Aboriginal and Torres Strait Islander Peoples and Australia's obligations under the United Nations Convention on the Elimination of all Forms of Racial Discrimination

A report submitted by the
Aboriginal and Torres Strait Islander Commission
to the United Nations Committee on the Elimination of
Racial Discrimination

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CONTENTS

TABLE OF ACRONYMS

ABR	Aboriginal Benefits Reserve
ACT	Australian Capital Territory
ALRA	*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)
ALRC	Australian Law Reform Commission
ATSIC	Aboriginal and Torres Strait Islander Commission
CERD Committee	Committee on the Elimination of Racial Discrimination
CERD Convention	Convention on the Elimination of All Forms of Racial Discrimination
CLC	Central Land Council
COAG	Council of Australian Governments
CTH	Commonwealth of Australia
HREOC	Human Rights and Equal Opportunity Commission
NATSIS	National Aboriginal and Torres Strait Islander Survey
NLC	Northern Land Council
NSW	New South Wales
NTAC	Northern Territory Aboriginal Council
NT	Northern Territory
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RDA	*Racial Discrimination Act 1975* (Cth)
RLC	Regional Land Council
SA	South Australia
SCAG	Standing Committee of Attorneys General
WA	Western Australia
QLD	Queensland

INTRODUCTION

Australia signed the International Convention on the Elimination of All Forms of Racial Discrimination on 13 October 1966 and ratified it on 30 September 1975. To date, Australia has submitted nine periodic reports to the CERD Committee in accordance with article 9(1) of the Convention. Australia's combined sixth, seventh and eighth reports were considered by the Committee in August 1991. In considering Australia's ninth periodic report in August 1994, the Committee recommended that Australia should "pursue an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past." At the same time the Committee expressed its appreciation for the "opportunity to engage in a frank, serious and extremely constructive dialogue with the delegation led by the responsible Minister. He was accompanied by the [Aboriginal and Torres Strait Islander] Social Justice Commissioner, himself from Australia's indigenous population and the holder of an independent post."[1] Australia's tenth periodic report was due to be submitted on 30 October 1994. An eleventh report was due in 1996. At the time of writing (10 January 1999), both reports are overdue.

Developments in Australia since the examination by the CERD Committee of Australia's ninth periodic report have seen a serious deterioration in relations between the Federal Government and indigenous organisations, communities and leaders. The seriousness of the crisis is illustrated in the adoption in August 1998 by the CERD Committee of an Early Warning/Urgent Action decision. The Committee asked Australia to provide information to it on "the changes recently projected to or introduced to the 1993 Native Title Act, on any changes of policy ... as to Aboriginal land rights, and of the functions of the Aboriginal and Torres Strait Islander Social Justice Commissioner." The Committee wished to examine the compatibility of such changes with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

The present report was commissioned by the Aboriginal and Torres Strait Islander Commission (ATSIC), a democratically elected body. ATSIC is the national policy-making and service-delivery body for Aboriginal and Torres Strait Islander people. It was established under an act of the Australian Parliament to give effect to the principles of respect, recognition of rights and participation in decision making. ATSIC has three major functions:

1. To formulate and deliver programs to Aboriginal and Torres Strait Islander peoples;
2. To advocate for Aboriginal and Torres Strait Islander peoples; and
3. To provide advice to the Minister on matters relating to Aboriginal and Torres Strait Islander affairs.

[1] Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc A/49/18 (1994) at paras 542-6.

Changes in Federal Government policy since the election of the current Coalition Government in March 1996 have severely eroded ATSIC's capacity to fully fulfil these functions. In particular the Government has continued to cast doubt on the financial accountability of Indigenous organisations, has shifted the focus from recognition of indigenous rights, undermined the principle of elected indigenous people determining their own priorities, and consistently failed to consult with the ATSIC Board and indigenous Australians.

The report is intended to be submitted to the CERD Committee in conjunction with the Committee's examination of Australia's outstanding tenth and eleventh periodic reports. It also provides information relating to the CERD Committee's Early Warning/Urgent Action Decision 1 (53). It focusses on the major issues for indigenous peoples in Australia which arise under the Convention. It is also hoped that the discussion of the jurisprudence of UN human rights treaty bodies and of the concerns raised, and suggestions and recommendations made by the CERD Committee in relation to Australia's 1994 periodic report will be of assistance to other indigenous organisations and NGOs proposing to submit material to the Committee. The Report is divided into four parts.

Part One provides a synthesis of the relevant jurisprudence of UN human rights treaty bodies. These include General Recommendations of the CERD Committee, General Comments of the Human Rights Committee and views of the Human Rights Committee adopted pursuant to the First Optional Protocol to the International Covenant on Civil and Political Rights. Part Two summarises the CERD Committee's 1993 Revised Guidelines for Reporting under the Convention, especially in relation to CERD's substantive provisions (articles 2-7). Part Three reviews concerns raised, and suggestions and recommendations made by the CERD Committee in relation to Australia's previous periodic report.

Part Four provides an overview of major developments during the past reporting period affecting indigenous rights in Australia, including:

- 4.1 Native Title (in particular the *Native Title Amendment Act 1998* (Cth))
- 4.2 Land Rights (in particular the Reeves Review of the *Aboriginal Land Rights (Northern Territory) Act 1976*)
- 4.3 Heritage Protection (in particular the Evatt Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth))
- 4.4 Recognition of Customary Law
- 4.5 Criminal Justice Issues (including implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody)
- 4.6 Juvenile Justice Issues
- 4.7 Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families
- 4.8 Economic and Social Indicators
- 4.9 Major Policy Developments in Indigenous Affairs Policy, including:
  - 4.9.1 Discontinuance of the "Social Justice Package" Process
  - 4.9.2 Abolition of the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner

This report was prepared by the Indigenous Law Centre (ILC) at the University of New South Wales in consultation with ATSIC[2].

[2] See page 133.

SUMMARY AND CONCLUSIONS: AN ANALYSIS OF AUSTRALIA'S PERFORMANCE DURING THE PAST REPORTING PERIOD

SUGGESTIONS AND RECOMMENDATIONS OF THE CERD COMMITTEE IN 1994

In the view of the Aboriginal and Torres Strait Islander Commission Australia has failed to address many of the concerns expressed, and suggestions and recommendations made by the CERD Committee upon its examination of Australia's ninth periodic report in 1994. In relation to many of the matters commented upon positively by the Committee on that occasion, there has been a serious lack of progress and, in some instances, a reversal of policy.

(a) Positive Comments

In 1994 the CERD Committee commented positively on, inter alia, the broad powers of the Human Rights and Equal Opportunity Commission (HREOC), the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), the establishment of the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner, the enactment of the *Native Title Act 1993* (Cth) and the readiness of the Federal Government to show leadership in securing better implementation of the Convention by the States and Territories.

During the period since 1994:

- HREOC's hearings functions have been disrupted and a legislative proposal has been introduced which would allow interference by the Attorney-General in Federal Court decisions concerning the grant of leave to HREOC Deputy-Presidents to exercise an amicus curiae function (see Part 4.10 below).

- There has been no appointment to the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner since January 1998 and there is a legislative proposal to abolish a distinct portfolio in this area (see Part 4.9.2 below).

- Despite claims by Federal, State and Territory Governments, key recommendations of the RCIADIC have not been implemented and/or have been undermined by legislative initiatives by State and Territory Governments, and RCIADIC monitoring mechanisms have been largely ineffective (see Part 4.5 below).

- The *Native Title Amendment Act 1998* (Cth) (NTAA) substantially alters the original provisions of the 1993 NTA, repudiates the accord reached with indigenous representatives prior to the enactment of the NTA and effects a diminution of native title rights (see Part 4.1 below).

- Instead of showing leadership, the Federal Government has consistently deferred to State and Territory Governments and passed significant areas of responsibility for

indigenous affairs to the States and Territories. Examples include the provision in the NTAA to allow States and Territories to establish regimes for the grant of interests to mining companies and other developers on terms less favourable to native title holders than under the NTA; the proposed withdrawal of the Commonwealth from the area of heritage protection upon the accreditation of State and Territory regimes in accordance with inadequate minimal requirements; and the Attorney-General's statement in March 1996 that the States and Territories are responsible for carrying the issue of recognition of indigenous customary law (see Parts 4.1.10, 4.3 and 4.4.5 below).

(b) Principal Subjects of Concern

In 1994 the CERD Committee identified as principal subjects of concern the fact that programs and strategies designed at the federal level were jeopardised by lack of cooperation on the part of States and Territories; the rate of deaths in custody; problems of proof of native title; the denial of the benefits of the NTA to some Aborigines; continuing disadvantage in areas such as education, employment, housing and health services; and the extent of social problems such as alcoholism, drug abuse and incarceration affecting Aborigines.

In the period since 1994:

- There has been ever-increasing deference on the part of the Federal Government to State and Territory Governments.

- Whilst Aboriginal deaths in police custody have declined, there has been a commensurate increase in the number of Aboriginal deaths in prison. Overall the responses of governments to the recommendations of the RCIADIC have had little effect on the total number of Aboriginal deaths in custody (see part 4.5 below).

- Issues surrounding the proof of native title and the denial of its benefits to certain Aboriginal people have not been ameliorated by the Native Title Amendment Act 1998. The NTAA operates to impair and extinguish native title and to reduce the statutory protections of native title. Controversial aspects of the amended legislation include the "confirmation" of past extinguishment; the validation of "intermediate period acts"; the expansion of the rights of pastoralists; and the erosion of the right to negotiate (see Part 4.1.10 below).

- Recent statistical information reveals continuing systematic discrimination against indigenous Australians in the areas of health, housing, education, income and employment (see Part 4.8 below).

- The over-representation of indigenous people in the criminal justice system continues to be linked to their social, economic and physical health and well-being. Since 1994 both the total number of Aboriginal prisoners and the level of Aboriginal over-representation have substantially increased (see Part 4.5.2 below).

- Legislation in Western Australia and the Northern Territory has imposed an obligation upon the courts to impose mandatory imprisonment for certain offences. The increasing over-representation of Aboriginal young people in the criminal justice system is particularly devastating (see Part 4.6 below).

(c) Suggestions and Recommendations

Relevant suggestions and recommendations of the CERD Committee in 1994 related to the pursuit of an "energetic policy" of recognising rights and furnishing compensation; the full implementation of the recommendations of the RCIADIC; and a strengthening of measures to remedy discrimination suffered by Aborigines.

Since 1994:

- Legislation has been introduced to abolish the distinct portfolio of Aboriginal and Torres Strait Islander Social Justice Commissioner (see Part 4.9.2 below).

- The "social justice package" process has been abandoned (see Part 4.9.1 below).

- "Self-determination" has been jettisoned as policy in indigenous affairs (see Part 4.9.3 below).

- The capacity of ATSIC to fulfil its statutorily mandated functions has been consistently undermined (see Part 4.9.4 below).

- The process of reconciliation has entered difficult waters (see Part 4.9.5 below).

- Key recommendations of the RCIADIC have not been implemented (see Part 4.5.3 below).

- The approach recommended by the Evatt Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) has been largely ignored (see Part 4.3.4 below).

- The central recommendations of HREOC's "Stolen Generations Inquiry" (apology, compensation, national standards for indigenous children) have been rejected (see Part 4.7.4 below).

- The Australian Law Reform Commission's 1986 recommendations on Recognition of Aboriginal Customary Laws have been disregarded (see Part 4.4.5 below).

- Australia's reservation to article 4(a) of CERD has not been withdrawn, and incitement to racial hatred has not been made a criminal offence.

- The High Court has failed to clarify whether the race power in section 51(xxvi) of the Australian Constitution can be relied upon to enact racially discriminatory legislation (see Part 4.12 below).

CERD, INDIGENOUS PEOPLES AND AUSTRALIA

The UN human rights treaty bodies have generated a considerable body of jurisprudence relevant to indigenous peoples. These include General Recommendations of the CERD Committee, General Comments of the Human Rights Committee and views of the Human Rights Committee adopted pursuant to the First Optional Protocol to the ICCPR.

