by major cuts to funding, a bias towards non-Indigenous organisations and the increasingly difficult task of tracking where funding is going and what impacts it is achieving.

Dr Lesley Russell, an Adjunct Associate Professor at the University of Sydney's Menzies Centre for Health Policy, analysed for Oxfam the funding maze of Australian Government spending on Indigenous programs (see Annex 3). She writes: "It's a policy-free zone (Indigenous policy), where ad hoc decisions are the norm, budgets continue to be constrained in ways that limit the effectiveness and reach of programs and services, little evaluation is undertaken, and there is a growing lack of transparency about policy and funding decisions."

8.1 Benefits of community controlled organisations

Aboriginal and Torres Strait Islander community controlled organisations are an intrinsic aspect of the right to self-determination and play an essential role in providing services to and empowering Aboriginal and Torres Strait Islander peoples. Starting in the 1970s, community controlled organisations were established due to the failure of mainstream organisations to provide appropriate and affordable services to Aboriginal and Torres Strait Islander peoples. Aboriginal and Torres Strait Islander community controlled organisations deliver a wide range of accessible and culturally appropriate services, including health services, run early childhood education and pre-schools, deliver core services and community programs, provide family support services, give legal advice, run training programs and much more. The provision of services by community controlled organisations is crucially important to achieving positive outcomes.⁵²

In addition to delivering valuable community services, community controlled organisations play a critical role in providing a voice for Aboriginal and Torres Strait Islander communities, advocating on their behalf and representing

their interests. Governments across Australia are constantly developing new laws and policies and it is vital that the voices of Aboriginal and Torres Strait Islander peoples are involved in these debates. The participation of Aboriginal and Torres Strait Islander peoples in decision-making is fundamental to realising their human rights.⁵³

Community controlled organisations have also become a significant employer of Aboriginal and Torres Strait Islander peoples. A 2014 report highlights the economic value of community controlled health services. In addition to providing highly effective health access and care, the economic benefits include being the main source of Aboriginal and Torres Strait Islander employment and training in many communities, producing significant benefits to the communities they serve.⁵⁴

Despite these clear benefits, community controlled organisations continue to face ongoing threats to their survival and effectiveness. This has significant consequences for realising the rights of Aboriginal and Torres Strait Islander peoples.

⁵² For a comprehensive review of Australian evidence indicating the crucial importance of Aboriginal and Torres Strait Islander community control to outcomes in health service delivery, see Ronald Denato and Leonie Segal (2013), 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?', *Australian Health Review*, 37(2), May, 232 at 235.

⁵³ UN Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, 2010, UN Doc: A/HRC/15/35, para. 2.

⁵⁴ See National Aboriginal Community Controlled Health Organisation, *Economic value of Aboriginal Community Controlled Health Services* (April 2014), available at <https://nacchocommunique.com/2014/04/02/economic-value-of-aboriginal-community-controlled-health-organisations/>.

IN FOCUS: CULLUNGHUTTI ABORIGINAL CHILD AND FAMILY CENTRE, NOWRA NSW⁵⁵

The Cullunghutti Aboriginal Child and Family Centre is an Aboriginal community controlled organisation that delivers allied health and family support programs. The centre has 70 children enrolled in the early childhood program and another 45 children on the waiting list. The centre has only been operating for 18 months and the high demand is attributed to the culturally centred, holistic services it provides to Aboriginal families.

The centre employs 12 Aboriginal workers out of 16 staff and has an Aboriginal general manager and community board that ensure strong Aboriginal management and leadership.

Positive outcomes achieved by the centre include:

- a significant increase in early childhood diagnosis of additional needs and learning delay;
- a minimum of 80–85% of the children and families accessing the early learning and supported playgroup did not previously access any early learning service; and
- many children with previously limited access to health professionals have now received health checks, visited health professionals and are receiving additional support.

The centre has also established its own catering business as a social enterprise.

8.2 Challenges faced by community controlled organisations

Aboriginal and Torres Strait Islander peoples' wellbeing has progressed little over the longer term despite the introduction of many new policies, programs and funds. Government programs for Aboriginal and Torres Strait Islander peoples have consistently failed to genuinely involve Aboriginal and Torres Strait Islander peoples and their organisations in their design, delivery and funding.

The Productivity Commission, which is tasked with reporting on overcoming Indigenous disadvantage, and the Government's own research advisor, the Australian Institute of Health and Welfare (AIHW), have both been critical of the design, delivery and funding of Aboriginal and Torres Strait Islander programs.

Both respected bodies have identified many problems in models of funding that contribute to the limited progress in Aboriginal and Torres Strait Islander programs. AIHW has developed a clear set of evidence-based criteria for what works, and what doesn't work, for the process of both funding and designing services to be delivered for and by Aboriginal and Torres Strait Islander communities.⁵⁶ Central to the criteria identified by AIHW is the direct involvement of the community, adequate resourcing, respect for language and culture, and the development of genuine partnerships. However, these criteria have never been formally adopted by governments, which is evident from many of the issues that continue to be faced by Aboriginal and Torres Strait Islander community controlled organisations. Consequently, it is likely that too many policies and programs will continue to fail to achieve their intended outcomes.

Administration of funding

Particularly since the demise of ATSIC, the approach to funding for Aboriginal and Torres Strait Islander Affairs has involved a largely centralised model of governing public finances with a focus on compliance and reporting obligations. This has involved a shift away from devolution to local organisations, where Aboriginal and Torres Strait Islander peoples are directly involved in decisions and developing services for their own community, and towards more centralised, contracted arrangements. Over time, this approach weakens local capacity and delivers programs that are often ineffective or poorly targeted.

The current Federal Government machinery for determining funding for Aboriginal and Torres Strait Islander programs is the Indigenous Advancement Strategy (IAS). The IAS consolidated 150 programs into five funding streams and transferred responsibility for its administration to the Department of the Prime Minister and Cabinet. Under the IAS, the Minister for Indigenous Affairs maintains sole decision-making responsibility over every funding decision. The consequence is that Aboriginal and Torres Strait Islander peoples and their organisations are not involved in decision-making about which programs are supported or not supported, or indeed which organisations or agencies receive funding to deliver the programs or services.

"The idea that a single minister can pick winners in a complex policy market would not be tolerated outside of Indigenous affairs. Ministers cannot determine what is right in any particular context and what projects will work."

Noel Pearson, 27 January 2016, National Press Club

⁵⁵ Information taken from <http://www.snaicc.org.au/wp-content/uploads/2015/12/Cullunghutti-service-case-study-2015.pdf>.

⁵⁶ See <http://www.aihw.gov.au/closingthegap/what-works/#block-8>.

The IAS process caused significant confusion and anxiety for Aboriginal and Torres Strait Islander organisations and resulted in substantial cuts to funding as Aboriginal and Torres Strait Islander programs were rationalised. Oxfam joined many Indigenous organisations and leaders in raising serious concerns about such a radical reform without proper consultation with Aboriginal and Torres Strait Islander peoples. It became the focus of a parliamentary committee review in 2016 that found that the shift to a competitive tendering model under the IAS “appeared to disadvantage Indigenous organisations”. The IAS also “disadvantaged smaller Indigenous organisations with less experience in applying for competitive funding, and who lacked the resources to hire such expertise, compared with larger non-government organisations”.⁵⁷ A report recently released by the Australian National Audit Office identified that the IAS was poorly planned, not implemented effectively, and that this limited the department’s ability to focus on prioritising the needs of Aboriginal and Torres Strait Islander communities.⁵⁸

Adequacy of funding

Given the disproportionate socio-economic disadvantage experienced by many Aboriginal and Torres Strait Islander peoples, adequate funding for community controlled organisations to meet this demand is essential. However, most Aboriginal and Torres Strait Islander organisations are largely dependent on government funding, which means they are often subject to the political and economic whims of the government of the day. Currently, Aboriginal and Torres Strait Islander organisations receive around 55% of the funding that is allocated under the IAS.⁵⁹ While government investment in Aboriginal and Torres Strait Islander organisations has increased in recent years, the levels of funding required to address unmet need remain largely inadequate.⁶⁰

57 Senate Standing Committee on Finance and Public Administration, *Report on Commonwealth Indigenous Advancement Strategy tendering processes* (17 March 2016), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Report.

58 Australian National Audit Office, *Performance Audit of the Indigenous Advancement Strategy* (3 February 2017), available at <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>.

59 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, ‘IAS grant round investment totals \$1 billion’, (Media Release, 27 May 2015).

60 See, for example, the calls for funding for Aboriginal and Torres Strait Islander organisations detailed in the Redfern Statement, available at <http://nationalcongress.com.au/about-us/redfern-statement/>.

IN FOCUS: INADEQUATE FUNDING TO ADDRESS FAMILY VIOLENCE

Aboriginal and Torres Strait Islander women experience family violence at enormously disproportionate rates. Nationally, Aboriginal and Torres Strait Islander women are 34 times more likely to be hospitalised from family violence and 10 times more likely to die of violent assault than non Indigenous women.

However, Aboriginal Family Violence Prevention Legal Services (FVPLSs) remain significantly under-funded to meet the extremely high levels of unmet need. Some FVPLSs report that up to 30–40% of women contacting the service seeking assistance are turned away because they don’t have the capacity to support them. Furthermore, FVPLSs across Australia are only funded to service an area that covers approximately half of the Aboriginal and Torres Strait Islander population. Much of this coverage in remote areas is extremely limited and often consists of only one or two days per month. This means that many extremely vulnerable Aboriginal and Torres Strait Islander women are not able to access the essential supports and services they need.

Conditions of funding

In addition to under-funding, many Aboriginal and Torres Strait Islander organisations identify various conditions and restrictions placed on them by government that limit their ability to provide effective services and to advocate for the rights of their people. The terms and conditions under which public funding is directed and provided can have a powerful impact on the capacity of Aboriginal and Torres Strait Islander organisations and communities to respond to the challenges they face. While funding for Aboriginal and Torres Strait Islander organisations has significant potential to empower communities it can also become a powerful lever that government can hold over Aboriginal and Torres Strait Islander peoples and their organisations.

Many Aboriginal and Torres Strait Islander organisations have reported a trend in the last decade of less government resources being made available for policy and advocacy work. For some organisations, funding for policy and advocacy work has been explicitly removed from funding contracts and organisations told that they should do this work in their own time. Some funding agreements even contain outright bans on undertaking any advocacy activities. These restrictions have a chilling effect on the capacity of Aboriginal and Torres Strait Islander organisations to advocate publicly on behalf of their communities. It is essential governments not only work with

Indigenous Australians to develop effective policy, they must also collaborate on addressing policies that are failing.

Limited funding and other restrictions for Aboriginal and Torres Strait Islander organisations to advocate and to engage in consultative processes severely hamper their ability to effectively participate in government decision-making processes. They also limit their ability to contribute to the development of laws and policies that protect and promote the rights of Aboriginal and Torres Strait Islander peoples. The defunding of the National Congress of Australia's First Peoples is a clear example of this.

Many Aboriginal and Torres Strait Islander organisations also identify that the over-administration of their affairs creates significant barriers to their effectiveness. An increase in control and influence over Aboriginal and Torres Strait Islander organisations is often tied with receiving government funding. Many Aboriginal and Torres Strait Islander organisations point to the short-term nature of contracts as a significant way in which government control is exerted and which substantially limits their ability to provide effective services. For example, the uncertainty created by one-year funding contracts makes it extremely difficult to build and maintain relationships with clients, attract and retain staff and even lease office space.

IN FOCUS: INCORPORATION REQUIREMENTS UNDER THE INDIGENOUS ADVANCEMENT STRATEGY (IAS)

Under the IAS, Aboriginal and Torres Strait Islander organisations receiving funding over \$500,000 must be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cwlth) (CATSI Act).⁶¹ The CATSI Act is legislation that applies to the governance and regulation of Indigenous organisations. There are several aspects of the CATSI Act that arguably disadvantage Aboriginal and Torres Strait Islander organisations. These include wide-ranging regulatory and enforcement powers granted to the Office of the Registrar of Indigenous Corporations (ORIC), which include the ability to place an Indigenous organisation under special administration. This strict requirement to be incorporated under the CATSI Act to receive IAS funding does not apply to non-Indigenous organisations.

61 Available at <https://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/incorporation-requirements>.

Funding for Aboriginal and Torres Strait Islander programs is increasingly being provided to mainstream organisations

Another major threat to Aboriginal and Torres Strait Islander organisations is a recent shift to competitive tendering processes that are markedly different from how Indigenous-specific funding has previously been administered by governments. This is most evident in the recent IAS process and has been criticised by several reviews of the strategy.⁶²

Competitive tendering disadvantages Aboriginal and Torres Strait Islander organisations in several ways. Often, community controlled organisations do not have the same size and scale to be able to compete with larger organisations and international non-government organisations. There are also major concerns that competitive tendering does not acknowledge the value of cultural competence and understanding the needs of the community.

IN FOCUS: ABORIGINAL PEAK ORGANISATIONS NT PRINCIPLES

Aboriginal Peak Organisations NT (APO NT) has developed a set of principles to guide a partnership-centred approach for mainstream non-government organisations (NGOs) working with Aboriginal organisations and communities in the Northern Territory. The purpose of the principles is to help strengthen and rebuild an Aboriginal controlled development and service sector. Many mainstream NGOs have adopted the principles, which commit them to recognise the existing capacity and expertise of Aboriginal NGOs and build on this capacity, seek partnerships with them, and ensure Aboriginal control over initiatives, services and programs.⁶³

Oxfam believes all Australian governments should adopt a policy to prioritise Indigenous organisations wherever possible in order to place Indigenous-identified funds in the hands of Indigenous Australians and to continue to build the capacity of the Aboriginal and Torres Strait Islander community controlled sector. Aboriginal and Torres Strait Islander organisations have strong relationships with communities, an understanding of community needs and exceptional cultural competence.

Conversely, many mainstream organisations have had little or no experience of working with Aboriginal and Torres Strait Islander communities. Despite often lacking sector expertise, mainstream organisations are contracted to provide an array of

62 See Senate Standing Committee report and Australian National Audit Office review, cited above.

63 For further information see <http://www.amsant.org.au/apont/our-work/non-government-organisations/apo-nt-ngo-principles/>.

specialist services. The result is that services and programs are often not accessible to or appropriate for many Aboriginal and Torres Strait Islander peoples, which has consequences for the enjoyment of rights.

| RECOMMENDATIONS | ACTIONS |
|--|--|
| <p>Increase and prioritise funding for Aboriginal and Torres Strait Islander organisations</p> | <ul style="list-style-type: none"> • All Australian governments, led by the Federal Government, must provide adequate and guaranteed long-term funding to Aboriginal and Torres Strait Islander peak sector organisations to address the complex and long-term issues that their communities face. Funding agreements should be for at least five years. • Funding provided by all Australian governments for Aboriginal and Torres Strait Islander services and programs should preference funding for Aboriginal and Torres Strait Islander organisations. Where no suitable Aboriginal and Torres Strait Islander organisations exist, funding should prioritise partnerships between Aboriginal and Torres Strait Islander organisations and non-Indigenous organisations to build capacity. • Allocations of funding for Aboriginal and Torres Strait Islander organisations, programs and services must be based on the level of need and recognise the disproportionate rates of socio-economic disadvantage within Aboriginal and Torres Strait Islander communities. • All Australian governments must establish mechanisms to ensure that decisions about government funding for Aboriginal and Torres Strait Islander services and programs are made by Aboriginal and Torres Strait Islander peoples. • All Australian governments must enshrine the importance of Aboriginal and Torres Strait Islander community controlled organisations, including their freedom to advocate, into public service codes of conduct and principles that guide funding decisions. |



8.3 Case study: Kirrae Health Service

The banks of the Hopkins River in Gunditjmara country in south-western Victoria sometimes double as an open-air therapy room for family therapist Brian Medew.

Mr Medew has found at times it's better to move outside the traditional consultation room and meet his

clients where they feel comfortable. A river bank can be a good place to tackle traumas of the Stolen Generation, or domestic violence or thoughts of suicide.

Mr Medew is the Social and Emotional Wellbeing Co-ordinator at the Kirrae Health Service, a community controlled organisation at the Framlingham Aboriginal Community, 23km north of Warrnambool and 180km west of Geelong.

"There might be men who wouldn't want to be seen coming into the health service to see me, but I could meet them down at the river or I could meet them at a shop in Warrnambool or down at the beach," he said. "It's about asking people 'how is this going to work for you? You don't have to walk into an office'."

The Framlingham Aboriginal Community's history dates to 1911 when it was set up as an Aboriginal reserve by the Board for Protection of Aborigines.

The Kirrae Health Service began on a small scale in the 1970s but was expanded in the late 1990s amid concerns that community members were leaving significant health problems until they became life-threatening rather than seeking treatment from outside.

"Warrnambool is a major regional centre now and that's about 20 minutes down the road, but people were reluctant to use those services based on the history of people being put into these missions," Mr Medew said. "And today that is still the case, mostly."

But Mr Medew said it was an ongoing battle to keep

services going at the 20-staff centre with unpredictable federal and state government funding. The centre needs about a million dollars a year to run its programs.

“One of the things that really annoys me as a white guy working in an Aboriginal world is all these stereotypes about Aboriginal money and funding,” he said. “It’s not true because we are audited and ‘compliance’ to within an inch of our lives.

“The amount of paperwork we have to feed back to government is high and rarely takes cultural approaches into account. And then trying to articulate to a government office the model of work we do and how it works is difficult.

“We need people in government departments who actually understand how communities work and how the Aboriginal service sector successfully works, because no matter what we do — and I know they have to justify their spend, we don’t mind that — they still have a mainstream hat on.”

Mr Medew said he had been touched by the people who used the Kirrae Health Service, which runs the full range of services from health to aged care.

Framlingham’s clients can vary from 60 families up to a couple of hundred people. Clients also come from surrounding areas.

“One of the most amazing things for me is that people on community have been told what to do forever,” Medew said. “So, when you ask the question, ‘What is it you want to do?’ that is quite an experience for them. People have said ‘I’ve never had that asked of me before.’”

9. LAND RIGHTS

9.1 Recognition of collective land rights

In the last 40 years there have been important developments in the recognition of collective rights to land for Aboriginal and Torres Strait Islander peoples in Australia. Significant developments during the 1970s led to the establishment of land rights legislation, and by 1996 most Australian jurisdictions had passed land rights legislation.

The introduction of the *Native Title Act 1993* (Cwlth) established a system for Aboriginal and Torres Strait Islanders to claim native title over traditional lands where they can prove an ongoing connection. The preamble to the act recognises the progressive loss of control over and access to traditional lands and natural resources by Aboriginal and Torres Strait Islander peoples, as well as the fact that dispossession has occurred largely without compensation. Much like the experience of other Indigenous peoples around the world, the introduction of the Native Title Act was a direct consequence of a court decision in favour of Indigenous peoples and their demand for the recognition of their ancestral lands.

IN FOCUS: MABO V QUEENSLAND (1992)

In 1992, the High Court of Australia held that the common law of Australia recognises native title to land, rejecting the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement. The decision stated that native title can continue to exist where Aboriginal and Torres Strait Islander peoples have maintained their connection with the land through the years of European settlement and that the content of native title is to be determined according to the traditional laws and customs of the Aboriginal and Torres Strait Islander peoples involved. The case had been led by Eddie Mabo of the Meriam people from the Mer (Murray) Islands of the Torres Strait. This landmark decision led to the enactment of the *Native Title Act 1993* (Cwlth), which provides a court process for determining native title claims.

9.2 Native title — an inadequate system

Despite significant judicial developments and the introduction of the Native Title Act, access to and control over traditional lands continues to be a major issue for Aboriginal and Torres Strait Islander peoples. The native title system that was established has been inadequate in providing recognition of ongoing rights to own, develop, control and use communal

lands, territories and resources.⁶⁴ Although Aboriginal and Torres Strait Islander peoples might have a right to native title, in practice the concept and scheme established under the Native Title Act raises several issues.

First, native title is extremely difficult to prove. The Native Title Act requires Aboriginal and Torres Strait Islander peoples to satisfy onerously high standards and burdens of proof to obtain recognition of their relationship with their traditional lands.⁶⁵ The requirement for claimants to prove continuity raises several significant challenges, including the myriad reasons for extinguishment (such as forced removal, urbanisation and agricultural development), the high level of evidence required and the onus resting with claimants. These difficulties are compounded by the length and complexity of court processes and the often significant costs involved.

Second, native title is a weak form of property right. Even when native title is established, native title interests are not recognised as being equivalent to other property interests, which undermines security in title to land for Aboriginal and Torres Strait Islander traditional owners. In the context of minerals and resources, native title often offers little or no protection against mining companies.⁶⁶ Native title can also be extinguished by other competing property interests such as freehold or pastoral leases. The general failure of the native title system to provide robust land interests of equivalent status to other land interests undermines Aboriginal and Torres Strait Islander peoples' opportunity to full and free economic participation.

"Native title is at the bottom of the hierarchy of Australian property rights."

Tom Calma AO, 2009, then Aboriginal and Torres Strait Islander Social Justice Commissioner

Third, Aboriginal and Torres Strait Islander peoples whose rights have been extinguished face extreme difficulty in obtaining compensation under the current native title scheme. Despite the Native Title Act's stated intention to deliver compensation for the wrongful extinguishment of native title, no litigation has led to this outcome.

64 Australian Human Rights Commission, Discussion Paper 2, above n 21, 9.

65 *The Native Title Act 1993* (Cwlth) requires claimants to demonstrate a continuing connection, under traditional laws and customs, with the land and/or waters, and to demonstrate that native title has not been extinguished by an inconsistent government act.