Of particular relevance is the jurisprudence of the CERD Committee and the Human Rights Committee on the principles of equality and non-discrimination. This body of jurisprudence establishes that not all differences in treatment are discriminatory; that is, equality does not mean identical treatment. Distinctions are not discriminatory where they pursue a legitimate aim. Special measures - or affirmative action - are sometimes required to redress inequality and to secure for members of disadvantaged groups full and equal enjoyment of their human rights. And particular regimes of minority rights are consistent with, and sometimes required to achieve factual or substantive equality. Thus, the protection of indigenous peoples' distinct rights is also implicit in the concept of equality.

It is clear from the statistical information which attests to the unequal enjoyment by Aboriginal and Torres Strait Islander peoples of their civil, cultural, economic, political and social rights that Australian governments continue to fail to adopt appropriate special measures to address systematic discrimination against the indigenous population. Policies of Australian governments are discriminatory in that they fail to take into account the cultural, social, economic and demographic characteristics of the indigenous population; fail to acknowledge the relative need of the indigenous population in the allocation of resources; design and deliver services on the basis of the characteristics and needs of the non-indigenous population; and fail to acknowledge impedients to the exercise of human rights by indigenous Australians.

The Federal Government's inaction or inadequate action in many areas is a matter of grave concern. In the 1967 Referendum 90% of voters gave the Commonwealth the power to make laws for the benefit of Aboriginal and Torres Strait Islander peoples. From that time successive Federal governments have accepted their responsibility of leadership in the area of indigenous affairs. The approach of the current Federal Government has been to remove policy responsibility from indigenous peoples, abdicate its own responsibility and transfer responsibility to State and Territory Governments. The crisis in the area of juvenile justice and the Federal Government's failure to respond to draconian mandatory sentencing legislation in Western Australia and the Northern Territory is of particular concern. In addition, a number of critical developments in Australia during the past reporting period raise serious doubts as to the Federal Government's commitment to recognising the distinct rights of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia. These include:

- the proposed abolition of the Office of Aboriginal and Torres Strait Islander Social Justice Commissioner (see Part 4.9.2);

- the abandonment of the "social justice package" process (intended to address outstanding issues raised by the final putting to rest of the *terra nullius* doctrine in *Mabo v The State of Queensland (No 2))* (see Part 4.9.1);

- the rejection of self-determination as policy in the area of indigenous affairs (see Part 4.9.3);

- a reduction in the capacity of ATSIC to plan and control its budget, and to act as principal adviser to the Government on Aboriginal and Torres Strait Islander affairs (see Part 4.9.4);

- the Government's failure to demonstrate any commitment to the reconciliation process and movement (see Part 4.9.5);

- the Government's half-hearted response and deference to the States in relation to customary law (Part 4.4.5), heritage protection (Part 4.3.5-4.3.8) and the entitlements of the "stolen generations" (Part 4.7.4);

- recent amendments to the *Native Title Act 1993* (see Part 4.1.9-4.1.12); and

- the prospect of a dismantling of the Land Council structures in the Northern Territory under the *Northern Territory Land Rights Act 1976* (see Part 4.2).

Many of these developments are inconsistent not only with the general equality jurisprudence of CERD and the Human Rights Committee, but with specific jurisprudence concerning the rights of ethnic minorities and the rights of indigenous peoples. The Human Rights Committee's General Comment on article 27 of the ICCPR and its views pursuant to the First Optional Protocol have shown that article 27 can require positive legal measures of protection to ensure the enjoyment of indigenous peoples' rights. *Ominayak's case* suggests that the expropriation of indigenous territories for the purpose of granting forestry leases and exploration licences is contrary to article 27. *Lansmann's case* supports the proposition that developments which adversely affect indigenous peoples' cultural rights - including places of spiritual significance and economic activities - will also be contrary to article 27. *Hopu and Bessert* is authority for the view that interference with indigenous burial grounds constitutes a violation of the right to privacy (article 17) and to family (article 23). Other General Comments of the Human Rights Committee offer guidance as to what constitutes "arbitrary arrest and detention", minimum requirements in respect of the administration of justice, the notion of "cruel, inhuman or degrading treatment or punishment", the rights of persons deprived of their liberty, the rights of children and young people, the protection of the family, and the concept of freedom of religion.

Most significantly, the CERD Committee's General Recommendation on Indigenous

Peoples (General Recommendation XXIII) specifies the implications of the prohibition of racial discrimination in relation to indigenous peoples. In this General Recommendation the CERD Committee calls on States parties to protect the rights of indigenous peoples to "own, develop, control and use their communal lands". The recent passage in Australia of legislation amending the *Native Title Act 1993* raises questions as to the extent to which Australia is in conformity with the standards articulated by the CERD Committee. The same applies to the prospect of legislation implementing the Reeves Review of the *Land Rights (Northern Territory) Act 1976*. The General Recommendation also calls on States parties to CERD to "recognise and respect indigenous culture, history and ways of life" and to "ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs, to preserve and practise their languages". One can ask how luke-warm to non-existent responses to the ALRC's 1986 Report on Recognition of Aboriginal Customary Laws, the Evatt Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, and the Report of HREOC's "Stolen Generations Inquiry" conform with this aspect of the CERD Committee's General Recommendation. Similarly, it is clear that numerous significant changes in indigenous affairs policy in Australia since 1994 have failed to comply with the General Recommendation's requirement that no decisions affecting the rights of indigenous peoples "are made without their informed consent." And finally, the General Recommendation calls on States parties to provide indigenous peoples with living conditions that "can sustain their appropriate economic and social development". In this respect as well Australia has a great deal of distance to travel before it can legitimately claim to be in full conformity with the obligations imposed under the International Convention on the Elimination of All Forms of Racial Discrimination.

It cannot be said that Australia has "pursue[d] an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past", as recommended by the CERD Committee in August 1994. Rather, developments since the examination by the CERD Committee of Australia's ninth periodic report have seen a deterioration in relations between the Federal Government and indigenous organisations, communities and leaders. The seriousness of the crisis can be seen in the adoption in August 1998 by the CERD Committee of an Early Warning/Urgent Action decision.

It is the view of the Aboriginal and Torres Strait Islander Commission, the peak indigenous body in Australia, that numerous developments during the past reporting period are inconsistent with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination. It is to be hoped that the examination by the CERD Committee of Australia's outstanding tenth and eleventh periodic reports will provide an occasion for the Australian Government to engage in a frank and constructive dialogue with the Committee and to make a commitment to ensuring that Australian law and practice are brought into conformity with the standards imposed by the CERD Convention.

1. JURISPRUDENCE OF UNITED NATIONS HUMAN RIGHTS PROCEDURES

1.1 GENERAL RECOMMENDATIONS OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

1.1.1 Introduction

All States that are party to the Convention on the Elimination of Racial Discrimination are required to submit a report every two years on the legislative, judicial and administrative or other measures which they have adopted to give effect to the Convention.[3] These reports are considered by the CERD Committee.

The 18 elected members of the CERD Committee must be from States that are party to the Convention but they serve in their personal capacity. It is not a judicial body. Its main function is to assist States parties in their efforts to fulfil their obligations under the Convention. The Committee has commented that reporting under the Convention needs to be monitored rigorously because of the "latent nature of racial discrimination, its persistence and its susceptibility to sudden flare ups and accentuation".[4]

The CERD Committee may also adopt "General Recommendations" based on its examination of States parties' reports. These recommendations are intended to assist States parties in the interpretation and implementation of the Convention.

1.1.2 General Recommendation XIV (1993)

General Recommendation XIV, adopted by the CERD Committee in 1993, offers guidance on the interpretation of article 1 of the Convention. Article 1 provides as follows:

> In this Convention the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The General Recommendation notes that the words "based on" should not be distinguished from the phrase "on the grounds of" which is used in the Preamble to the Convention: "A distinction is contrary to the Convention if it has either the purpose or the effect of impairing particular rights and freedoms." Differential treatment will not amount to racial discrimination if the differentiation is legitimate or can be characterised as a "special measure" under article

[3] Article 9(1).
[4] LV Rodriguez, "The International Convention on the Elimination of all Forms of Racial Discrimination" in United Nations, *Manual on Human Rights Reporting*, Geneva 1997, at 303.

1(4). Special measures are a type of affirmative action aimed at advancing certain disadvantaged groups and ensuring that they have equal enjoyment of human rights.

In determining whether an action by a State party has an effect contrary to the Convention, the Committee considers "whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent or national or ethnic origin". States are thus responsible for addressing systemic discrimination and structural impediments to substantive equality.

1.1.3 General Recommendation XXI (1996)

In 1996, the CERD Committee expressed its views on the right to self-determination in General Recommendation XXI. This General Recommendation confirms that the right to self determination is a fundamental principle of international law enshrined in various instruments, including article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. General Recommendation XXI distinguishes between "the internal aspect" of self-determination, the right of all peoples to pursue their cultural development without outside interference, and the "external aspect" of self-determination. The latter is expressed as a right of all peoples "to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism".

The CERD Committee's observations on self determination should not be construed as encouraging any action which would impair the territorial integrity or political unity of sovereign independent States conducting themselves "in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory". In particular, according to the CERD Committee, international law has not recognised a general right of peoples unilaterally to secede from a State, although free agreements between all the parties may be a possibility. At the same time, in accordance with article 2 of CERD:

> Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens.

1.1.4 General Recommendation XXIII (1997)

In 1997, the CERD Committee adopted General Recommendation XXIII concerning Indigenous Peoples. This important General Recommendation affirms that discrimination against indigenous peoples falls within the scope of the Convention and that indigenous peoples have lost their land and resources to colonists, commercial companies and State enterprises, thus jeopardising the preservation of their cultural and historical identity.

The General Recommendation especially calls on States parties to protect the rights of indigenous peoples to own, develop, control and use their communal lands and to take steps

to return their traditional lands. If this is not possible, just, fair and prompt compensation should be made, preferably in the form of lands.

In addition, States parties are to:

- recognise and respect indigenous culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- ensure that indigenous peoples are free and equal in dignity and rights and not discriminated against on the basis of their racial identity;
- provide indigenous peoples with living conditions that can sustain their appropriate economic and social development;
- ensure that indigenous peoples can participate effectively in public life and that decisions affecting their rights are made with their informed consent;
- ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs, to preserve and practise their languages.

1.2 GENERAL COMMENTS OF THE HUMAN RIGHTS COMMITTEE

1.2.1 Introduction

The Human Rights Committee is the body established to supervise implementation by States parties of their obligations under the International Covenant on Civil and Political Rights 1966 (ICCPR). The following section contains summaries of "General Comments" adopted by the Committee in relation to a number of articles of the ICCPR. They focus on provisions of the Covenant which have particular implications for Aboriginal and Torres Strait Islander peoples.

1.2.2 General Comment 6 (1982)

General Comment 6 describes the inherent right to life (article 6) as "the supreme right for which no derogation is permitted even in time of public emergency". The right should be interpreted broadly:

> The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in measures to eliminate malnutrition and epidemics.

1.2.3 General Comment 8 (1982)

Article 9 of the ICCPR states that everyone has the right to liberty and security of person. Arbitrary arrest or detention is prohibited. In General Comment 8, the Human Rights Committee observed that this right extends to all deprivations of liberty including, detention arising from mental illness, vagrancy, intoxication, immigration control and detention for educational purposes. The Committee also commented on the lack of sufficient detail from States parties about the actual delays experienced in criminal matters: between arrest and being brought before the court, and between detention and trial. Further, pre-trial detention should be an exception and as short as possible.

1.2.4 General Comment 11 (1983)

Article 20 of the ICCPR provides as follows.

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In its General Comment 11, the Committee stated that for article 20 to become fully effective, there should be a law making it clear that such propaganda and advocacy are contrary to public policy and providing a sanction for violation of the prohibition.