66 See, for example, High Court of Australia's decision in *Western Australia v Ward* (2002) 191 ALR 1.

Despite these well-documented concerns with the native title system, successive federal governments have failed to address any key substantive issues relating to native title, with most amendments largely technical and administrative in nature. This is despite the significance of land to Aboriginal and Torres Strait Islander peoples and ultimately the potential for economic development. By contrast, Oxfam notes that when other interests such as mining are affected by changes to native title laws, government are all too quick to make changes — in most cases without consulting with Aboriginal and/or Torres Strait Islander peoples. The recent Federal Court decision in *McGlade v Native Title Registrar* (2017) prompted the Attorney General to introduce to the Parliament the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* and ask that it be passed within 24 hours. This rushed process does not adhere to the principle of free, prior and informed consent and is yet the latest incident of changes to a major piece of legislation being changed with no engagement with Indigenous Australians.

For many Aboriginal and Torres Strait Islander peoples, native title has become a source of division within their communities and contributed to a further denial of rights. The UN Special Rapporteur on Indigenous Rights has observed that progressive loss of control over and access to traditional lands and natural resources by Aboriginal and Torres Strait Islander peoples is another “crippling aspect” of racial discrimination against these communities.⁶⁷

“Despite the fact that the challenge of gaining native title is still a fight that many of us share, there has been a shift in focus now and we have started to see a gradual change in terms of ownership. That nearly a third of our land mass is Indigenous owned is testament to this. And that shift is the move to the next emerging challenge; how do we maximise these rights to their full potential, now that we have our native title recognised?”

Mick Gooda, 2015, speech at annual Mabo Lecture at the 2015 National Native Title Conference

There have long been calls for changes to the native title system. Native title reports published annually since 1994 by the Aboriginal and Torres Strait Islander Social Justice Commissioner have contained comprehensive recommendations for reform. The National Native Title Council has repeatedly advocated for major changes to the native title system so that it can deliver on its initial intent to provide meaningful rights and a basis for

economic and community development for Aboriginal and Torres Strait Islander peoples. In 2015, the Australian Law Reform Commission recommended changes to the Native Title Act to lower the threshold for proof of native title and to expand the scope of native title rights and interests, such as the possibility of using resources for commercial purposes.⁶⁸

| RECOMMENDATIONS | ACTIONS |
|--------------------------------|--|
| Change the native title system | <ul style="list-style-type: none"> Native title should be simpler to prove, including reversing the onus of proof placed on claimants and reducing the high burden of proof currently required to demonstrate ongoing connection. Native title should provide a more meaningful cultural and economic asset once recognised. |

The protection of language and cultural rights is essential for

67 James Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Situation of indigenous people in Australia*, UN Doc A/HRC/15/37/Add.4 (2010), [20].

68 See Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (June 2015).



Photo supplied by Kimberley Land Council.

9.3 Case study: Kimberley Land Council

As native title claims grind their way through long and complicated processes, Kimberley Land Council Chief Executive Nolan Hunter has seen the sad reality of Elders dying before their rights are formally recognised.

“A big issue for our people is that it can take 15 or more years to

resolve a native title claim,” Mr Hunter said. “There’s got to be something else to try and improve that because there are complications, especially when senior Elders pass away in that process.

“Indigenous people have looked after country for thousands of years — they need land rights that allow them to care for their country, to practise their culture and to secure their future.”

The Kimberley Land Council came to life in 1978 when Aboriginal people from throughout the region stood against the WA Government and an international mining company drilling for oil on sacred ground. Nearly 40 years on, native title and land rights remain a battle.

Mr Hunter said native title laws were developed on the run and needed an overhaul. He said even when native title rights were granted at a federal level, they could still be undermined at a state level.

“Governments don’t acknowledge that people’s native title rights mean that they are the ones who should have control,” he said.

“They spend all their time trying to undermine those rights by doing things like issuing marine or conservation parks over the top of native title. You have leases being created, promises of joint management being made to take over people’s native title. If you understood what it is that epitomises native title, it is the ability of people to have control of their own lands.”

In 2015, the council took another important fight for

its people onto the international stage. When the WA Government announced forced closures of communities in WA’s far north because of the cost of essential services, Mr Hunter addressed a United Nations forum in New York on the race-based erosion of Indigenous rights. He received support from around the world.

“Everybody has the right to have electricity and running water and good standards of water,” he said. “But for Aboriginal people, that is a right we have to fight for — despite living in a country like Australia.”

For Mr Hunter, constitutional change would be just a starting point to tackle the rights issues facing Indigenous Australians. Mr Hunter said the whole framework of Australian society needed to be rebuilt, from the Constitution through to the Native Title Act and other laws and government policies.

“If you are serious about reform, the whole of the Australian community needs to heal, not just Aboriginal people,” Mr Hunter said. “You can’t do that while you are providing the mechanism that keeps people separated. That’s got to change. Constitutional reform should guarantee us a place at the table.”

Hunter says there has been a lot of talk about righting past wrongs for Indigenous people, but not much action. “There have been different political statements made, whether it is the Apology or the acceptance of the United Nations Declaration on Indigenous issues, but there is no action behind it,” he says.

“When ‘Sorry’ happened, did they take that extra step? It’s not what you say, it’s what you do.

“Simplifying the native title process and giving proper recognition and respect for land rights — allowing Aboriginal and Torres Strait Islander people real control over their own lands — would be a good start that could bring about real change for Indigenous people.”

10. PROTECTION OF LANGUAGE AND CULTURAL RIGHTS

Aboriginal and Torres Strait Islander peoples to maintain their cultures and identities and to maximise human potential. Yet the experiences of colonisation and ongoing impacts of laws, policies and practices have had major impacts on their ability to protect, maintain and promote their cultures, identities and languages. *Australia's legislation and policies provide* limited protection of Aboriginal and Torres Strait Islander language and culture, largely through native title and cultural heritage laws.

Institutions such as the AIATSIS play an essential role in reconnecting communities with their cultures and histories. However, AIATSIS faces severe funding constraints, limiting the effectiveness of its work.

10.1 Cultural heritage laws

Calls for greater protection of cultural heritage and intellectual property rights began in the 1970s, with Aboriginal and Torres Strait Islander artists seeking recognition of their creative rights on the same level as that of other Australian artists.⁶⁹ However, there is no overarching law in Australia that protects the rights of Aboriginals or Torres Strait Islanders in relation to all aspects of their traditional cultural heritage. While cultural heritage laws in various states and territories provide some recognition and protection of Aboriginal and Torres Strait Islander cultural rights, their scope is generally limited to traditional sites and objects. In addition, the laws are often ineffective at providing adequate protection from the threats of resource extraction on traditional lands.

At the federal level, an Aboriginal or Torres Strait Islander may apply to the Environment Minister for a declaration to protect an Aboriginal area or object (including remains) that is under threat of injury or desecration. However, approximately 93% of valid applications received since 1984 have not resulted in declarations.⁷⁰ Further, compensation is not available for any damage to traditional sites or objects.

IN FOCUS: WESTERN AUSTRALIAN CULTURAL HERITAGE LAWS

The protection of Aboriginal cultural heritage in Western Australia continues to face substantial and ongoing threats. Since 2008, the WA Government has gradually reduced the protection of Aboriginal cultural heritage by reinterpreting definitions contained in the Aboriginal Heritage Act 1972. Between 2008 and 2015, 1,262 Aboriginal sites had been blocked from gaining protection⁷¹ and 3,207 existing cultural heritage sites had been downgraded or deregistered.⁷²

Proposed amendments to cultural heritage laws currently being considered by the WA Parliament would also create significantly differential treatment between Aboriginal cultural heritage sites and non-Aboriginal heritage sites. The maximum penalty for an individual illegally disturbing a non-Aboriginal heritage site will be \$1 million and two years' imprisonment, but for an Aboriginal site it will be \$100,000 and 12 months' imprisonment.⁷³

The proposed amendments would also allow developers to appeal if their applications are rejected, but make no provision for Aboriginal custodians to appeal the decision.

69 Terri Janke, *Beyond Guarding Ground: A Vision for a National Indigenous Cultural Authority* (2009), 7.

70 Identified by Arts Law as at 4 March 2013, available at http://www.artslaw.com.au/art-law/entry/australias-cultural-heritage-laws/#_edn19.

71 Tod Jones, 'Separate but unequal: the sad fate of Aboriginal heritage in Western Australia', *The Conversation*, 7 December 2015, <http://theconversation.com/separate-but-unequal-the-sad-fate-of-aboriginal-heritage-in-western-australia-51561>.

72 Aboriginal Heritage Action Alliance, 'UWA "Sitewatch" Study Highlights Mass Deregistration of Aboriginal Sites under Barnett Government since 2008' (4 July 2015), available at <https://aboriginalheritagewa.com/2015/07/04/uwa-sitewatch-study-highlights-mass-deregistration-of-aboriginal-sites-under-barnett-government-since-2008/>.

73 Aboriginal Heritage Amendment Bill 2014 (WA), available at <http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=E863020A2E318B6A48257D9D000BC478>.

10.2 Indigenous languages

Maintaining distinct languages is an essential part of being Indigenous. The preservation of Aboriginal and Torres Strait Islander languages is essential to the preservation of culture. Language is an important component of identity and fundamental to understanding values, beliefs, ideology and other intangible aspects of culture.⁷⁴

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has claimed that more than 100 languages in Australia are in danger of extinction.⁷⁵ The National Indigenous Languages Survey Report 2012 identifies that there are now only around 120 out of 250 known Aboriginal and Torres Strait Islander languages that are still spoken, and that of these only 13 are not currently considered endangered. These figures are down significantly from the previous report in 2005, which identified that 145 known languages were still spoken, and of these 18 were not considered endangered.⁷⁶

The survival of Aboriginal and Torres Strait Islander languages is challenged as a result of unintended consequences of colonisation, but also due to deliberate policies adopted by governments. Investment in programs to maintain, strengthen and protect Aboriginal and Torres Strait Islander languages, including bilingual education programs in schools, is essential to preserve Aboriginal and Torres Strait Islander peoples' languages, particularly given the valuable role that language plays in maintaining traditional knowledge and culture.

| RECOMMENDATIONS | ACTIONS |
|--------------------------------------|--|
| Protect language and cultural rights | <ul style="list-style-type: none"> The Federal Government must provide stronger legislative protection for the right of communal ownership of Aboriginal and Torres Strait Islander cultural heritage, which encompasses the full range of cultural heritage including traditional knowledge, traditional and cultural expressions (such as dance, music, song, writings and ceremonies), tangible cultural property (such as sacred sites and burial grounds) and intangible cultural property (such as oral stories). The Federal Government must introduce increased penalties for contravening cultural heritage laws, including the provision of compensation to affected Aboriginal and Torres Strait Islander community members. Institutions such as AIATSIS should be broadened and strengthened to recognise the special importance of preserving Aboriginal and Torres Strait Islander collections and the unique value of traditional knowledge and practices within Australia. Primary and secondary schools should be resourced and supported to deliver bilingual education programs and to develop appropriately skilled bilingual education teachers and aides. |

74 UN Report on the State of the World's Indigenous Peoples (2009), above n 11, 57.

75 UNESCO, Atlas of the World's Languages in Danger (2011), available at <http://www.unesco.org/new/en/culture/themes/endangered-languages/atlas-of-languages-in-danger/>.

76 Australian Institute of Aboriginal and Torres Strait Islander Studies in association with the Federation of Aboriginal and Torres Strait Islander Languages, *National Indigenous Language Survey Report 2005* (2005) page 5, available at <http://aiatsis.gov.au/publications/products/national-indigenous-languages-survey-report-2005>.

11. REFORM OF THE AUSTRALIAN CONSTITUTION

The exclusion of Aboriginal and Torres Strait Islander peoples in the broader societal structures of Australia is a legacy of our national Constitution, which continues to this day. Over many decades there have been calls for recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution. In recent years, there has been growing momentum about the need to bring the Constitution up to date to reflect the reality of Australia in the 21st century. The Australian Constitution was enacted in 1901. Our country's foundational legal document does not recognise Aboriginal and Torres Strait Islander peoples as the First Peoples, and elements of the Constitution still maintain racially discriminatory provisions.⁷⁷

11.1 Recognition of Aboriginal and Torres Strait Islander Peoples

In 2010, the Federal Government appointed an Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples (Expert Panel) to consult on options for a constitutional amendment on recognition of Aboriginal and Torres Strait Islander peoples. The Expert Panel comprised Aboriginal and Torres Strait Islander and community leaders, constitutional experts and parliamentarians and consulted extensively across the country. In its report to the Prime Minister in 2012, the Expert Panel identified high levels of support among Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians for constitutional recognition and made several recommendations.⁷⁸

"Exclusion from the framing of the nation's Constitution continued a pattern of marginalisation and systematic discrimination, the consequences of which endure today."

Report of the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, 2012

11.2 Protections against racial discrimination

Aboriginal and Torres Strait Islander peoples have long fought against racial discrimination and for equal rights. However, actions that sought to establish equal rights sometimes had perverse effects. For example, the successful 1966 equal pay case for Aboriginal pastoral workers led to many workers and their families being forced off the land and, over time, onto welfare.⁷⁹

⁷⁷ Section 25 of the *Australian Constitution* contemplates the exclusion of voters based on race, while section 51(xxiv) allows Parliament to enact racially discriminatory laws.

⁷⁸ See <http://www.recognise.org.au/about/expert-panel-report/>.

⁷⁹ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016), 1.10.

The Racial Discrimination Act 1975 (Cwlth) provides important protection from racial discrimination, but there is no protection from racial discrimination entrenched in the Australian Constitution.

One of the limitations of the Racial Discrimination Act is that it does not prevent the Federal Parliament from enacting legislation that discriminates against people on the basis of race. In fact, the "race power" in the Australian Constitution has been interpreted as allowing the enactment of legislation that is detrimental and discriminatory on the basis of race.⁸⁰ History demonstrates that Aboriginal and Torres Strait Islander peoples are particularly vulnerable to this lack of protection. The Federal Parliament has compromised the Racial Discrimination Act on three occasions, and each time it involved issues impacting on Aboriginal and Torres Strait Islander peoples: the 1998 amendments to the *Native Title Act 1993* (Cwlth) that placed restrictions on native title claims; legislation that enabled the construction of the Hindmarsh Island Bridge; and the legislation supporting the 'Northern Territory Emergency Response' intervention into Aboriginal communities in the Northern Territory in 2007.

⁸⁰ See the High Court of Australia's decision in *Kartinyeri v Commonwealth* 195 CLR 337.

IN FOCUS: NORTHERN TERRITORY EMERGENCY RESPONSE

In June 2007, the Northern Territory Government released a report on the protection of children from sexual abuse in Indigenous communities, entitled *Little Children Are Sacred*, which detailed the “extent, nature and factors contributing to sexual abuse of Aboriginal children” and the obstacles and challenges associated with effective child protection mechanisms. The *Little Children Are Sacred* report called for a radical change in the way government consults, engages with and supports Aboriginal people, with an emphasis on “immediate and ongoing effective dialogue with Aboriginal people with genuine consultation in designing initiatives that address child sexual abuse.” Previous approaches, the report found, had left Aboriginal people “disempowered, confused, overwhelmed, and disillusioned”.⁸¹

In response, the Federal Government announced a national emergency intervention and assumed greater responsibility over Aboriginal communities in the Northern Territory. The response has been the subject of much controversy, particularly the suspension of the operation of the Racial Discrimination Act. A range of draconian measures were introduced that applied only to Aboriginal communities, including:

- compulsory acquisition of Aboriginal land;
- “quarantining” of social security payments;
- banning alcohol;
- deployment of military and police in traditional lands;
- powers given to the Federal Government to take over representative community councils; and
- abolition of Community Development Employment Projects.

There was very little relationship between the recommendations in the *Little Children Are Sacred* report and the Intervention measures.⁸² The legislation was passed without consultation with Aboriginal representatives and affected communities. The Northern Territory Emergency Response raised (and continues to raise) serious concerns in relation to racial discrimination, self-determination and a number of other specific human rights.

Calls for the inclusion of some form of constitutional protection against racial discrimination go as far back as the debates during the constitutional conventions in the 1890s.⁸³ In 1966, Liberal politician William Wentworth introduced a Private Member’s Bill that, among other provisions, proposed a new racial discrimination provision be included in the Australian Constitution.⁸⁴

Following the High Court’s decision in *Mabo*, Noel Pearson spoke of the need for constitutional change given the limitations of the Racial Discrimination Act.⁸⁵ In recent decades, there has been a growing number of calls for constitutional protection against racial discrimination, including recommendations by the Constitutional Commission in 1998⁸⁶ and the Council for Aboriginal Reconciliation in 2000.⁸⁷

Most recently, and significantly, the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution identified that submissions to the panel overwhelmingly supported a racial non-discrimination provision and argued in favour of the principle of racial equality. The Expert Panel concluded that “recognition of Aboriginal and Torres Strait Islander peoples will be incomplete without a constitutional prohibition of laws that discriminate on the basis of race”.⁸⁸

Without strong and effective protections against racial discrimination embedded in the Australian Constitution, the right to equality and freedom from racial non-discrimination remains vulnerable to the vagaries of politics.

| RECOMMENDATIONS | ACTIONS |
|------------------------------------|--|
| Reform the Australian Constitution | <ul style="list-style-type: none"> • The Federal Government should take appropriate steps to implement the recommendations made by the Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples. |

83 See Report of the Expert Panel, above n 78, 158.

84 The Bill passed both Houses of Parliament but ultimately lapsed and did not go to referendum. See Report of the Expert Panel, *ibid*, 30.

85 Noel Pearson, ‘Racism: The Current Australian Experience’ (1995) 8 *Without Prejudice* 10.

86 Constitutional Commission, *Final Report of the Constitutional Commission* (1998), at [10.372].

87 Council for Aboriginal Reconciliation, *Reconciliation: Australia’s Challenge—Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000).

88 Report of the Expert Panel, above n 78, 167.

81 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle – ‘Little Children are Sacred’ Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

82 For a detailed analysis, see Alison Vivian and Ben Schokman, ‘The Northern Territory Intervention and the Fabrication of “Special Measures”’ (2009) 13(1) *Australian Indigenous Law Review* 78.

12. ONGOING LEGACIES OF PAST WRONGS

12.1 Racial discrimination since colonisation

Aboriginal and Torres Strait Islander peoples have been subjected to racial discrimination resulting in disadvantage and inequality since colonisation.⁸⁹ In many instances the discriminatory treatment of Aboriginal and Torres Strait Islander peoples has been enabled by legislation, such as the Aboriginal Protection Acts which began in the 1890s and operated in some states until the 1970s. During this time, it is estimated that at least 100,000 Aboriginal and Torres Strait Islander children were forcibly removed.⁹⁰

One positive development has been the formal parliamentary “Apology” issued in 2008 to the “Stolen Generations” — Aboriginal and Torres Strait Islander children who were forcibly removed from their families under official government policies. The formal Apology was a long-awaited gesture towards reconciliation, however, much remains to be done to work towards meaningful reconciliation. Despite the Apology, significant issues remain within the child protection system due to ongoing and embedded discrimination. Since the release of the Bringing Them Home report in 1997, the number of Aboriginal and Torres Strait Islander children being removed from their families has almost doubled.⁹¹

IN FOCUS: CHILD REMOVAL

Despite numerous legal and policy frameworks protecting the rights of Aboriginal and Torres Strait Islander children, the number of Aboriginal and Torres Strait Islander children removed from their homes is almost 10 times that of other children and continues to increase. When the Bringing Them Home report was released in 1997, Australians were shocked to learn that Aboriginal and Torres Strait Islander children represented one in every five children living in out-of-home care. Nearly 20 years later, they represent one in every three.

The Family Matters campaign was launched in 2016 to break the cycle of Aboriginal and Torres Strait Islander child removal. The campaign’s Family Matters Roadmap details the policy and practice changes needed to improve the safety and wellbeing of Aboriginal and Torres Strait Islander children.⁹²

In 2015, the National Sorry Day Committee undertook detailed research to develop a “Scorecard Report” on the implementation of the recommendations of the Bringing Them Home report. The report found that there has never been a national strategy or comprehensive framework for monitoring and evaluating the implementation of the recommendations, that only partial steps had been taken toward reparations and that the “set of 54 recommendations remains as relevant today as it was in 1997”.⁹³

The issue of “stolen wages” is another past wrong, a term used to refer to the wages of Aboriginal and Torres Strait Islander peoples whose paid labour was controlled by the Government under the Aboriginal Protection Acts. The issues of “stolen wages” received detailed consideration and a number of recommendations in the Senate Standing Committee on Legal and Constitutional Affairs’ 2006 report, *Unfinished Business: Indigenous Stolen Wages*.⁹⁴

Despite recommendations from various parliamentary inquiries, no comprehensive national compensation scheme exists for the survivors of the Stolen Generations or for victims of stolen wages.

89 Australian Human Rights Commission, Implementation of the United Nations Declaration on the Rights of Indigenous Peoples – Declaration Dialogue Series – Discussion Paper 5: Equality and non-discrimination (2013), 10.

90 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* (1997), available at <https://www.humanrights.gov.au/publications/bringing-them-home-report-1997>.

91 See Australian Institute of Health and Welfare, *Child protection Australia 2014-15* (2016), discussed extensively in The Family Matters Report, available at http://www.familymatters.org.au/wp-content/uploads/2016/12/Family_Matters_Report_2016.pdf.