1.2.5 General Comment 12 (1984)

Article 1 of the ICCPR recognises the right of all peoples to self-determination. In its General Comment 12, the Human Rights Committee emphasised the importance of this right: "Its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights." The Committee emphasised the desirability of States parties describing the constitutional and political processes that allow the exercise of the right in practice. It noted the broader benefits of implementing the right to self-determination:

> History has proved that the realisation of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

1.2.6 General Comment 13 (1984)

Article 14 of the ICCPR sets out rights in respect of the administration of justice. In its General Comment 13, the Human Rights Committee noted that each aspect of the article requires specific comment including detail on legislative and other measures adopted to implement it. Article 14(1) entrenches the rights to equality before the courts and to a fair and public hearing by an impartial tribunal. Article 14(2) provides that all suspects have the right to be presumed innocent until proven guilty.

General Comment 13 notes the failure of many States parties to recognise that elements of article 14 apply to civil as well as criminal hearings. It calls for detailed information on "the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice."

Article 14(3) sets out a list of minimum guarantees required in criminal trials. The Committee's observations on those most directly relevant to the present report follow:

- Paragraph 3(a) provides that an accused must be informed promptly of the nature of the charge against him or her in a language s/he understands. The Committee's General Comment interprets promptly as "as soon as the charge is first made by a competent authority".

- Paragraph 3(b) provides that the accused must have adequate time and facilities for the preparation of his or her defence, including the opportunity to communicate with a lawyer of his or her choice. The Committee's General Comment notes that an accused must be able to communicate with her or his lawyer confidentially.

- Paragraph 3(c) provides that the accused must be tried without undue delay. This raises issues similar to those addressed in General Comment 8 above. Delays must be avoided both at first instance and on appeal.

- Paragraph 3(d) enshrines the right of the accused to be present at the trial and to put on a defence: "The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair."

- Paragraph 3(f) provides that any accused who does not speak the language of the court must be provided with an interpreter free of charge: "It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence."

- Paragraph 3(g) provides that the accused must not be compelled to testify against him or herself or to confess guilt. The Committee's General Comment notes that this safeguard should be read in conjunction with the prohibition on torture (article 7) and the right to humane and dignified treatment in custody (article 10). If unlawful methods are used to compel an accused to confession, such evidence should be inadmissible.

Article 14 (4) provides that criminal procedure in juvenile matters must take account of the defendant's age and promote his or her rehabilitation. The Committee's General Comment calls for greater detail in State reports on the ages of criminal responsibility and majority specialist children's courts and rehabilitation initiatives.

Article 14 (5) enshrines the right to appeal conviction and sentence to a higher court. Article 14 (6) provides for lawful compensation for a miscarriage of justice: "It seems from many

State reports that this right is often not observed or insufficiently guaranteed by domestic legislation." Finally, Article 14 (7) enshrines the principle of double jeopardy, that no one may be tried twice for the same offence.

1.2.7 General Comment 16 (1988)

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person's privacy, family, home or correspondence and unlawful attacks on reputation. The Human Rights Committee's General Comment invites States to indicate in their reports the meaning given in their society to the terms "family" and "home". The General Comment emphasises the importance of regulating State interference with people's privacy, including the collection of personal data: "A decision to make use of such authorised interferences must be made only by the authority designated under the law, and on a case-by-case basis."

1.2.8 General Comment 17 (1989)

Article 24 of the ICCPR recognises the right of every child to receive, without discrimination, from his or her family, society and State the protection required by his or her status as a minor. The Committee's General Comment 17 notes that these rights are not the only ones for children: "As individuals, children benefit from all of the civil rights enunciated in the Covenant." In terms of article 24, it is a matter for each State to determine what measures need to be adopted to protect children appropriately. These include economic and social initiatives, such as eradicating malnutrition and providing education, as well as legal measures, such as child labour laws. Reports by States parties "should indicate how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child." Information should also be given concerning special measures taken to protect children when they cannot live with their family of origin.

1.2.9 General Comment 18 (1989)

Article 26 of the ICCPR enshrines the fundamental principle of non-discrimination:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the Committee notes that the term discrimination is not defined in the ICCPR and refers to the definitions in the International Convention on the Elimination of Racial Discrimination and the Convention on the Elimination of all Forms of Discrimination Against Women. The Committee echoes the views of the CERD Committee in its General Recommendation XIV above that discrimination is any distinction that has the effect of impairing the exercise by all persons, on an equal footing, of all rights and freedoms. Again, equal enjoyment is not equated with identical treatment in every instance; certain

differentiation may be legitimate. States parties may need to take affirmative action to eliminate conditions that perpetuate discrimination.

General Comment 18 is critical of States parties' focus on formal measures taken to combat discrimination and the failure to include material in their reports revealing discrimination in fact: "The Committee wishes to know if there remain any problems of discrimination, in fact, which may be practised either by public authorities, by the community or by private persons or bodies." The Committee seeks information on all the grounds of discrimination listed in article 26 and would like to receive information "as to the significance of [any] such omissions."

Significantly, the application of the principle of non-discrimination contained in article 26 is not limited to those rights that are provided for in the ICCPR (cf article 2).

1.2.10 General Comment 19 (1990)

Article 23 of the ICCPR states that the family is the fundamental group unit of society and is entitled to protection by society and the State. It should be read with article 17 (unlawful interference with the family) and article 24 (protection of the child) — see General Comments 16 and 17 above. In its General Comment 19, the Human Rights Committee notes that given the variations in family structure between and within States, it is not possible to give the concept a standard definition. However, "when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23." The General Comment calls for information on how the family is protected by the State and social institutions, and on the protections offered to unmarried couples and their children, and to single parents and their children.

The General Comment notes that the right to found a family implies a right to live together which in turn implies that States should take appropriate measures "to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons".

1.2.11 General Comment 20 (1992)

Article 7 of the ICCPR provides: "No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation." Article 7 is complemented by article 10, which requires detainees to be treated with humanity and dignity, and by article 2 which requires States parties to provide citizens with effective remedies for any breaches of their rights and freedoms under the ICCPR.

In its General Comment 20, the Human Rights Committee emphasises that article 7 relates not only to acts that cause physical pain but also to acts that cause the victim mental suffering. No derogation from the provision is allowed: "No justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including

those based on an order from a superior officer or public authority." The prohibition of torture extends to corporal punishment, including the disciplining of school students.

The Human Rights Committee makes no attempt to define or list acts of torture but notes that prolonged solitary confinement of detainees may be in breach of article 7. The Committee emphasises the need for States parties to ensure that persons who are involved in the custody and detention of suspects receive appropriate instructions and training to prevent contraventions of article 7. In addition, statements or confessions obtained through torture should be inadmissible in judicial proceedings.[5] States parties should provide detailed information in their reports on safeguards for the special protection of particularly vulnerable persons. Reports should also set out provisions of the criminal law which penalise torture and cruel, inhuman and degrading treatment or punishment.

1.2.12 General Comment 21 (1992)

Article 10(1) of the ICCPR requires that all persons deprived of their liberty be treated with humanity and dignity. The provision covers all detainees, including those in police custody, prison and psychiatric hospitals. In its General Comment 21, the Committee notes that persons deprived of their liberty must enjoy all the rights guaranteed by the Covenant, subject to the restrictions that are unavoidable in a closed environment. The Committee seeks information from States parties on the concrete measures taken by the relevant authorities to ensure article 10 is complied with, including material on the training provided to people who supervise detainees.

Paragraph 2 of article 10 provides that accused persons should be segregated from prisoners and that child suspects should be separated from adults. Juvenile matters should be brought before the court "as speedily as possible". According to the Human Rights Committee persons under 18 should be treated as juveniles. [See also General Comment 13 on article 14 above] Paragraph 3 of article 10 states that the essential aim of the penitentiary system should be the social rehabilitation of prisoners. The Committee seeks specific information on the measures applied during detention, for example, the conditions on which prisoners can have contact with those outside the prison system.

1.2.13 General Comment 22 (1993)

Article 18 of the ICCPR guarantees freedom of thought, conscience and religion. According to the Committee this right is "far reaching and profound". It encompasses freedom of belief in the broad sense and is not limited to formal religion:

> Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

[5] See also General Comment 13 on ICCPR article 14 above.

The fundamental character of the freedom is reflected in the fact that it cannot be derogated from even in time of public emergency (article 4(2)). In accordance with paragraph 3 of article 18, freedom to practice religion or beliefs may only be subject to lawful limitations necessary "to protect public safety, order, health or morals or the fundamental rights and freedoms of others". The Committee's General Comment notes that the concept of morals derives from many social, philosophical and religions traditions and an inclusive approach should be taken.

1.2.14 General Comment 23 (1994)

Article 27 of the ICCPR provides that persons belonging to ethnic, religious or linguistic minorities must not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion or to use their own language.

The Committee's important General Comment 23 notes that article 27 recognises a distinct right of minorities that is additional to the other rights they are entitled to enjoy under the ICCPR as individuals. The General Comment rejects a minimalist interpretation of article 27 as merely imposing an obligation on States parties to abstain from activities which interfere in the enjoyment of the rights under article 27. According to the Committee, "positive measures by States may...be necessary to protect the identity of a minority and the rights of its members". In their reports, States parties should indicate the measures they have adopted to ensure the "full protection of these rights". Moreover, "[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of the minority."

Most significantly, the General Comment affirms the significance of article 27 in protecting the land and resource rights of indigenous peoples and in securing their participation in decisions affecting them:

> [T]he Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, specially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.

1.3 SELECTED VIEWS OF THE HUMAN RIGHTS COMMITTEE

1.3.1 Introduction

The following section provides an overview of three important decisions or "views" of the Human Rights Committee involving issues of indigenous peoples' rights. These views were adopted pursuant to the First Optional Protocol to the ICCPR. The First Optional Protocol establishes an optional procedure for the submission of complaints to the Human Rights Committee by individuals claiming to be victims of violations of rights contained in the ICCPR. Australia acceded to the First Optional Protocol on 25 September 1991.

1.3.2 *Ominayak v Canada* (26 March 1990)

On 14 February 1984 Chief Bernard Ominayak submitted a communication to the Human Rights Committee under the First Optional Protocol to the ICCPR (article 5). Chief Ominayak was the elected chief of the Lubicon Lake Band, a Cree Indian band living in the Canadian Province of Alberta. On behalf of his people, Ominayak alleged a breach by the Canadian Government of the right to self-determination in article 1 of the ICCPR by the Canadian Government. Specifically, Ominayak claimed that the provincial government of Alberta had been allowed to expropriate territory of the Lubicon Lake Band for the benefit of private corporate interests (by granting leases for oil and gas development). In addition, it was alleged that destruction of the natural environment had deprived the Band of its traditional means of subsistence.

The Canadian Government submitted that the communication was inadmissible for two reasons: First, on the ground that the right of self-determination applies only to "peoples" and that the Lubicon Lake Band was not a people; and second, on the ground that communications under the Optional Protocol can only be made by individuals and must relate to a breach of individual rights. As the right to self-determination is a collective right, it was contended that Ominayak did not have standing before the Human Rights Committee.

The Committee accepted the second submission of the Canadian Government and found that Ominayak:

> as an individual, could not claim under the Optional Protocol to be a victim of a violation of the right of self-determination enshrined in article 1 of the Covenant, which deals with rights conferred upon peoples, as such.

Although the Committee found the complaint under article 1 inadmissible, it noted that the facts as submitted might raise issues under other articles of the ICCPR, particularly article 27 which protects the cultural rights of minorities. In addition, it noted that it is open to groups of individuals who claim to be similarly affected collectively to submit a communication about alleged breaches of their rights.

At a later stage, the Canadian Government argued that the communication was inadmissible because the Lubicon Lake Band had not exhausted all domestic remedies. The Committee accepted Ominayak's submission that no effective remedy was available to the Band within the meaning of article 5(2)(b) of the Optional Protocol. In views adopted on 26 March 1990 on the merits of the communication, the Committee found that there had been a violation of article 27, recognising that:

> [T]he rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.

According to the Committee:

> Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.

Significantly, the decision in Ominayak was based upon Rule 86 of the Rules of Procedure which allows the Committee, prior to forwarding its final views on the communication, to inform the State party as to the desirability of interim measures to avoid irreparable damage to the victim.

1.3.3 *Lansmann v Finland* (26 October 1994)

Ilmari Lansmann and 47 other members of the Muotkatunturi Herdsmen's Committee submitted a communication claiming a violation of article 27 by the Government of Finland. The authors, reindeer breeders of Sami ethnic origin, challenged the decision of the Central Forestry Board to enter a contract enabling a private company to quarry stone from mount Etelä-Riutusvaara. They alleged that the quarrying and transport of the rock would disturb their reindeer herding activities and the "complex system of reindeer fences determined by the natural environment". In addition, they submitted that Etelä-Riutusvaara is a sacred place of the old Sami religion. The authors argued that such disturbances amounted to a violation of their right to enjoy their own culture. The case involved consideration of preliminary quarrying that had already occurred, as well as a proposal for more extensive industry.

Finland argued that the communication was inadmissible for failure to exhaust domestic remedies as not all applicants had been parties to the unsuccessful hearing before the Supreme Administrative Court of Finland. The Committee reiterated the position that:

> Wherever the jurisprudence of the highest domestic tribunal has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies for the purposes of the Optional Protocol.

Accordingly, the communication was held to be admissible. In relation to the merits of the communication, the Committee stated that there was no dispute that the applicants were

members of a minority and that reindeer husbandry was an essential element of their culture.[6] It also rejected the submission of Finland that Article 27 only protects traditional means of livelihood of national minorities. The fact that the authors "may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology" did not prevent them from invoking Article 27.

The final issue was the degree of impact of the quarrying on the Sami reindeer husbandry. The Committee did not consider the impact of quarrying to be so substantial that it effectively denied the authors their "right to enjoy their cultural rights in that region". In reaching this conclusion, the Committee noted that the interests of the Herdsmen's Committee of the authors were taken into account in the proceedings leading to the delivery of the quarrying permit, that the authors had been consulted during the proceedings, and that reindeer herding in the area did not appear to have been adversely affected by such quarrying as had occurred.

The Committee concluded by noting that significant expansion of mining activities might constitute a violation of the authors' rights under article 27.

1.3.4 *Hopu and Bessert v France* (29 July 1997)

Francis Hopu and Tepoaitu Bessert submitted a communication to the Committee alleging violation by France of a number of articles of the ICCPR. Hopu and Bessert, ethnic Polynesians living in Tahiti (French Polynesia), based their claims on their rights as the descendants of the traditional owners of a tract of land called Tetaitapu. They argued that their ancestors were dispossessed of the land in 1961 when ownership of it was awarded to a private company by court judgment. Since 1988, the Territory of Polynesia has been the sole shareholder of this company which in 1990 leased the land to a development company. When the sub-lessee began construction of a luxury hotel on the land in 1992, the authors and other descendants of the owners of the land occupied the site in peaceful protest. They claimed that if the building work continued, it would destroy their traditional burial grounds and have a strong negative impact on their fishing activities. The protesters were removed from the site by court order.

On the question of admissibility, the Committee found that there were no effective domestic remedies to exhaust in relation to the question of land ownership, particularly as France had not contradicted the claim that land matters are adjudicated haphazardly in Tahitian tribunals. In relation to the merits of the communication, the authors alleged a breach of article 2(3)(a) of the ICCPR, which obliges States parties to provide persons whose rights have been violated with an effective remedy, and of article 14(1), which guarantees access to an independent and impartial tribunal. The authors claimed that indigenous tribunals should have been made available to them.[7] The Committee concluded that there had been no violation of articles 2(3)(a) and 14(1). The authors could have brought their claim before a French

[6] The Committee restated its view that economic activities may come within the ambit of article 27 if they are an essential element of the culture of an ethnic community: Views on Communication No 197/1985, *Kitok v Sweden*, adopted on 27 July 1988, para 9.2.

[7] Such tribunals had not been available since 1936 when the High Court of Tahiti ceased to operate.

Tribunal but chose not to; the previous owners did not appeal the 1961 court decision alienating the land from the authors' ancestors; and peaceful occupation was the only step taken by the authors to challenge the ownership of the land.[8]

The authors also alleged that the construction of the hotel would destroy their ancestral burial grounds and arbitrarily interfere with their privacy and family lives in breach of articles 17(1) and 23(1). The Committee observed that the term "family" should be given a broad interpretation and that cultural traditions should be taken into account. It was undisputed that the authors considered the relationship to their ancestors to be an essential part of their identity and to play an important part in family life. The Committee concluded the construction of a hotel on the authors' ancestral burial grounds did interfere with their right to family and privacy in violation of articles 17 and 23. France failed to show this was reasonable in the circumstances.

Four Committee members dissented from this view in an individual opinion.[9] They found the extension of the concept of family to all cultural ancestors untenable. In addition, "the mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy". The dissenting members expressed their reluctance to reach such a conclusion: "We too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia". However, they concurred with the majority in finding that as a result of the reservation made by France to article 27 of the ICCPR, the question of whether minority cultural rights had been infringed was not open to consideration.

As noted, the majority also rejected the authors' claim that the construction of the hotel amounted to a violation of article 27. The Committee noted that France has made a reservation to article 27 and that the Committee accordingly is "not competent to consider complaints directed against France under article 27 of the Covenant"'. Five members (including Australian member Justice Elizabeth Evatt) gave an individual opinion, dissenting on this point. They did not consider that the "reservation" by France extended to overseas territories under French sovereignty.[10]

In the result, the Committee found that the authors were entitled to a remedy in accordance with article 2(3)(a):

> The State party is under an obligation to protect the authors' rights effectively and to ensure that similar violations do not occur in the future.

[8] The authors also claimed to be the victims of discrimination in violation of article 2(1) as Polynesians burial grounds do not enjoy the same legal protections as other cemeteries. This issue does not seem to be addressed separately by the Committee in its examination of the merits of the complaint.

[9] David Kretsmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville.

[10] After the initial communication, the authors made a claim of discrimination under article 26 of the ICCPR. The Committee held that it was not in a position to determine this issue on the information before it.

2. REVISED GUIDELINES FOR REPORTING UNDER THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

2.1 GUIDELINES FOR REPORTING UNDER THE CONVENTION

The CERD Committee has issued General Guidelines to assist States parties in the preparation of their periodic reports under the Convention.[11] Part 1 of these reports should contain general background information on the land and people, including the political and legal structures under which human rights are protected. Part 2 should deal individually with each of the substantive provisions of the Convention (articles 1-7). It should describe briefly the policy of eliminating racial discrimination in all its forms. In this part, the Committee expects to receive information from States parties on their compliance with the obligation assumed under article 1 of the Convention; the ethnic characteristics of the country; and the text of relevant laws, judicial decisions and regulations that relate to articles 1 to 7 of the Convention.

2.2 REPORTING ON THE SUBSTANTIVE PROVISIONS

Article 1

Article 1 defines the concept of racial discrimination. According to the General Guidelines, reports should enable the Committee to obtain a clear understanding of the overall position in the reporting State relevant to questions of racial discrimination. Reports should provide three kinds of information:

1. A discussion of the policy with regard to racial discrimination and the implementing legal framework;

2. Information on how the Convention and the rights contained in it become part of the domestic legal order; and

3. General background on the reporting State, making special reference to the demographic composition of the population and to any problems confronting ethnic groups.

Article 2

In accordance with article 2(1), States parties undertake to pursue a policy to eliminate racial discrimination. This includes amending laws that have the effect of perpetuating racial discrimination. Fulfilment of these obligations depends to a large extent on whether law

[11] UN Doc CERD/C/70/Rev 3. Material in this Part draws on LV Rodriguez, "The International Convention on the Elimination of all Forms of Racial Discrimination" in United Nations, *Manual on Human Rights Reporting*, Geneva 1997.

enforcement officials are properly informed about the State's obligations under the Conventions. States parties should report on whether such officials receive training to ensure that they respect as well as protect the human rights of all persons without distinction as to race. State reports should address measures taken to prohibit racial discrimination in the private as well as the public sector.

Article 2(2) provides for the adoption of special measures to ensure the adequate development and protection of certain racial groups. States reports should focus on the socio-economic and political situation of groups such as indigenous peoples, migrant workers and refugees to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population. They should report in detail on existing policies and practices, the functions of public authorities and the relevant law. Reports should also describe any special programs and how they contribute towards achieving the goal of racial equality.

Article 3

Article 3 condemns racial segregation and apartheid. States parties undertake to prevent, prohibit and eradicate all such practices in territories under their jurisdiction. The CERD Committee has invited States parties to monitor trends that give rise to racial segregation. These can arise without any direct involvement of the Government, for example, as a result of income distribution patterns.

Article 4

In accordance with article 4, States parties undertake to condemn all propaganda and organisations that are based on ideas of superiority of one race or which promote racial hatred. They undertake to eradicate all such discrimination through measures including making incitement to racial discrimination and violence criminal offences, prohibiting organisations that promote racial discrimination and prohibiting public authorities from promoting racial discrimination.

Article 5

In accordance with article 5, States parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone to enjoy without discrimination the rights listed in the article. These include the right to equal treatment in the administration of justice (article 5(a)); the right to security of person and protection against violence or bodily harm (article 5(b)); political rights (article 5(c)); other civil rights, including the right to own property alone as well as in association with others (article 5(d)(v)), the right to inherit (article 5(d)(vi)) and the right to freedom of religion (article 5(d)(vii)); economic, social and cultural rights (article 5(e)); and the right of access to any public place (article 5(f)).

The CERD Committee has recommended that States parties report on the non-discriminatory implementation of each of the rights and freedoms referred to in article 5 individually.

Article 6

In accordance with article 6, States parties must ensure that all persons within their jurisdiction have effective access to remedies for acts of racial discrimination which violate the Convention. Article 6 also entrenches the right to adequate reparation for damage suffered as a result of such discrimination. To comply with article 6, the legislation of the State party must contain appropriate mechanisms for accessing remedies. Remedies need not be judicial. For example, the obligation may be satisfied by conciliation or mediation mechanisms or administrative bodies such as an Ombudsman. Information provided by States parties under article 6 should include details of relevant court cases as well as a description of legislative provisions.

Article 7

In accordance with article 7, States parties undertake to adopt measures in the fields of teaching and education, culture and information to combat prejudices that lead to racial discrimination. Each field should be addressed under a separate heading. Information on teaching and education should include descriptions of any initiatives to promote human rights in school curricula and teacher training programs. Information on cultural initiatives should outline the role of institutions or associations working to develop national culture, to combat racial prejudices and to promote intra-national and intra-cultural tolerance. The overview of measures taken in the field of information should include detail on the role of the State and commercial media in the dissemination of material to combat racial prejudices and promote human rights instruments.

3. AUSTRALIA'S NINTH PERIODIC REPORT: CONCLUDING OBSERVATIONS OF THE CERD COMMITTEE

Australia's most recent periodic report, its ninth, was submitted in 1993 and examined by the CERD Committee in August 1994. The following section contains a summary of the Concluding Observations adopted by the Committee.

3.1 POSITIVE ASPECTS

The CERD Committee made a number of positive comments on the ninth periodic report of Australia under article 9 of the Convention. Australia was commended for its regularity in reporting and appreciation was expressed for the quality of the report which complied with the Committee's Reporting Guidelines. Reference was also made to the comprehensiveness of the additional information submitted to the CERD Committee prior to and during the course of discussion of the report. Particular mention was made of the composition of the Australian delegation that appeared before the CERD Committee. The delegation included the former Minister for Aboriginal and Torres Strait Islander Affairs and the then Aboriginal and Torres Strait Islander Social Justice Commissioner: "Members of the Committee highly commended the composition of the delegation, describing it as an example to be followed by other reporting States."