92 See <http://www.familymatters.org.au/>.

93 National Sorry Day Committee, *Bringing them home: Scorecard Report 2015*, 6.

94 Available at Senate Standing Committee on Legal and Constitutional Affairs’ 2006 report, *Unfinished Business: Indigenous Stolen Wages*.

12.2 Experiences of racism

Racial vilification and discrimination can cause serious harm, and for Aboriginal and Torres Strait Islander peoples compounds the impacts of colonisation and past laws and government policies. A survey of Aboriginal and Torres Strait Islander peoples in Victoria, for example, found that 97% had experienced racism within the last year.⁹⁵

Oxfam with many other civil society groups have spoken out strongly against proposed changes to Section 18C of the Racial Discrimination Act, which makes it unlawful to commit a public act that is reasonably likely to offend, insult, humiliate or intimidate another person or a group of people based on their race. Section 18D provides a number of broad ranging exemptions, such as for artistic work or in making fair comment. Both provisions have operated well for 20 years, however current concerted efforts to weaken protections contained in the Racial Discrimination Act against racist hate speech are a worrying trend. The Racial Discrimination Act provisions in their current form should be retained to ensure strong and effective protections against racial vilification.

| RECOMMENDATIONS | ACTIONS |
|--|---|
| Right past wrongs and retain present protections against racial vilification | <ul style="list-style-type: none"> The Federal Government should establish a national scheme to provide comprehensive reparations, including compensation, to the Stolen Generations. The Federal Government, in consultation with Aboriginal and Torres Strait Islander peoples, audit and implement the recommendations contained in the Australian Human Rights Commission's <i>Bringing Them Home</i> report on the forcible removal of children. The Federal Government, in consultation with Aboriginal and Torres Strait Islander peoples, reviews and implements the recommendations contained in the <i>Unfinished Business: Indigenous Stolen Wages</i> report, including to establish a national compensation scheme. The Racial Discrimination Act should be retained in its current form to ensure strong and effective protections against racial vilification. |

12.3 Case study: Lake Tyers Health and Children's Service

Suzie Squires can remember only one member of the Lake Tyers Aboriginal community graduating from Year 12 in the past 17 years. In fact, most young people don't go to school much beyond the primary-level classes held within the community on Gunai/Kurnai country in Victoria's Gippsland region.

Ms Squires said while the primary school was on community land, the high school was a 25-minute bus ride away at Lakes Entrance, where Aboriginal teenagers are a minority and face bullying and racism. Most find it too difficult to deal with and drop out.

This year, there are an unprecedented four teenagers from the community in high school. It is breaking new ground and Ms Squires is hopeful the students will go the distance.

Ms Squires is Chief Executive Officer of the Lake Tyers Health and Children's Service, which sits at the heart of life in the 150-member strong community. She and her staff see encouraging and helping Lake Tyers' youth get an education as one of their key roles.

For a decade, a breakfast program made sure primary school children started the day with a nutritious meal. When further funding was knocked back by the Federal Government at the start of the 2016 school year, it affected up to 22 kindergarten and primary school children. Ms Squires and her 21 staff have kept the program going with funds from other areas and the help of donations. But this could be the last term. And it is not the only service to be hit.

An after-hours transport service to drive community members for medical help when the clinic is closed was axed when ongoing federal funding was refused. A drug and alcohol program also had its funding cut. And a social and emotional wellbeing program, now funded by the state, has been pulled back from five days to three.

In other areas, there have been wins. This year, the Lake Tyers Health and Children's Service will get \$500,000 from the Federal Government to expand a building that it has outgrown. While this is a positive, it comes in the context of funding being taken from for other crucial services — services that are often inter-related in ensuring the wellbeing of community members.

⁹⁵ VicHealth, *Mental health impacts of racial discrimination in Victorian Aboriginal communities* (2012), 2, available at <https://www.vichealth.vic.gov.au/media-and-resources/publications/mental-health-impacts-of-racial-discrimination-in-victorian-aboriginal-communities>.

Ms Squires said Lake Tyers', or Bung Yarda's, problems could not be separated from its past. The community's history stretches back to the 1860s when it became home to Aboriginal people from all over Victoria who had been forcibly removed from their homelands.

"Because we are in a closed community there is a lot of trans-generational trauma, a lot of drug and alcohol issues, dysfunctional issues, previous history and things," she said.

Ms Squires said relationships with the Victorian Government had improved, but dealing with the Federal Government had become increasingly difficult since an intermediary, Primary Health Networks, had been introduced.

"I think the old way they used to have it where we could actually contact someone in the office was better," Ms Squires said.

"Now it's like 'Oh no we just hold the contract'. So, you have trouble getting that contact and relationship happening with the Federal Government now."

Short-term and sometimes erratic funding also made it impossible to set long-term goals and keep staff, and the service did not have a say in which areas needed funding the most in the community.

"East Gippsland alone — there are really high rates of Aboriginal people who live here, a high rate of unemployment, a high rate of child protection issues — we're right up there in the whole country," Ms Squires said. "But on a national level Victoria seems to be of a less priority for Government."

Ms Squires said that until grassroots programs like those at Lake Tyers are taken seriously, these programs, which are working to tackle disadvantage so deeply rooted in history, will continue to be denied the chance to reach their potential.

ANNEX 1: SNAPSHOT OF MAJOR REPORTS ON INDIGENOUS RIGHTS

There are numerous reports over recent decades into issues impacting on Aboriginal and Torres Strait Islander peoples that contain detailed recommendations for change. However, many of these recommendations have been largely ignored by successive Australian governments. Below is a snapshot of some of the major national reports that line government bookshelves.

| | |
|------|--|
| 1991 | The final report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which investigated 99 deaths of Aboriginal people in custody over nine years, was released. It found that the disproportionate rate at which Aboriginal people were arrested was the major and most immediate cause of these deaths and revealed a history of racism and state control of Indigenous communities. It made 339 recommendations. |
| 1993 | The Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) began preparing annual social justice and native title reports. In the first <i>Social Justice Report</i> in 1993, Social Justice Commissioner Mick Dodson emphasised a rights-based approach to achieving social justice: “The recognition that social justice is about the enjoyment and exercise of human rights establishes a framework in which indigenous peoples cannot be regarded as the passive recipients of government largess but must be seen as active participants in the formulation of policies and the delivery of programs.” ⁹⁶ |
| 1997 | The Human Rights and Equal Opportunity Commission’s <i>Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families</i> was tabled. It was more commonly referred to as the <i>Bringing Them Home</i> report. Attorney-General Daryl Williams ruled out payment of compensation to members of the Stolen Generation on the grounds that it would be inappropriate and divisive. In December, Minister Herron announced Government initiatives in response to the <i>Bringing Them Home</i> report. They included access to records, additional funding for link-up services and counselling, funding for family support and parenting programs and an oral history project. They fell short, however, of the report’s recommendations. For example, there was no provision for reparations or compensation and no apology. |
| 2000 | The Council for Aboriginal Reconciliation presented <i>Reconciliation: Australia’s Challenge – Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament</i> , an aspirational statement that the Council hoped would be embraced by all Australians, and <i>Roadmap for Reconciliation</i> , containing four strategies proposing practical and symbolic actions to make reconciliation a reality. |
| 2000 | The Senate Committee for Legal and Constitutional Affairs tabled its report <i>Healing: A legacy of generations</i> and made 10 recommendations. The key recommendations concentrated on the issue of reporting and monitoring of responses to the <i>Bringing Them Home</i> report and the establishment of a reparations tribunal. |
| 2003 | The Senate’s Legal and Constitutional References Committee reported on progress towards reconciliation. In <i>Reconciliation: Off track</i> , it reported that there had been progress towards reconciliation at all levels of government but expressed concern on slow progress in setting appropriate targets, benchmarks and evaluation mechanisms and that progress towards reconciliation in a broader sense had stalled: “There is a sense that momentum is being lost. People are becoming disheartened and reconciliation is slipping off the national agenda”. The majority report criticised the limited nature of the Federal Government’s “practical reconciliation” policy. |
| 2003 | The Productivity Commission began producing bi-annual “overcoming Indigenous disadvantage” reports. The reports are comprehensive report cards that measure where things have improved (or not) against 52 indicators across a range of areas including governance, leadership and culture, early childhood, education, health, home and safe and supportive communities, and include case studies on things that work to improve outcomes. ⁹⁷ |
| 2004 | House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs completed its report <i>Many ways forward: Report of the inquiry into capacity building and service delivery in Indigenous communities</i> . ⁹⁸ |

96 *Social Justice Report* 1993, available at <http://www.austlii.edu.au/au/other/indigLRes/1993/3.html>.

97 See <http://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2016>.

98 Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/indigenouscommunities/report.

| | |
|------|---|
| 2005 | Australia appeared before the UN Committee for the Elimination of Racial Discrimination, which expressed concern about the abolition of ATSIC, the lack of genuine progress in native title, the continuing over-representation of Indigenous Australians in prisons and the extreme inequities between Indigenous Australians and others in the areas of employment, housing, health, education and income. |
| 2008 | The Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Stolen Generation Compensation Bill 2008 received 85 submissions. Its report recognised that most of these submissions expressed support for monetary compensation, presented models for effecting it and recommended that “the Commonwealth should engage with state and territory governments, through COAG, to establish a cooperatively funded national scheme” even though this had been explicitly ruled out by the Rudd government. |
| 2008 | Annual reports are prepared by the Prime Minister and presented to the Federal Parliament on progress in Closing the Gap. The Productivity Commission also begins preparing an annual report on the National Indigenous Reform Agreement, which provides an independent assessment of progress towards COAG’s Closing the Gap targets. ⁹⁹ |
| 2012 | The Expert Panel on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples undertakes a detailed consultation and provides a report that identifies very high levels of support among Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians for constitutional recognition. The report makes a number of recommendations regarding recognition and equality for Aboriginal and Torres Strait Islander peoples in the Australian Constitution. |

⁹⁹ Available at <http://www.pc.gov.au/research/supporting/national-agreements/indigenous-reform>.

ANNEX 2: ANALYSIS OF GOVERNMENT SPENDING ON INDIGENOUS PROGRAMS

This paper is the result of a request from Oxfam for information about the impact of changes made by the Abbott / Turnbull governments in the organisation, management and funding of Indigenous programs.

These are issues I have been assessing over almost a decade; my analyses of federal budgets and Close the Gap initiatives are publicly available on the University of Sydney e-scholarship website.¹⁰⁰ Like most academics and policy people, I have access only to data that is publicly available and it is a recurrent theme of my annual budget analyses that this data, along with information about and evaluations of programs and activities, is less and less accessible. Too much information that is routinely collected is

not relevant and there is little or no effort within government to use this information to learn about meaningful outcomes and wise investments.