The Committee expressed its satisfaction at measures taken since consideration of Australia's previous report to improve relationships between all groups and "in particular the situation of Aboriginal people". It commented positively on:

- strategies aimed at advancing multiculturalism such as the Access and Equity Strategy;
- the *Council for Aboriginal Reconciliation Act 1991* (Cth);
- the broad responsibilities and powers of the Human Rights and Equal Opportunity Commission in the implementation of the *Racial Discrimination Act 1975* (Cth) and in conducting inquiries into human rights matters;
- the activities of the Aboriginal and Torres Strait Islander Commission and the Torres Strait Regional Authority;
- the recommendations of the Royal Commission into Aboriginal Deaths in Custody;
- the establishment of the office of the Aboriginal and Torres Strait Islander Social Justice Commissioner;
- the over-turning of the *terra nullius* principle by the High Court of Australia in *Mabo*[12]*;*
- the enactment of the *Native Title Act 1993* (Cth);
- the establishment of the National Aboriginal and Torres Strait Islander Land Fund; and
- the readiness of the Federal Government to show leadership in securing better implementation of the Convention by the States and Territories.

[12] (1992) 175 CLR 1

3.2 PRINCIPAL SUBJECTS OF CONCERN

The majority of the concerns expressed by the CERD Committee related to the situation of indigenous Australians. The Committee identified as "principal subjects of concern", amongst others, the following issues:

- programs and strategies designed at the federal level to promote reconciliation and social justice and to address the problems associated with Aboriginal deaths in custody could be jeopardised by lack of cooperation from State and Territory governments;
- the situation of Aborigines and Torres Strait Islanders remained a concern, particularly the rate at which Aborigines continue to die in custody;
- legal proceedings for the recognition of native title and for responding to land claims had been protracted;
- the necessity for native title claimants to prove that they have maintained their connection with their land and that their title has not be extinguished can be "an exigent condition";
- people who identify as Aboriginal but whose ancestors are predominantly non-Aboriginal may not benefit from the provisions of the *Native Title Act 1993* (Cth);
- Aborigines continued to suffer disadvantage in such areas as education, employment, housing and health services;
- the level of participation of Aborigines in public affairs was disappointing; and
- Aborigines were more affected by social problems such as alcoholism, drug abuse and incarceration than any other Australian social group.

3.3 SUGGESTIONS AND RECOMMENDATIONS

The CERD Committee made the following suggestions and recommendations:

- that Australia pursue an energetic policy of recognising Aboriginal rights and furnishing adequate compensation for the discrimination and injustice of the past;
- that the Commonwealth undertake appropriate measures to ensure a harmonious application of the provisions of the Convention at the federal and State or Territory levels;
- that the recommendations adopted by bodies that protect Aboriginal rights — the Royal Commission into Aboriginal Deaths in Custody, Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Commission — be fully implemented, particularly by the States and Territories;
- the strengthening of measures to remedy any discrimination suffered by members of non-English speaking minorities and Aborigines in the administration of justice, education, employment, housing and health services;
- that the participation of all minorities in the conduct of political affairs be promoted;
- that law enforcement officials received more effective training to ensure that they respect and protect human dignity and human rights during the performance of their duties;
- that Australia continue to strengthen its education and training programs and provide more information on these matters in its next periodic report;
- that Australia withdraws its reservation to article 4(a) of the Convention; and

- that Australia's report and the CERD Committee's concluding comments be widely disseminated to encourage the elimination of all forms of racial discrimination.

4. OVERVIEW OF MAJOR DEVELOPMENTS IN AUSTRALIA CONCERNING INDIGENOUS RIGHTS DURING THE REPORTING PERIOD

4.1 NATIVE TITLE

4.1.1 Introduction

The International Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination and provides for equality before the law without distinction as to race, colour or national or ethnic origin. Significant parts of the 1998 amendments to the *Native Title Act 1993 (Cth)* ("NTA") do not accord with the principles of racial non-discrimination and equality laid down in CERD. In particular:

- the amendments prefer the rights of non-native title holders over those of native title holders;
- they fail to provide native title holders with protection of the kind given to other landowners;
- they allow for discriminatory action by governments;
- they place barriers to the protection and recognition of native title; and
- they fail to provide for appropriately different treatment of unique aspects of Aboriginal culture.

4.1.2 *Mabo V The State Of Queensland (No 2)* 1992

On 3 June 1992 the High Court of Australia handed down its historic decision in *Mabo v The State of Queensland (No 2)*.[13] The High Court rejected the view that Australia was *terra nullius* at the time of European colonisation and held that the common law of Australia recognises a form of native title to which the radical title of the Crown is subject. The Court held that native title might be extinguished only by legislation, by the alienation of land by the Crown, or by the appropriation of the land by the Crown in a manner inconsistent with the continuation of native title.

4.1.3 *Native Title Act 1993* (Cth)

On 27 October 1992 the former Federal Labor Government commenced a process of consultation with State and Territory Governments, Aboriginal and Torres Strait Islander organisations and industry to discuss the implications of and appropriate responses to the

[13] (1992) 175 CLR 1. The following sections draw substantially on S Pritchard, "Native Title from the Perspective of International Standards" [1998] *Australian Yearbook of International Law* (forthcoming).

High Court's decision. The first element of the Government's response was the negotiation and passage of the NTA. The NTA received Royal Assent on 24 December 1993 and its operative provisions commenced on 1 January 1994. The main objects of the NTA are stated in section 3:

- to provide for the recognition and protection of native title;
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings;
- to establish a mechanism for determining claims to native title; and
- to provide for, or permit, the validation of past acts invalidated because of the existence of native title.

The NTA recognises and protects the native title of Aboriginal people and Torres Strait Islanders in relation to land and waters which they possess under their traditional laws and customs and with which they have a connection, where these rights have not been extinguished by acts of governments.[14] The NTA also establishes a regime for the protection of native title rights in future dealings affecting native title land and waters ("future acts"). In the case of future acts, other than low impact future acts, native title holders are entitled to the same procedural rights as the holders of freehold title. For certain future acts, relating amongst other things to mining proposals, the NTA recognises an additional right of native title holders and claimants to negotiate, not a right to veto.[15]

The NTA validates past acts of the Commonwealth which might otherwise have been invalid because of the existence of native title. It enables States and Territories to validate past acts attributable to them. It provides a right to compensation for the effects of validation of past acts on the rights of native title holders since the enactment of the RDA. The Act establishes federal processes, including a National Native Title Tribunal (NNTT), for the determination of native title rights and of compensation for acts affecting native title. It also provides for the recognition of procedures established under State or Territory laws consistent with criteria prescribed in the NTA.

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[14] Sections 3, 10, 223(1).

[15] With respect to certain types of development, essentially mining and the compulsory acquisition of native title, in order to make a grant to a third party, native title holders were given additional rights to negotiate before the development or "act" can proceed (section 26). If the parties cannot reach agreement after negotiation, any party can apply to the National Native Title Tribunal (NNTT) or State or Territory arbitral body for a determination (section 27). In making its determination, the relevant body takes account of a number of factors, including the effect of the proposed act on the way of life, culture and traditions of native title holders; on the development of social, cultural and economic structures and on areas or sites of particular traditional significance; the interests and wishes of the native title holders in relation to the management, use or control of the land or waters concerned; and the economic significance of the proposed act to Australia and the relevant State or Territory (section 39). A determination of the NNTT or a State or Territory arbitral body can be overruled by the Commonwealth or the State or Territory Minister respectively (section 42). Under the native title regime, therefore, the right to negotiate is not a veto. Recent amendments to the NTA substantially limit the extent of the right to negotiate: see Part 4.1.9 below.

4.1.4 Native Title Amendment Bill 1996

A number of amendments to the NTA were proposed by the Federal Coalition Government through an Amending Bill of 27 June 1996 and its Exposure Draft of October 1996. Key elements of the proposed amendments included:

- a stringent new retrospective registration test for activating the right to negotiate in respect of mining (and some compulsory acquisition);

- substantial reduction or elimination of the right to negotiate through a discretionary power of the Minister to exclude exploration in deference to State/Territory regimes; otherwise, provision for a once-only right to negotiate at the exploration stage to cover both exploration and extraction; discretionary Ministerial powers to short-cut or by-pass the right to negotiate; limitation of the matters subject to negotiation; exclusion from the "expedited procedure" by-pass of the right to negotiate of any consideration of spiritual attachment to land;

- conversion of pastoral leases from term leases to perpetual leases and authorisation of non-pastoral activities, such as agricultural, commercial or tourism activities;

- enlarged responsibilities for Aboriginal and Torres Strait Islander representative bodies; and

- provision for wide-ranging indigenous land-use agreements.[16]

4.1.5 *Wik Peoples V The State Of Queensland*

On 23 December 1996 the High Court handed down its decision in *Wik Peoples v The State of Queensland.*[17] The Court held that the granting of a pastoral lease did not necessarily extinguish native title and that the rights of native title holders could coexist with those of pastoral leaseholders. The Court recognised pastoral leases as a peculiar feature of the Australian legal system created to meet the particular needs of the emerging Australian pastoral industry. Pastoral leases did not give exclusive possession to pastoralists but gave them the right to use the land for pastoral purposes, while recognising the rights of indigenous peoples to continue to exercise their native title rights. The High Court held that in the event of inconsistency between rights of pastoralists and those of native title holders, the rights of pastoralists will prevail.

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[16] See G Nettheim, "Nailing Down Native Title" (1997) (4) 3 *Indigenous Law Bulletin*13; also Aboriginal and Torres Strait Islander Commission, *Proposed Amendment to the Native Title Act 1993: Issues for Indigenous Peoples*, 1996; S Beckett, "Workability in Whose Interest? The Native Title Amendment Bill 1996" (1996) (3) 84 *Aboriginal Law Bulletin* 4; S Beckett, "But Wait … There's More! Federal Government Releases More Amendments to the Native Title Act" (1996) (3) 87 *Aboriginal Law Bulletin* 8.

[17] *Wik Peoples v The State of Queensland* (1996) 141 CLR 129.

4.1.6 Responses to Wik

Following the High Court's *Wik* decision, the National Indigenous Working Group on Native Title (NIWG), a national body representing major indigenous organisations, developed a proposal for a formal process of co-existence which "recognised and respected the rights and interests of all with a stake in the pastoral rangelands".[18] In a statement of 23 April 1997, augmented by further statements of 8 and 23 May, the Prime Minister announced his Government's "Ten-Point Plan" in response to the High Court's decision.[19] The NIWG responded that the Ten-Point Plan was not "a fair and reasonable response to *Wik*". Instead, "it provided for a substantial up-grading of pastoralists' rights, at the direct expense of indigenous peoples' ability to enjoy the rights which have been recognised by the courts."[20]

The NIWG argued that the Ten-Point Plan would allow States to authorise more intensive use of pastoral land without negotiation with native title holders. The NIWG claimed that the Ten-Point Plan would extinguish conflicting native title rights, contrary to the decision in *Wik* in which the High Court held only that in the event of inconsistency native title rights yield to pastoralists' rights, leaving open the possibility of revival of native title rights. In relation to the Ten-Point Plan's discussion of the right to negotiate, the NIWG was concerned that the right of indigenous peoples to have a say about activity on their land would be seriously reduced. In relation to non-exclusive tenures such as pastoral leases, including former pastoral leases abandoned long ago, the Ten-Point Plan would eliminate native title holders' right to negotiate altogether.

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[18] National Indigenous Working Group on Native Title, *Coexistence: Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993*, April 1997.

[19] The Ten-Point Plan provided for, amongst other things: validation of acts between 1 January 1994 and 23 December 1996 (point 1); confirmation of extinguishment of native title on "exclusive" tenures such as freehold, residential, commercial and public works, as well as agricultural leases to "the extent that it can reasonably be said that … exclusive possession must have been intended" (point 2); permanent extinguishment of native title rights over current or former pastoral leases and any agricultural leases not covered under point 2 to the extent that those rights are inconsistent with those of the pastoralist (point 4); provision of statutory access rights to native title claimants pending determination of native title claim (point 5); in relation to mining on vacant Crown land, a higher registration test for claimants seeking the right to negotiate, as well as no negotiations at the exploration stage and only one right to negotiate per project. In relation to mining on other non-exclusive tenures such as current or former pastoral lease-holdings, the right to negotiate would continue to apply unless displaced by a State/Territory statutory regime which includes compensation (point 6); the ability of governments to manage water (including offshore) resources and airspace to be put beyond doubt (point 8). Further, the 1996 proposal for a higher registration for the right to negotiate would apply to native title claims generally. The Ten-Point Plan also proposed a sunset clause — that is, a date by which native title claims must be lodged, as well as "means to encourage States and Territories to manage claims within their own systems".

[20] National Indigenous Working Group, "Critique of the Ten-Point Plan" (1997) (4) 3 *Indigenous Law Bulletin* 10; also Aboriginal and Torres Strait Islander Commission, *The Ten-Point Plan on Wik and Native Title: Issues for Indigenous Peoples*, ATSIC Canberra June 1997.

4.1.7 Native Title Amendment Bill 1997

On 4 September 1997 a Bill was introduced into the House of Representatives which incorporated the amendments to the NTA proposed in June and October 1996, as well as *Wik*-specific amendments.[21] The Native Title Amendment Bill 1997 (NTAB) generated considerable controversy within the community. This was added to by the Prime Minister's assertion on national television that native title holders could veto development over 79% of Australia.[22] Australians for Native Title and Reconciliation (ANTAR) expressed concern at the following aspects of the NTAB[23]: the number of provisions affecting outright, partial, *de facto* and retrospective extinguishment[24]; difficulties in obtaining compensation; cutting back of the right to negotiate; under-cutting of rural development negotiations[25]; the high threshold test for lodging claims, the short cut-off date for lodging claims and the restriction of claims to people with current physical access.

On 20 September 1997 in a letter and media release responding to an advertisement in the *Weekend Australian*, Senator Nick Minchin accused ANTAR of "promoting a complete misrepresentation of the High Court's *Wik* decision and the Federal Government's 10 point plan." The Senator described the NTAB as "a fair and balanced response to the

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[21] J Clarke, "The Native Title Amendment Bill 1997" (1997) (4) 6 *Indigenous Law Bulletin* 4; Aboriginal and Torres Strait Islander Commission, *The Native Title Amendment Bill l997: Issues for Indigenous Peoples*, ATSIC Canberra June 1997.

[22] The statement was incorrect on two counts: First, the NTA contained no right to veto, only a right to negotiate; and second, the figure of 79% glossed over different tenures giving a grossly misleading impression of land available for full claim. The true figure is closer to 12%, and even then traditional connection must have been maintained. Examining the figure of 79% more closely, it can be seen that approximately 15% of Australia is already held by Aboriginal people under land rights legislation, leasehold or reserves. Approximately a further 40% is pastoral land. The *Wik* decision established clearly that native title claims on pastoral leases cannot displace existing pastoral interests, and that the interests of pastoralists prevail. Native title on pastoral leases is about residual rights such as access for traditional purposes and negotiation if mining is proposed. This leaves vacant Crown land and land reserved for public purposes such as defence land and national parks. National parks and other reserve lands account for approximately 12% of the land mass. As these areas will continue to be used for those public purposes, it is only on vacant Crown land that Aboriginal people can make native title land claims which can provide for full ownership and possession. Vacant Crown land accounts for approximately 12% of the land mass of Australia. This land is largely in Western Australia where extensive areas remain vacant because of remoteness and arid desert conditions.

[23] Australians for Native Title and Reconciliation, *9 Facts About Howard's Wik Legislation*, 1997.

[24] ANTAR argued that native title would be extinguished forever on many types of land which are essentially public land (public works, land grants from one government to another or to a statutory authority, land subject to community purposes leases) even where there is minimal or no conflict between the public uses and native title uses; that native title rights inconsistent with pastoralists' rights would be extinguished on all land which at any time since colonisation had been pastoral leasehold; that pastoralists would be permitted to upgrade to full primary production, and native title rights inconsistent with new primary production activities would be extinguished forever; and that hundreds of unlawful mining licences and leases issued by State governments between 1 January 1994 and 23 December 1996 would be retrospectively validated.

[25] ANTAR claimed that in order to obtain compensation, indigenous people would still need to prove native title, and that technical difficulties and expense would make compensation almost impossible to obtain; that gutting the right to negotiate over proposed developments would leave traditional owners with negligible ability to protect their heritage; and that the extinguishment of most native title and destruction of the *Wik* co-existence model would destroy any real incentive for negotiated agreements.

uncertainties arising from the *Wik* decision and to the practical difficulties with the workability of the existing Native Title Act."

4.1.8 The Senate Debates

The first round of Debate in the Senate took place between 25 November and 5 December 1997.[26] Both the Government and Opposition parties tabled a substantial number of amendments to the NTAB, with a majority of the amendments proposed by the Opposition parties (the Australian Labor Party, Australian Democrats, the Greens and Senator Harradine) being rejected. The most notable of the amendments moved by Opposition parties which were defeated in the Senate included those seeking to remove/modify the Government's validation of intermediate period acts (that is, acts between the commencement of the NTA and the handing-down of *Wik*); the confirmation of the extinguishment of native title by interests deemed to confer "exclusive possession"; the retention of the sunset clause in relation to claims for compensation; and pastoral lease diversification through authorisation of acts within a broad definition of "primary production" without regard to native title holders. Key amendments to the NTAB made by the Senate include the removal of the sunset clause in relation to native title claims; the rejection of the physical connection test for registration of native title claims; retention of the right to negotiate on pastoral leases, in national parks and in cities and towns; retention of the existing right to negotiate at both the exploration and extraction stages; rejection of early Ministerial intervention in right to negotiate processes; suspension rather than extinguishment of native title on pastoral leases; and the capacity to make full claims on vacant Crown land and Aboriginal reserves regardless of previous lease history.[27]

The Senate passed the Bill as amended on 5 December 1997. The following morning, in an unusual Saturday session, the House of Representatives voted against the majority of the non-Government amendments made in the Senate. The Prime Minister moved a motion citing four main sticking points: the threshold test for registration; the right to negotiate; the proposal to make the NTA subject to the RDA; and the sunset clause. The NTAB was reintroduced early April 1998 (Native Title Amendment Bill 1997 [No 2]), including most of the amendments accepted by the House of Representatives in December 1997. The Senate was again unable to accept all aspects of the Government's Bill and the House of Representatives again unable to accept all amendments adopted by the Senate. After the Senate's second rejection of key aspects of the Native Title Amendment Bill there was much speculation about the prospect of a double-dissolution election to secure passage of the Government's Bill through a joint sitting of both Houses of Parliament.

In late June 1998 the Prime Minister announced that agreement had been reached with independent Senator Brian Harradine over further amendments to the Government's Bill which would enable Senator Harradine to support its passage through the Senate. It was a bitter disappointment to indigenous interests that they were not consulted on this crucial last minute compromise. The agreement was brokered directly between the Government and

[26] See account in P Burke, "The Native Title Amendment Bill: What Happened in the Senate" (1998) (4) 9 *Indigenous Law Bulletin* 4.
[27] Ibid.

Senator Harradine. Eighty-eight additional amendments were quickly passed by the House of Representatives and, after a lengthier debate, were finally accepted by the Senate on 7 July 1998. The amended Bill was passed by the Senate on 8 July. The NTAA received the Royal Assent on 27 July and most of its provisions commenced on 30 September 1998.[28]

4.1.9 *Native Title Amendment Act* 1998 (Cth)

The four sticking points cited by the Prime Minister in December 1997 were:

- the threshold test for registration;
- the right to negotiate;
- proposals to make the NTA subject to the RDA; and
- the sunset clause.

(a) The Threshold Test

In relation to the threshold test for registration, the NTAA provides a substantially higher threshold test for the registration of claims; including that the factual basis of a claim must be sufficient to support the rights asserted; that *prima facie* some native title rights can be established; and the physical (rather than traditional) connection of at least one member of the claim group. There is an exception to the physical connection test where physical connection cannot be established because a parent was removed from their traditional country (section 190B(7)), but where connection of a parent is relied upon, registration can only be by court order.

(b) The Right to Negotiate

The amendments contained in the NTAA affect the right to negotiate in three broad ways. First, the range of matters to which the right to negotiate applies have been reduced. It is removed altogether from compulsory acquisition for private infrastructure projects not associated with mining (section 26(1)(c)(iii)). Private infrastructure projects associated with mining and compulsory acquisition for a third party in a town or city attract extra procedural rights. The right to negotiate can be excluded altogether at the exploration stage in relation to acts "unlikely to have a significant impact on the particular lands or waters concerned"; and replaced with an alternative consultation scheme (section 26A). Second, State and Territory Governments are empowered to replace the right to negotiate over large areas with their own regimes (subject to Commonwealth Ministerial approval and disallowance by either House of Parliament). The areas to which State and Territory regimes can apply include pastoral leases (past and present), land reserved for a public or particular purpose, national parks, and areas in a town or city (section 43A(2)). The standards for alternative regimes include many but not all of the procedural rights associated with the right to negotiate; in particular the requirement for good faith negotiations has been removed and the scope for

[28] Provisions relating to the interim regime for representative bodies commenced on 30 October 1998 and the new regime will commence one year later (s 2, NTAA).

consideration by an independent body reduced. Third, the new registration test will render the right to negotiate significantly more difficult to access.

(c) The RDA

A so-called "clause-buster" (proposed by the Democrats and Greens) designed to make the NTA in its entirety subject to the RDA was ultimately defeated. The effect of such a clause would have been to render inoperative any provisions in the NTA (as amended) which accord to native title rights treatment less than that accorded to the rights of other property holders. Such provisions might have included those relating to validation of intermediate period acts, legislative extinguishment, diversification up to full range of primary production activities without negotiating with native title holders (section 24GA), and other future acts of governments.[29] Instead the amendment ultimately adopted and reflected in the NTAA will ensure that the RDA will apply to the administration of all government native title regimes (including State and Territory regimes); and the interpretation of ambiguous terms and provisions in the NTA as amended. This will leave little scope for challenging provisions of the NTA on the ground of inconsistency with the RDA. A clear provision of the NTA will override the RDA and will permit State and Territory laws to have similar effect.[30]

(d) The Sunset Clause

Finally, the Government backed down from its insistence upon the inclusion in the NTA of a sunset clause on claims either for the determination of native title or for compensation.

4.1.10 The NTAA: Some Key Concerns

Assessments of the outcomes of the so-called Howard/Harradine compromise differ widely, with indigenous leaders decrying the NTAA as an attack on the rights of indigenous Australians and a setback in the process of reconciliation.[31] Indigenous organisations have argued that the NTAA operates to extinguish and impair native title, and to reduce greatly the statutory protections of native title. Some of the key concerns are:

- **Confirmation of Past Extinguishment:** A range of previously issued titles are deemed by the legislation to extinguish native title permanently, whether or not such titles extinguish native title at common law.

- **Validation of "Intermediate Period" Titles:** Titles issued on leases since the commencement of the NTA (1 January 1994) until the date of the *Wik* decision (23 December 1996) without following the procedures required under the NTA are

[29] See P Burke, "Evaluating the Native Title Amendment Act 1998" (1998) 3 *Australian Indigenous Law Reporter* 333, citing advice of Faigenbaum QC and Moshinski published in *Tenth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1997*, Parliament of the Commonwealth of Australia 1997, Appendix 4.

[30] Burke, op cit.

[31] Ibid.

validated.[32] The consequence of validation is the arbitrary extinguishment or impairment of affected native title and the loss of an opportunity to negotiate.