This paper focuses particularly on funding provided to and through the Indigenous Advancement Strategy and the Indigenous Australians' Health Program since the 2014–15 budget. It represents my best efforts at clarifying the current situation. The opinions expressed are mine and I accept full responsibility for any inadvertent errors.

I am proud to have my work associated with that of Oxfam.

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Introduction

As part of the Machinery of Government changes that followed the election of the Abbott government in September 2013, responsibility for most Indigenous-specific policies and programs (around 150 in all) was consolidated into the Department of the Prime Minister and Cabinet (PM&C). This transfer of responsibilities to a single department provided a unique opportunity for developing a whole-of-government approach to addressing Indigenous disadvantage and streamlined consultation, cooperation and engagement with Aboriginal and Torres Strait Islander communities and organisations. The then Prime Minister Tony Abbott declared that he would be the first to lead serious change in Indigenous Affairs.

More than three years have passed, and all the evidence points to the failure of this approach from its inception. There has been none of the needed holistic approach to Indigenous policy and programs, which are as fragmented as ever. There have been significant failings around Closing the Gap on Indigenous disadvantage (the 2017 Prime Minister's report acknowledges that efforts to reduce Indigenous disadvantage are "starkly inadequate"¹⁰¹) and in addressing the disproportionately high Indigenous incarceration rates and discriminatory outcomes in the justice system. Too many Aboriginal and Torres Strait Islander peoples have low levels of education, are unable to gain meaningful employment and live in appalling housing conditions. Progress towards social justice and constitutional recognition is painfully slow. Despite the need and the promises, specific Commonwealth funding for Indigenous Affairs is in decline.

These issues will not be resolved by simply applying more funds to them, although it is increasingly difficult to do more with less. What is needed is more Indigenous control and decision-making and a real focus on what works and doesn't work and why. Aboriginal and Torres Strait Islander groups and spokespeople have called the government on the absence of real engagement and consultation — something which has long been recognised as the key to failure or success in Indigenous Affairs.

Many Aboriginal and Torres Strait Islander organisations in urban, rural and remote areas are successfully managing a broad range of programs and services for their communities. We must learn from their experience and expertise, and be as willing to accept their timeframes for outcomes, their need to be unencumbered by red tape, their requirements for capacity building and their failures as we are for mainstream programs and services.

100 Lesley Russell, University of Sydney e-scholarship repository, <https://ses.library.usyd.edu.au/browse?type=author&value=Russell%2C+Lesley>.

101 S Fitzpatrick, 'Closing the Gap failure a political disaster for all, says Kevin Rudd', *The Australian*, 14 February 2017, <http://www.theaustralian.com.au/national-affairs/indigenous/closing-the-gap-failure-a-political-disaster-for-all-says-kevin-rudd/news-story/dea4fd0ec47e581ae03006a627f898cd>.

The PM&C website has a statement that “Indigenous Affairs remains a national priority for the Australian Government”.¹⁰² It is time to put these words into action; to rigorously assess the implications of commissioned reports and reviews, to capitalise on the restructure and realignment of Indigenous programs, to develop promised new policies and to roll them out. All that has been done to date is to shift responsibility for programs to a new department, rebrand them, and for the most part, deliver less funding. Indigenous policy is a policy-free zone, where ad hoc decisions are the norm, budgets continue to be constrained in ways that limit the effectiveness and reach of programs and services, little evaluation is undertaken, and there is a growing lack of transparency about policy and funding decisions.

Indigenous Advancement Strategy

In May 2014, the Australian Government announced the Indigenous Advancement Strategy (IAS) as a significant reform in the administration and delivery of services and programs for Indigenous Australians.¹⁰³ Under the IAS the 150 programs and activities transferred to PM&C were consolidated into five broad categories under Outcome 2 of the department. While there are lists of which programs and activities were transferred to PM&C¹⁰⁴ and which stayed with other departments,¹⁰⁵ no rationale was provided for these decisions. Moreover, there does not appear to be any description or list of how existing programs and activities were allocated among the five new categories.

There was little or no consultation with Indigenous advisory bodies and experts on these changes and the accompanying financial implications.¹⁰⁶ This led to considerable anger and confusion, a situation that was aggravated because PM&C did not meet its commitments with respect to providing advice on all the elements identified as necessary for the implementation of the IAS and did not have a consistent engagement plan and mechanism for engaging more broadly with service providers

and the community around the new tendering processes.¹⁰⁷

The Government has stated that a first step after the establishment of the IAS was to review current Indigenous programs and has indicated that “analysis of each programme and activity showed that, even within a single programme, there was often limited coordination between individual activities and varying administrative and delivery arrangements”.¹⁰⁸ However, none of this work has been made public.

Federal funding for Indigenous Affairs

The Indigenous-specific funding managed by PM&C is allocated through the IAS and National Partnership Agreements (NPAs), Special Accounts and Special Appropriations. Other grant funding is available through Indigenous-specific and mainstream programs delivered by other departments, as well as PM&C Indigenous Portfolio bodies.

The 2014–15 budget cut \$534 million from Indigenous programs in the name of “rationalisation”. This included \$409 million from programs within PM&C and \$122 million from programs within the Department of Health (DoH).¹⁰⁹ The two subsequent budgets have done nothing to reverse this situation: the 2015–16 budget cut more than \$145 million from Indigenous programs and services in 2015–16, including \$46 million from Indigenous health;¹¹⁰ the 2016–17 budget had new spending of just \$60.7 million over four years on programs specifically for Aboriginal and Torres Strait Islander peoples.

There were also several examples where new program funding was provided at the expense of other needed programs. The most egregious examples are the use of \$11.5 million from Indigenous Safety and Wellbeing programs to reverse funding cuts to the Indigenous Legal Assistance Program in 2015–16 and in 2016–17 a further \$32.2 million from this category was provided to mainstream initiatives to address violence against women and children as part of the National Plan to Reduce Violence Against Women and Their Children 2010–2022.¹¹¹

102 Department of Prime Minister and Cabinet, Indigenous Affairs, <http://www.dpmc.gov.au/indigenous-affairs>.

103 Department of Prime Minister and Cabinet, Indigenous Advancement Strategy, <http://www.indigenous.gov.au/indigenous-advancement-strategy>.

104 Department of Prime Minister and Cabinet, Submission to Senate Inquiry into Commonwealth Indigenous Advancement Strategy tendering process, 2015, see Appendix A, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Submissions.

105 Parliament of Australia, Indigenous Affairs: a quick guide to key internet links, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/06/IndigenousAffairs#_Australian_Government_Departments.

106 Australian National Audit Office, Indigenous Advancement Strategy, Report 35 2016–2017, <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>.

107 Senate Finance and Public Administration References Committee, Commonwealth Indigenous Advancement Strategy tendering processes, Report, March 2016, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Report.

108 Department of Prime Minister and Cabinet, Submission to Senate inquiry into Commonwealth Indigenous Advancement Strategy tendering processes, February 2015, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous.

109 Lesley Russell, *Impact of the 2014–15 Federal Budget on Indigenous Programs and Services*, <https://ses.library.usyd.edu.au/bitstream/2123/11442/1/2014-15IndigenousProvisions.pdf>.

110 Lesley Russell, *Indigenous Provisions in the 2015–16 Budget*, <https://ses.library.usyd.edu.au/handle/2123/13476>.

111 See Lesley Russell, 2015–16 and 2016–17 budget analyses, <https://ses.library.usyd.edu.au/browse?type=author&value=Russell%2C+Lesley>.

Table 1. Budget allocations of Indigenous funding within the Department of Prime Minister and Cabinet by category 2014-15 to 2019-20

| | 2014-15 EST ACTUAL \$M | 2015-16 EST ACTUAL \$M | 2016-17 BUDGET \$M | 2017-18 FORW EST \$M | 2018-19 FORW EST \$M | 2019-20 FORW EST \$M |
|-----------------------------|---------------------------|---------------------------|-----------------------|-------------------------|-------------------------|-------------------------|
| Jobs, Land, Economy | 773.1 | 911.2 | 927.3 | 882.3 | 855.0 | 891.8 |
| Children & Schooling | 292.4 | 285.9 | 286.9 | 288.7 | 289.1 | 295.8 |
| Safety & Wellbeing | 241.3 | 286.5 | 293.7 | 294.9 | 274.8 | 308.6 |
| Culture & Capability | 49.2 | 63.3 | 54.9 | 48.8 | 48.8 | 50.3 |
| Remote Australia Strategies | 83.2 | 94.2 | 92.7 | 90.9 | 88.9 | 90.8 |
| Program Support | 311.2 | 281.5 | 279.8 | 277.5 | 282.2 | 281.1 |
| Total | 1750.4 | 1922.7 | 1935.3 | 1883.1 | 1838.8 | 1918.5 |

Funding via Prime Minister and Cabinet

The total Indigenous-specific budget managed by PM&C is \$8.6 billion over four years to June 2019 — this includes \$4.9 billion for the IAS and \$3.7 billion in NPAs, Special Accounts and Special Appropriations.¹¹² A further \$2.4 billion over three years to June 2018 has been provided to DoH for the Indigenous Australians' Health Policy (IAHP).

Funding for PM&C Indigenous programs has been allocated as shown in Table 1 (this shows how the \$8.6 billion was spent in 2015-16 and has been allocated over the years 2016-17 to 2018-19). The 2016-17 Budget indicates funding levels out to 2019-20 with a small increase in the final year, perhaps as a consequence of the lifting of the current freeze on indexation which some programs are subject to and / or the renewal of some expiring NPAs. Regrettably it is not possible to compare current spending with spending prior to 2014-15 for these categories.

There does not appear to be a 2016-17 version of how the \$4.9 billion provided for the IAS has been allocated and spent. Table 2 is taken from the PM&C submission to the February 2015 Senate inquiry into IAS tendering.¹¹³ Although now dated, it is interesting and useful because it highlights that in any given year only 50-60% of funds were uncommitted and therefore available for new and needed spending. This is consistent with evidence to the Senate IAS inquiry which heard that "about half" of the total

funding available was allocated to existing programs before the first grant application round opened.

Elsewhere in this report, there is an effort to look at what can be learnt about how these funds were / are being spent.

The other major source of funding for Indigenous programs for PM&C comes from NPAs with the states and territories (see Table 3).

Funding via Department of Health

This issue is dealt with in a separate, following section.

112 Department of Prime Minister and Cabinet, Funding under the IAS, <https://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/funding-under-ias>.