- **Expansion of the Rights of Pastoralists:** Pastoralists who currently enjoy little more than rights of pasturage over often vast areas of land can apply for an upgrade of their rights to permit a broad range of higher intensity "primary production activities" without requirements of consultation or negotiation with affected native title holders.

- **Erosion of the Right to Negotiate:** States and Territories are entitled to establish regimes for the grant of interests to mining companies and other developers on terms significantly less favourable to native title holders than under the 1993 NTA regime.

- **Effective Suspension of the RDA:** The RDA is largely overridden by the provisions of the NTAA, and is confined to apply in very limited circumstances.

(a) Confirmation of Past Extinguishment of Native Title

The common law of Australia requires a "clear and plain intention" on the part of government to extinguish native title before native title will be held to be extinguished by the grant of an inconsistent interest.[33] Generally, the 1993 NTA left the principles of extinguishment of native title by the grant of an inconsistent interest to be developed by the courts. In contrast, the NTAA pre-empts the development of the common law by providing that particular classes of titles and grants of interest extinguish native title permanently.

The NTAA provides that native title is totally and permanently extinguished by the grant of defined "previous exclusive possession acts", including freehold estates, exclusive agricultural and pastoral leases, commercial, residential and community purpose leases, scheduled interests and public works. [34]

Where the "previous exclusive possession acts" are attributable to a State or Territory there is provision to allow the State or Territory to legislate to "confirm" extinguishment of native title.[35] "Extinguishment" is now defined to mean "permanent extinguishment".[36] To the extent that the common law would otherwise contemplate the survival of native title or its revival upon the expiry of a third party interest in land, the amendments amount to a legislative extinguishment of native title. In such cases, the term "confirmation of extinguishment" is a euphemism for legislative extinguishment of native title. Some examples follow.

[32] Section 232A(2)(e) NTA (as amended).
[33] *Mabo v State of Queensland* (1992) 175 CLR 1 per Brennan J at 64; Deane and Gaudron JJ at 111; Toohey J at 195.
[34] Division 2B of Part 2 and Schedule 1 of the NTA (as amended).
[35] Section 23E NTAA .
[36] Section 237A NTAA.

In the recent decision of the Federal Court in *Miriuwung Gajerrong*[37] Justice Lee found that a range of scheduled interests in Western Australia did not reflect a clear and plain intention on the part of government to extinguish native title.[38] The Government of Western Australia has already tabled draft legislation to "confirm" extinguishment of native title by the scheduled interests, as States are entitled to do under the NTAA. Once the State legislation is enacted, native title will be extinguished by operation of the legislation itself.

In Queensland, indigenous people sought legal advice concerning another species of scheduled interest known as the Grazing Homestead Perpetual Lease. Walter Sofronoff QC, the leading barrister in the Wik People's legal team before the High Court, advised that Grazing Homestead Perpetual Leases are even more amenable to co-existence with native title than the pastoral leases considered by the High Court in *Wik*. In August 1998 the Government of the State of Queensland passed legislation in accordance with the NTAA "confirming the extinguishment of native title by all Grazing Homestead Perpetual Leases."[39] The Queensland Government had been provided with a copy of Mr Sofronoff's advice before enacting the legislation. It is estimated that Grazing Homestead Perpetual Leases cover twelve percent of the State of Queensland. In those areas, native title has now been permanently extinguished.

The Commonwealth Government's Supplementary Explanatory Memorandum to the NTAA sets forth the position plainly:

> If the inclusion of a particular lease in the Schedule results in the extinguishment of native title (which may be the case if a court considers that the lease does not confer a right of exclusive possession) the native title holders involved are entitled to compensation (Section 23J). However, the lease will continue to be a Scheduled interest and the extinguishment by Division 2B of native title cannot be revisited.[40]

This passage indicates that the intention of the Commonwealth Government is not to "confirm" the common law position, but to ensure extinguishment of native title by the scheduled interests, whether or not in accordance with the common law. Indeed, the Deputy Prime Minister boasted in May 1997 that:

> There are bucket-fulls of extinguishment in the 10-Point Plan.[41]

Extinguishment of native title is taken to have happened when an act was done, irrespective of how long ago the act was done, or whether the land subsequently reverted to vacant Crown land. For example, pursuant to the provisions of the NTAA native title may be

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[37] *Ben Ward on behalf of the Miriuwung Gajerrong Peoples & Ors v State of Western Australia & Ors* Federal Court of Australia (unreported 24 November 1998). This decision is currently on appeal by the Governments on Western Australia and the Northern Territory.

[38] These included Conditional Purchase Leases granted pursuant to section 62 of the *Land Act* 1898 (WA*)* and a variety of Special Leases granted pursuant to section 152 of the *Land Act 1898* (WA) and sections116 and 117 of the *Land Act 1933* (WA).

[39] *Native Title (Queensland) State Provisions Act (No 1) 1998* (Qld).

[40] Supplementary Explanatory Memorandum to the NTAA at12.

[41] Hon T Fischer, ABC Radio "PM" Program, Friday 16 May 1997.

extinguished by the grant, last century and for a limited duration, of an interest which falls within the definition of "previous exclusive possession act". Such a regime exceeds any necessary response to the *Wik* decision.

The "confirmation of extinguishment" amendments fail to meet the non-discrimination standard of CERD, as well as Australia's own RDA. The effect of these provisions is arbitrarily to deprive native title holders of their rights to own property, to inherit and to freedom of religion (article 5(d)(v)-(vii)), and to discriminate against native title holders on the basis of their race.

Additionally, the "confirmation of extinguishment" provisions fail to accord native title holders equality before the law. The provisions deny native title claimants access to the courts and the opportunity to present their native title claims. Any defined "previous exclusive possession act" will operate as a bar to the registration of claims[42] and will allow for existing claims to be struck out where the claim involves a form of tenure which falls within the NTAA definition of a "previous exclusive possession act". The result is to deny indigenous people access to procedures designed to facilitate the formal recognition of native title.[43] Mr Michael Dodson, former Aboriginal and Torres Strait Islander Social Justice Commissioner, commented:

> If tenures are declared "exclusive", one group's rights to have their interests determined by the courts is abrogated. Confirmation will only affect native title. The discrimination is plain. No other title holder will be adversely affected by confirmation, only indigenous people who possess native title over land where a co-existent interest is declared to be "exclusive" with consequential extinguishment of the native title.[44]

In September 1997 the Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund received advice from barristers Jacob Fajgenbaum QC and Mark Moshinski that the "confirmation of extinguishment" provisions fall within the definition of racial discrimination in article 1 of CERD, and are contrary to Australia's obligations under Part II of CERD.[45]

(b) Validation of "Intermediate Period" Titles

After the commencement of the NTA on 1 January 1994, several State and Territory Governments granted interests in land without following the processes established by the Act. They argued that the grant of interests in pastoral lease land was justifiable on the basis of the belief held in some quarters that the grant of a pastoral lease extinguished native title.

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[42] Section 61A NTAA.

[43] However the operation of sections 47, 47 A and 47 B, which allow prior extinguishment to be disregarded in respect of pastoral leases, reserves and vacant Crown land in certain circumstances, should be noted.

[44] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report* July 1996 – June 1997, Commonwealth of Australia, September 1997, at 158-159.

[45] Appendix 4, Third Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of the Commonwealth of Australia, October 1997.

As a result of the High Court holding in the *Wik* case that the grant of a pastoral lease did not necessarily extinguish native title, grants of interest in land made without following the processes of the NTA after 1 January 1994 were potentially invalid by reason of their inconsistency with the NTA. The NTAA operates retrospectively to validate those potentially invalid acts of governments done in the "intermediate period", between the commencement of the NTA (1 January 1994) and the date of the *Wik* decision (23 December 1996).[46] There is also provision for each State and Territory to validate their own otherwise invalid "intermediate period acts".[47]

The effect of the validation of intermediate period titles is to extinguish native title permanently in the case of "intermediate period" freehold and certain leasehold grants, and to impair and suppress native title to the extent of the inconsistency in other cases. Extinguishment is now defined in the NTAA as permanent.[48] The validation amendments have the effect of rewarding State and Territory Governments' failure to use the NTA processes. All State and Territory Governments should have been aware during the "intermediate period" of the risk of incorrectly assuming that pastoral lease grants extinguish native title. Native title holders affected by the validation amendments are now required to bear the cost of governments' failure to use the processes of the NTA.

Distinguishing between the validation of titles under the NTA and the NTAA, the former Aboriginal and Torres Strait Islander Social Justice Commissioner Mr Michael Dodson commented:

> Validation of titles post *Wik* is entirely different to the validation of land interests which occurred after *Mabo*. Ignorance of the existence of native title is one thing, denial of its existence is another.[49]

The validation provisions of the NTAA breach the non-discrimination principle in that they validate acts and provide for extinguishment only in relation to native title, and not in relation to other forms of title. This favours Crown-granted titles over native title and does not provide native title with equal protection. Rather than protect native title, the validation provisions operate to subordinate and extinguish native title in favour of subsequently granted Crown titles. Validation also seeks to absolve governments from a failure to comply with explicit statutory provisions. The use of validation provisions in this context is discriminatory as it favours the interests of governments and those individuals who were granted titles post 1 January 1994 over native title holders. The provision of compensation to native title holders does not remedy the clear preference conferred on non-indigenous titles granted during the validation period. Human rights require respect, not obliteration followed by compensation.[50]

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[46] Division 2A of Part 2 NTA (as amended).
[47] Subdivision C of Division 2A of Part 2 NTA (as amended).
[48] Section 237A NTA (as amended).
[49] Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report* July 1996 – June 1997, Commonwealth of Australia September 1997, at 62.
[50] Ibid at 154.

The Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund enquiring into the Native Title Amendment Bill 1997 received advice from barristers Jacob Fajgenbaum QC and Mark Moshinski that the provisions of the Bill concerning the validation of intermediate period acts fall within the definition of "racial discrimination" in article 1 of CERD, and are therefore contrary to Australia's obligations under Part II of CERD.[51]

(c) Expansion of the Rights of Pastoralists: Primary Production Activity

The 1993 NTA allowed renewals of pastoral leases without any requirement to negotiate with native title holders, provided that the renewed lease did not grant a larger proprietary interest than the original lease. Following the High Court's *Wik* decision, pastoralists identified two main concerns about practical coexistence of titles. Those concerns were:

- The need to clarify the rights of pastoralists under their lease. Many pastoral leases were simply expressed to be "for pastoral purposes", without particularising the pastoralists' rights under their lease; and

- Potential impediments to pastoralists in obtaining expanded rights to diversify from pastoralism to more intensive activities, such as agriculture, horticulture, aquaculture, forestry and so on, should they so desire.

While some indigenous representatives were willing to support the legislative confirmation of existing pastoral rights, the Federal Government has gone much further than this and has introduced provisions to allow diversification of activities on pastoral leases for most primary production purposes with little or no reference to native title holders.[52] "Primary production purposes" is widely defined to include agriculture, forestry, horticulture, aquaculture and farm tourism.[53] These are far more intensive activities than pastoralism, which essentially involves grazing of cattle and activities incidental thereto, such as the building of fences and dams. The provisions of the NTAA do not contain any meaningful requirement for consultation or negotiation with native title holders in respect of most proposed primary production diversification.

The non-extinguishment principle applies to the grant of expanded primary production rights, however the doctrine of co-existing titles elaborated in the *Wik* decision requires that native title yields to the extent of inconsistency with third party interests. The ability of pastoralists to upgrade their rights without reference to native title holders reduces the scope of possible co-existence. Native title holders are entitled to compensation for impairment of native title resulting from the primary production diversification provisions. Compensation is neither adequate nor sufficient to militate against the discrimination involved in the systematic subordination of native title rights and interests in favour of third parties. The "primary production diversification" provisions diminish the exercise and enjoyment of native title

[51] Appendix 4, Third Minority Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Parliament of the Commonwealth of Australia, October 1997.