113 Department of Prime Minister and Cabinet, Submission to Senate Inquiry into Commonwealth Indigenous Advancement Strategy tendering process, 2015, See Appendix A, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Submissions

Table 2. Budget allocation of Indigenous Advancement Strategy funding 2014–2015 to 2017–18

| | | 2014-15 \$M | 2015-16 \$M | 2016-17 \$M | 2017-18 \$M | TOTAL \$M |
|--------------------------------|-------------|----------------|----------------|----------------|----------------|--------------|
| Jobs, Land, Economy | Committed | 513 | 491 | 480 | 466 | 1949 |
| | Uncommitted | 52 | 122 | 187 | 185 | 546 |
| | Total | 565 | 613 | 667 | 651 | 2495 |
| Children & Schooling | Committed | 210 | 84 | 63 | 62 | 419 |
| | Uncommitted | 22 | 140 | 162 | 163 | 487 |
| | Total | 231 | 224 | 225 | 226 | 906 |
| Safety & Wellbeing | Committed | 242 | 44 | 26 | 21 | 333 |
| | Uncommitted | 11 | 218 | 242 | 258 | 729 |
| | Total | 253 | 263 | 268 | 279 | 1062 |
| Culture & Capability | Committed | 48 | 16 | 8 | 8 | 79 |
| | Uncommitted | 1 | 36 | 44 | 41 | 122 |
| | Total | 49 | 52 | 52 | 49 | 202 |
| Remote Australia Strategies | Committed | 77 | 18 | 11 | 8 | 114 |
| | Uncommitted | 18 | 31 | 38 | 45 | 132 |
| | Total | 95 | 49 | 50 | 52 | 247 |
| Total | Committed | 1090 | 652 | 588 | 564 | 2894 |
| | Uncommitted | 103 | 548 | 673 | 692 | 2017 |
| | Total | 1193 | 1201 | 1261 | 1256 | 4911 |

From PM&C submission to Senate inquiry February 2015

Table 3. Funding for Indigenous programs provided through National Partnership Agreements

| | 2015-16 \$M | 2016-17 \$M | 2017-18 \$M | 2018-19 \$M | 2019-20 \$M |
|---|----------------|----------------|----------------|----------------|----------------|
| NP on NT Remote Aboriginal Investment | 337.9 | 169.1 | 166.9 | 103.4 | 94.4 |
| NP on Indigenous Health* | 10.8 | 11.5 | 1.1 | 1.1 | 1.1 |
| NP on Torres Strait health protection strategy – mosquito control | 1.0 | 1.0 | 1.0 | 1.0 | 1.0 |
| NP on Torres Strait / PNG cross border health issues | 4.6 | 4.7 | 4.7 | 4.8 | 4.9 |
| NP on Remote Indigenous Housing | 388.3 | 428.5 | 345.7 | - | - |
| Total | 742.6 | 614.8 | 519.4 | 110.3 | 101.4 |

**does not include health component of NP on Remote Aboriginal Investment, which is with DoH
From 2016–17 Budget Paper No 3*

Transition issues 2014–15

The report from the Australian National Audit Office (ANAO), released in February 2017, highlights a series of early problems with the design and implementation of the IAS.¹¹⁴ The extent to which these issues have now been addressed is not clear. Obvious problems within PM&C caused by an ambitious timeline were identified in early June 2014. Key tasks, including the determination of the final budget amounts available for 2014–15 and 2015–16, were not completed and this affected the ability to build a funding profile and determine priorities.

The failure to consult with the Indigenous sector and to outline the new grant funding processes in a timely fashion meant that the transitional arrangements that PM&C put in place for 2014–15 generated considerable uncertainty and confusion for both grant holders and potential applicants for grants and made unexpected in-roads into the IAS budget. Ahead of the implementation of new, competitive tendering processes, some contracts were simply extended for a limited time at reduced funding levels, although this was not done until a month before the expected expiration date of the original contracts. The total cost of these extensions was \$130 million.¹¹⁵

The Senate Inquiry into the IAS tendering process learned that ongoing commitments over the forward estimates also acted to limit the funding available for new programs.¹¹⁶ The information provided to the Senate committee by PM&C on 28 February 2015 is detailed in Table 2.

There is a strong view that the move to competitive funding arrangements disadvantages smaller, Aboriginal and Torres Strait Islander community controlled organisations against larger, well-resourced applicants and at the same time fails to recognise the benefits Indigenous-led organisations offer — not just in terms of cultural safety, but also in terms of Indigenous employment rates and community responsibility.

There is some evidence that potentially eligible Aboriginal and Torres Strait Islander organisations were deterred from applying for grants in 2014–15 and this has led to concerns about the percentage of funding that has gone to Indigenous organisations. The Minister for Indigenous Affairs reported to

the Senate inquiry that in 2015, 46% of funded organisations were Indigenous and 55% of IAS funding went to Indigenous organisations. He did not commit to improving these numbers.

In April 2015, following the announcement of the initial IAS funding round outcomes, the National Aboriginal Community Controlled Organisation (NACCHO) looked at the implications of the new funding model for its member organisations.¹¹⁷ It was determined that funding for Aboriginal Community Controlled Health Services (ACCHSs) had been reduced by approximately \$112,884 in the 2014–15 financial year. Many services did not apply due to the confusing templates and miscommunications from DoH — 50% of the 94 services NACCHO surveyed did not apply for funding. NACCHO calculated a reduction of IAS funding allocations of \$1.2 million overall to essential frontline services including for services for Social Emotional Wellbeing, Alcohol and Drugs, “Bringing Them Home”, Men’s Health, Youth and Early Years.

Organisations like NACCHO have not seen many of the espoused benefits of the IAS as some Indigenous programs remain with DoH and so they must negotiate the grants processes with both PM&C and DoH.

Mainstream services

There is every indication that the Government is increasingly looking to mainstream services and programs to meet Aboriginal and Torres Strait Islander peoples’ needs, especially in non-remote areas, despite the fact that these are often lacking in cultural competency and safety. This approach is also seen in the ability of non-Indigenous organisations and individuals to compete in competitive tendering under the IAS to provide services to Indigenous Australians.

The 2014 *Indigenous Expenditure Report* from the Productivity Commission¹¹⁸ found that mainstream services (from both federal and state and territory governments) accounted for \$24.7 billion (81.4%) of direct Indigenous expenditure in 2012–13 (a real increase of 26.0% from 2008–09) with the remaining \$5.6 billion (18.6%) provided through Indigenous-specific services (a real decrease of 1.2% from 2008–09). Further information is provided in Table 4.

114 Australian National Audit Office, *Performance Audit Indigenous Advancement Strategy*, Report No 35, 2016–2017, February 2017, <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>.

115 Department of Prime Minister and Cabinet, *Submission to Senate Inquiry into Commonwealth Indigenous Advancement Strategy tendering process*, 2015, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Submissions.

116 Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy tendering processes*, Report, March 2016, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Commonwealth_Indigenous/Report.

117 NACCHO, 2015–16 Federal Budget: Indigenous Advancement Strategy (IAS) funding implications, <https://nacchocommunique.com/2015/05/20/naccho-2015-16-federal-budget-indigenous-advancement-strategy-ias-funding-implications/>.

118 Productivity Commission, *Indigenous Expenditure Report*, 2014, <http://www.pc.gov.au/research/ongoing/indigenous-expenditure-report/indigenous-expenditure-report-2014/indigenous-expenditure-report-2014.pdf>.

Table 4. Indigenous expenditure by Australian governments 2012–2013

| COAG CATEGORIES | GOVERNMENT | MAINSTREAM \$M | SPECIFIC \$M | TOTAL DIRECT \$M |
|---|------------|----------------|--------------|------------------|
| Early childhood support Education & training | Aus | | | 913 |
| | S&T | | | 3595 |
| | Total | 3477 | 1035 | 4508 |
| Healthy Lives | Aus | | | 2397 |
| | S&T | | | 3893 |
| | Total | 4828 | 1462 | 6290 |
| Economic participation | Aus | | | 5412 |
| | S&T | | | 107 |
| | Total | 4967 | 552 | 5519 |
| Home environment | Aus | | | 773 |
| | S&T | | | 2133 |
| | Total | 1857 | 1049 | 2906 |
| Safe and supportive communities | Aus | | | 2399 |
| | S&T | | | 5605 |
| | Total | 6580 | 1424 | 8004 |
| Other government services | Aus | | | 2239 |
| | S&T | | | 873 |
| | Total | 3000 | 112 | 3112 |
| Total | Aus | | | 14134 |
| | S&T | | | 16207 |
| | Total | 24707 | 5634 | 30341 |

From 2014 Productivity Commission report Tables 3&4

IAS and other Indigenous grant funding: where did the money go?

Definitive and detailed tracking of how IAS and other Indigenous funds that are provided as competitive grants are distributed and spent is increasingly difficult. This section of the PM&C website has not been updated since 23 August 2016.¹¹⁹ It has the following information:

1. IAS Guidelines, funding agreement and application forms.¹²⁰ The department released new guidelines in March 2016, which consolidated the funding mechanisms into three options. The department can:

- Invite applications through an open grant process or targeted grant process where it has identified a need to address specific outcomes on a national, regional or local basis;
- Approach an organisation where an unmet need is identified; or
- Respond to community-led proposals for support related to an emerging community need or opportunity.

It is not possible to definitively identify which grants were funded by which mechanism. This does seem to leave open the possibility of Minister/s and PM&C using IAS funds to replace other funding sources (robbing Peter to pay Paul), and making funding decisions that may not be a priority and may not have been subject to appropriate vetting.

¹¹⁹ Department of Prime Minister and Cabinet, Indigenous Affairs, Grants and Funding, <http://www.dpmc.gov.au/indigenous-affairs/grants-and-funding> (as at 13 February 2017).

¹²⁰ Department of Prime Minister and Cabinet, Indigenous Affairs, Funding under IAS, <http://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/funding-under-ias>.

2. A section headed "IAS Grant Reporting (excluding IAS 2014 Grant Round)"¹²¹ has information about a large number of projects that are/were funded before 1 July 2014 and since 27 May 2015. It is not clear why these two categories are combined. In total there are 4,944 grants in the Jobs, Land, Economy category, 1,252 grants in the Children and Schools category, 443 grants in the Safety and Wellbeing category, and 1,273 grants in the Culture and Capability category. Information provided for each grant indicates the recipient, the title of the grant, the funding level, the date the grant was approved and the term of the grant. It is important to note that a significant proportion of these grants have now ended. In the Jobs, Land, Economy category, many grants were for \$7,150 for five to six months to non-Indigenous contractors for wage subsidies for Indigenous employees. In the Children and Schooling and Safety and Wellbeing categories, there was a greater likelihood that larger amounts of funding for longer periods went to Indigenous organisations. A number of the larger grants went to universities and state governments.
3. There is a list of organisations recommended for funding under the IAS 4 March 2015 (964 organisations) plus a supplemental list of 32 organisations that was added 27 May 2015.¹²² There is no information provided about the categories and levels of funding. A press release from Minister Scullion¹²³ states that IAS funding provided to these 996 organisations for more than 1,350 projects was \$1 billion, up from the original \$860 million. In total, 46% of funded organisations were Indigenous and they received 55% of funds. The media release indicates that the funding of additional projects was in response to concerns about the need for longer funding agreements for important frontline services and ensuring that any gaps that emerged as part of the round were filled as quickly as possible. There is no way to verify this, but it appears that these later-funded organisations did not receive funds in the first allocation and so perhaps there were appeals.
4. A section headed IAS 2014 Grant Round Reporting¹²⁴ has additional information about these 996 grants including the

recipient, the title of the grant, the funding level, the date the grant was approved and the term of the grant. Some of the entries are for variations in the grant and have no funding attached (hence 1,489 entries for 1,350 grants). There were 94 grants in the Jobs, Land, Economy category, 770 grants in the Children and Schools category, 491 grants in the Safety and Wellbeing category, and 134 grants in the Culture and Capability category. There were no grants in the Remote Australia Strategies category. Several specific grants stand out and deserve comment as it appears IAS grant funds have been used for general budget purposes. In the Children and Schools category there is a grant of \$5.5 million over 147 months awarded to the Australian Indigenous Education Foundation on 3 May 2016. This presumably was not a competitively awarded grant to a body that has received \$32 million in budgeted government funds since 2008 but this additional funding was not announced as part of the 2016–17 budget. Set aside in a category headed "Safety and Wellbeing Strategic Investment" four grants to Indigenous organisations totalling \$940,000 are listed as starting on 1 July 2015, with no further information provided.

Very little of this information is useful and relevant to researchers looking to see how IAS funding is spent and there is nothing about outcomes, even for completed initiatives. Improved transparency and public information around these issues is critical, given the ANAO determination that PM&C's grants administration processes fell short of the standard required to effectively manage a billion dollars of Commonwealth resources.

In its response to the ANAO report in January 2017, PM&C advised that it had completed a project to group and classify activities under the IAS. Perhaps this will help track who gets grants and the levels of expenditure. However, the real issue is ensuring that these precious funds are spent wisely, improving Aboriginal and Torres Strait Islander peoples' lives and opportunities and fostering learning, culture and capability in ways that are acceptable to the people involved. An evaluation and performance improvement strategy for the IAS was drafted in 2014 but was not finalised, and to date evaluation activities have been limited, despite the fact that in May 2016 an evaluation approach and budget was approved by the Minister for Indigenous Affairs.¹²⁵

It is the opinion of the ANAO that the performance framework and measures established for the IAS do not provide sufficient information to make assessments about program performance and progress towards achievement of the program outcomes:

121 Department of Prime Minister and Cabinet, Indigenous Affairs, IAS grant reporting, <http://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/ias-grant-reporting>.

122 Department of Prime Minister and Cabinet, Indigenous Affairs, 2014 funding round results, http://www.dpmc.gov.au/sites/default/files/publications/ias_grant_funding_recommended_orgs.pdf.

123 S Scullion, IAS grant round investment totals \$1 billion (Media Release 27 May 2015), <https://ministers.dpmc.gov.au/scullion/2015/ias-grant-round-investment-totals-1-billion>.

124 Department of Prime Minister and Cabinet, Indigenous Affairs, IAS 2014 grant round reporting, <http://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/ias-2014-grant-round-reporting>.

125 Australian National Audit Office, Performance Audit Indigenous Advancement Strategy, Report No 35, 2016–2017, February 2017, <https://www.anao.gov.au/work/performance-audit/indigenous-advancement-strategy>.

“The monitoring systems inhibit the department’s ability to effectively verify, analyse or report on program performance. The department has commenced some evaluations of individual projects delivered under the Strategy but has not planned its evaluation approach after 2016–17. The performance indicators against which funding recipients report cannot be easily linked to the achievement of results and intended outcomes across the Strategy. More than half of the indicators are deliverables and do not measure outcomes. In addition, the performance indicators do not clearly address the relevant program objectives and are not clearly defined.”

At the recent launch of the 2017 Close the Gap report, the Prime Minister announced he would appoint an Indigenous Productivity Commissioner and make \$50 million available for “research into policy and its implementation.”¹²⁶ It will be wasteful if the Government starts this work afresh when so much useful work has already been done by other government and non-government organisations and researchers.¹²⁷

Indigenous Australians’ Health Program (IAHP)

The Indigenous Australians’ Health Program (IAHP) was established in July 2014 within DoH.¹²⁸ It is not known why these health programs were not also moved to PM&C. This would have enabled the integration of health and healthcare services with the issues such as housing, education, employment, and safety and wellbeing (the social determinants of Health) and facilitated efforts to Close the Gap; on the other hand, DoH has the necessary expertise.

The IAHP consolidated four previously existing funding streams: primary health care funding; child, maternal and family health programs; the Health Implementation Plan of the former Stronger Futures in the Northern Territory National Partnership Agreement in the Northern Territory (now known as Northern Territory Remote Aboriginal Investment) and programs covered by the Aboriginal and Torres Strait Islander Chronic Disease Fund.

Funding appropriated to the IAHP in 2015–16 was \$2.413 billion over three years. This funding was allocated as follows:

- \$1.4 billion to fund primary health care services (primarily delivered through Aboriginal Community Controlled Health

Services and other suitably qualified providers), including the Healthy for Life program;

- \$205.9 million to the Care Coordination and Supplementary Services and Improving Indigenous Access to Mainstream Primary Care;
- \$116 million for Tackling Indigenous Smoking;
- \$237 million New Directions and the Australian Nurse-Family Partnership child and maternal health initiatives;
- \$46 million to capital works; and
- \$12 million for Integrated Early Childhood Services (over two years).

This leaves the fate of \$396 million undetermined.

The 2016–17 budget provides projections for funding for the IAHP for the two years beyond 2017–18 (see Table 5).

¹²⁶ Prime Minister M Turnbull, Closing the Gap report statement to Parliament, 14 February, 2017, <https://www.pm.gov.au/media/2017-02-14/closing-gap-report-statement-parliament>.

¹²⁷ See, for example, *Journal of Indigenous Policy*, ‘What Works – And Why the Budget Measures Don’t.’ Issue 16, December 2014, https://www.uts.edu.au/sites/default/files/article/downloads/JIP_16_2014.pdf.

¹²⁸ Department of Health, <http://www.health.gov.au/internet/main/publishing.nsf/Content/indigenous-programme-lp>.

Table 5. Indigenous health spending

| | 2015-16 \$M | 2016-17 \$M | 2017-18 \$M | 2018-19 \$M | 2019-20 \$M |
|-----------------------------------|----------------|----------------|----------------|----------------|----------------|
| Indigenous health spending (IAHP) | 746 | 798 | 856 | 892 | 929 |
| Indigenous health spending (NPAs) | 22 | 23 | 13 | 13 | 14 |
| Total | 768 | 821 | 869 | 905 | 943 |

From 2016–17 Budget Papers No 1 & 3

Table 6. Budgeted expenses for Program 2.2 Aboriginal and Torres Strait Islander Health

| | 2015-16 EST ACTUAL \$M | 2016-17 BUDGET \$M | 2017-18 \$M | 2018-19 \$M | 2019-20 \$M |
|--------------------------------------|------------------------------|--------------------------|----------------|----------------|----------------|
| Administered expenses | | | | | |
| Ordinary annual services | 729.13 | 780.21 | 849.14 | 884.03 | 921.58 |
| Departmental expenses | | | | | |
| Departmental appropriation | 44.58 | 40.92 | 40.93 | 41.23 | 41.31 |
| Expenses not requiring appropriation | 1.15 | 0.96 | 0.97 | 1.04 | 0.87 |
| Total | 774.87 | 822.10 | 891.05 | 926.29 | 963.76 |

From 2016–17 DoH PBS

There are additional funds available for Indigenous health programs from several National Partnership Agreements (NPAs) (see Table 5). Almost all of these NPAs are focused on remote communities and the Torres Strait.

The National Aboriginal and Torres Strait Islander Health Plan 2013–2023¹²⁹ was developed to provide an overarching framework for Commonwealth health activities and identifies areas of focus to guide future investment and effort in relation to improving Indigenous health. There is an accompanying Implementation Plan which was developed in 2015.¹³⁰

Tracking the spending against the plan is impossible. This is aggravated by the fact that the location of Indigenous Health in the Departmental Outcome structure has changed multiple times. It currently sits as one of seven programs within Outcome 2.

The Budgeted Expense figures from the DoH 2016–17 Portfolio Budget Statement (PBS) show that for the period 2015–16 to 2017–18, these total \$2.488 billion (see Table 6). Comparison with

figures from the 2015–16 PBS shows spending of \$102.3 million less over the period 2015–16 to 2018–19 is forecast in 2016–17. The PBS also indicates that the Care Coordination and Supplementary Services program and the Improving Indigenous Access to Primary Care programs have been amalgamated into an Integrated Team Care activity. No further information is available.

Note that the figures in Table 6 do not exactly align with those in Table 5, presumably because they were prepared by different government departments.

The best estimate for total specific Indigenous health spending for 2016–17 is \$822 million. This is considerably less than the \$1.207 billion spent in 2014 (as per the Productivity Commission), although there is no way to directly compare how these figures were derived. What would be most useful would be to compare spending per person over the forward estimates, as annual increases in funds are small, healthcare costs are rising, and the annual growth rate of Aboriginal and Torres Strait Islander population is 2.2%, compared to 1.2–1.7% for the non-Indigenous population.¹³¹

129 Department of Health, <http://www.health.gov.au/natsihp>.

130 Department of Health, <http://www.health.gov.au/internet/main/publishing.nsf/Content/indigenous-implementation=plan>.

131 Creative spirits, Aboriginal population in Australia, <https://www.creativespirits.info/aboriginalculture/people/aboriginal-population-in-australia>.

The current freeze on Medicare rebates is a form of hidden cuts to Indigenous health funding, experienced by both ACCHSs and Indigenous Australians directly.

There is a raft of reports from both government and non-government departments, agencies and organisations that monitor Indigenous health outcomes. However, many of these are not produced regularly, usually the data is already several years old when published, and often changes in measurement hinder direct comparisons. None of these reports assess outcomes on the basis of expenditure.

The Aboriginal and Torres Strait Islander Health Performance Framework monitors progress in Indigenous Australian health outcomes, health system performance and broader determinants of health on a biannual basis. The most recent report,¹³² released in June 2015 with 2014 data, is being used to monitor progress towards achieving the COAG targets for Closing the Gap, as well as the implementation of the National Aboriginal and Torres Strait Islander Health Plan.

The AIHW used to produce a regular series of reports on expenditure on Aboriginal and Torres Strait Islander Health, but there has been no report since the 2010–11 analysis, which was released in March 2013.¹³³ It is hoped that the next Productivity Commission Indigenous Expenditure Report (due in 2017) should have some useful data, but because this will now report against the new IAS structure, comparisons with previous reports will not be possible.

¹³² Department of Health, <http://www.health.gov.au/indigenous-hpf>.

¹³³ Australian Institute of Health and Welfare, Expenditure on health for Aboriginal and Torres Strait Islander people 2010–11, Health and welfare expenditure series no. 48. 2013, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129542784>.



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