[52] Section 24GB NTA (as amended).

[53] Section 24GA and 24GB(2) NTA (as amended).

rights. Native title holders are denied meaningful procedural rights in these circumstances. The primary production amendments diminish only native title rights. They are discriminatory as holders of non-native title property interests which "co-exist" with pastoral leases are not affected in the same way as native title holders.

The framework of the primary production diversification provisions of the NTAA fails to provide native title holders with equality before the law. It allows the rights of pastoral leaseholders to be expanded at the expense of native title holders, without affording native title holders adequate procedural protection. The provisions are designed to privilege the rights of third parties over those of native title holders, and are therefore contrary to Australia's obligations under CERD.

(d) Erosion of the Right to Negotiate

The 1993 NTA provided a statutory framework for the protection of common law native title through specific provisions which allowed native title holders a right to negotiate for acts relating to mining and to the compulsory acquisition of native title land for the purpose of making a grant to a third party.[54] Native title claimants had a right to negotiate before such acts take place. Where parties failed to reach agreement, there was provision for arbitration, with decisions of the arbitral body subject to Ministerial over-ride in the national, State or Territory interest.

In *Mabo (No 2)* Brennan J (with whom Mason CJ and McHugh J agreed) stated that: "Native title has its origins in and is given its content by the traditional laws acknowledged by and traditional customs observed by the indigenous inhabitants of a territory." [55] In a Parliamentary submission, former Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson noted that this passage supports the right to negotiate as an incident of common law native title. He stated that "the right to control access to and activities on traditional estates is a consistent feature of Australian indigenous law", and that:

> The right to negotiate is not a special right which is given to indigenous people "above" the rights of other Australians. The right to negotiate acknowledges that indigenous peoples have an attachment to land which includes not only economic but also cultural and spiritual aspects.[56]

The current Coalition Government has rejected the argument that the right to negotiate is sourced from a common law Aboriginal right. The implications of the Government's approach is that, as a statutory right, the right to negotiate is susceptible to variation without the provision of compensation. To this end, key provisions in the NTAA further reduce the already diminished statutory right to negotiate contained in the NTA.[57]

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[54] Sections 26-44 NTA.

[55] (1992) 175 CLR 1 at 58.

[56] M Dodson, Submission to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Submission No 36A, 4 October 1996, at 1.

[57] N. Lofgren, "Compulsory Acquisition and the Right to Negotiate", Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Issues Paper No 25, Canberra, September 1998.

It is implicit in the Government's argument that the right to negotiate provisions could be removed and the protection of common law native title left to existing legal mechanisms. But existing legal mechanisms would be inadequate as:

(1) The particular characteristics of native title make it much more difficult to identify native title holders than freehold title holders. Native title holders would not necessarily receive notification of a government's act. They would need to exercise extraordinary surveillance of all government activities to detect the one act that may affect them; and

(2) The legal processes to halt governmental action (such as interlocutory injunctions) are discretionary and depend on the court's assessment of the balance of convenience. Thus, damage might already have been done by government acts before the native title holders could sufficiently establish their interest to require that consultation take place.

At the time of the enactment of the NTA the right to negotiate provisions were seen by indigenous Australians as a trade-off for the potentially extensive extinguishment and subordination of native title by the Act's validation provisions. The right to negotiate is removed, replaced and diminished in a variety of ways by operation of the NTAA. For example the right to negotiate is now automatically excluded from "primary production" diversification[58], mining infrastructure[59], and mining lease renewals. Further, the States and Territories are empowered to replace the right to negotiate in respect of mining and mineral exploration with significantly diluted minimum procedural rights over most areas.[60] Whilst the Federal Government may argue that it cannot influence the way in which States and Territories exercise the discretionary powers granted them under the NTAA, it is a matter of public record that the Premiers of several States and the Chief Minister of one Territory have called for the "blanket extinguishment" of native title. The Federal Government cannot close its eyes to the potentially negative consequences of providing greater discretion to the States and Territories to deal with native title. Ultimately, where actions of State and Territory Governments are discriminatory and contrary to Australia's international treaty obligations, the Federal Government is internationally responsible for those actions.

Moreover, native title holders cannot access the right to negotiate, or the less favourable State alternatives, unless they have passed a stringent new registration test.[61] The new registration test imposes a significant burden of proof upon native title holders, and contains requirements not necessarily forming part of the common law.[62] The prospect exists that bona fide native title holders will be denied the procedural protections of the NTA (as amended) because of rigours of the new registration test. Where the right to negotiate has been removed, native title holders are entitled to procedural rights equivalent to those of an

[58] Subdivision G of Division 3 NTA (as amended).

[59] Subdivision M of Division 3 NTA (as amended).

[60] Sections 26A, 26B, 26C and 43A NTA (as amended), allow the States and Territories to replace the right to negotiate with a right of consultation and objection wherever there have been pastoral lease tenures or reserve land. In most cases, this covers the majority of the State or Territory.

[61] Section 190B and 190C NTA (as amended).

[62] See, for example, the requirement that one or more of the applicants has or had a 'traditional physical connection' with part of the area claimed: Section 190B(7) NTA (as amended).

"ordinary title holder".[63] Indigenous representatives have argued that formal equality between native title holders and ordinary title holders will not result in substantive equality. The *sui generis* nature of native title requires commensurate procedural protections.

(e) Effective Suspension of the RDA

Section 7 of the NTAA deals with the relationship between the RDA and the NTA as amended. Section 7 limits the application of the RDA to the performance of functions and exercise of powers under the NTA, and as an interpretive aid in cases of ambiguity in the provisions of the NTA. There is no provision for any part of the NTAA to be challenged on the basis that it conflicts with the provisions of the RDA. Those provisions of the NTA (as amended) which are racially discriminatory override the RDA. The general provisions of the RDA must yield to the specific provisions of the NTA (as amended).

One concern that has been raised is that the discriminatory nature of the NTAA could affect the ongoing efficacy of the RDA. Mr John Basten QC observed in his evidence to the Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund that:

> The Racial Discrimination Act… does not arise under any specific constitutional head of power in Section 51 [of the Constitution]. It relies on the external affairs power and gives effect to the Convention [on the Elimination of All Forms of Racial Discrimination]. As I am sure you all are aware, that is a very special form of legislative power, because the Parliament does not in effect have power to enact laws with respect to racial discrimination but only to give effect to the Convention. Immediately one starts to interfere with the scope, purpose and the intent of the Racial Discrimination Act, there is a very live danger than the High Court will at some stage say, "the Act no longer accords sufficiently closely to the terms of the Convention and, therefore either the amendments to it express or implied will be invalid or the whole act itself will be invalidated." So that is my concern about fears arising in relation to implicit amendment to the Racial Discrimination Act 1975 (Cth) by later legislation. It is not a fear which would arise normally in relation to a principle which we all accept, that later legislation can impliedly repeal or vary earlier legislation.[64]

Having regard to the discriminatory nature of features of the NTAA discussed above, the Coalition Government's exclusion of the meaningful operation of the RDA suggests a course of racially discriminatory conduct on the part of the Australian Government, in breach of its obligations under CERD.

4.1.11 The Concepts of Equality and Non-Discrimination

Much of the discussion of native title as defined in *Mabo (No 2)* and *Wik* was plagued by misunderstanding not only about the nature of native title, but more fundamentally about the

[63] Subdivision M of Division 3 NTA (as amended).

[64] *Hansard*, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Wednesday, 27 November 1996, at NT3609.

nature of indigenous rights and their relationship to principles of non-discrimination and equality.[65] It was claimed by various "stakeholders" that indigenous rights are somehow additional rights or special privileges, the removal or narrowing of which would not offend the prohibition of racial discrimination. This argument was made with respect to amendments to the right to negotiate regime in the NTA[66], to heritage protection legislation generally[67] and to the Hindmarsh Island Bridge Bill 1996, in particular.[68] During the second round of the Debate in the Senate in April 1998, the Prime Minister explained in Parliament his opposition to a compromise "right to negotiate" clause for native title holders dealing with miners on pastoral leases:

> It is fundamental to our kind of society that all Australians should be treated equally before the law. All Australians should be entitled to an equal dispensation of justice and all Australians should have equal responsibility before the law.

The native title debate - and the challenge of reconciliation between indigenous and non-indigenous Australians - would benefit from greater clarity in relation to the concepts of equality and non-discrimination.

Clearly it is wrong to refer to positive measures to protect native title as discriminatory. Rather, positive measures to protect the unique and vulnerable nature of native title are a reasonable and proportionate means to achieve substantive equality, required to safeguard indigenous cultural characteristics. In a submission to the Senate Legal and Constitutional Legislation Committee in relation to the Hindmarsh Island Bridge Bill, the former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson argued that Commonwealth heritage legislation is not a special measure but a permanent measure to protect the heritage of indigenous Australians: "Part of the features of a special measure are that it is to overcome … disadvantage and is temporary in nature …". Heritage legislation, on the other hand, "is about spiritual and religious and heritage values" and "not about disadvantage in the socio-economic sense". Mick Dodson has argued that it is similarly misconceived to talk of the NTA and, in particular, the right to negotiate as special measures.[69] Such an approach leads to the result that "Oh, because [the NTA] is a special measure and we gift it, we can do what we like with it."[70]

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[65] This section draws substantially on S Pritchard, "Native Title from the Perspective of International Standards" [1998] *Australian Yearbook of International Law* (forthcoming).

[66] See for example the characterisation by Senator Minchin of the right to negotiate as a "special privilege" because "Aborigines Have These Special Rights That Other Australians Don't Have." *Sydney Morning Herald*, 1 June 1996, at 138; also Parliament of the Commonwealth of Australia, *Seventh Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1996 and the Racial Discrimination Act*, 1996, at 28.

[67] See Chief General Counsel, Attorney-General's Department, Senate Legal and Constitutional Legislation Committee, 29 November 1996, at 86. The Committee agreed with the opinion provided to it by the Attorney-General's Department: see Senate Legal and Constitutional Legislation Committee, "Consideration of Legislation Referred to the Committee: Hindmarsh Island Bridge Bill 1996", December 1996, at 19. See also evidence of Mr Stephen Palyga, Solicitor for Tom and Wendy Chapman, Senate Legal and Constitutional Legislation Committee, 29 November 1996, at 120.

[68] Ibid.

[69] Senate Legal and Constitutional Legislation Committee, 29 November 1996, at 93; also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: July 1995–June 1996*, Australian Government Publishing Service, August 1996, at 2; Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 17 October 1996, at 3108–9, 3300–1.

[70] Senate Legal and Constitutional Legislation Committee, 29 November 1996, at 94.

An approach in accordance with international human rights law conceptualises law and policy relating to native title not as *prima facie* discriminatory special measures, but as measures necessary to ensure the protection of distinct indigenous identities and safeguard the particular relationship of indigenous peoples with their land. A more contextualised understanding of equality has regard to cultural identity as an important aspect of a commitment to substantive equality rather than construing all race-conscious distinctions as *prima facie* unlawful and saving some, exceptionally, as remedial measures designed to eliminate disadvantage in the equal enjoyment of human rights. Native title — and aspects of the native title regime such as the right to negotiate — are not special privileges or additional rights, the removal of which would not offend the prohibition of discrimination. Such positive measures of protection are necessary to achieve substantive racial equality and to accommodate the inherently different character of native title, including the need of native holders to exercise, on an ongoing basis, a reasonable level of control over access to, and the use of their land.[71] The same analysis applies to native title in relation to land subject to pastoral leases. In this context substantive equality and realistic coexistence require that native title holders are able to exercise some control over future developments affecting native title land.

4.1.12 *Native Title Act 1993* and the Indigenous Land Fund

(a) The Indigenous Land Fund

In the face of European encroachment, most Aboriginal and Torres Strait Islander people are unable to demonstrate the kind of association with their traditional country required to establish native title; or where they can establish their native title, their ancestral lands are no longer available for claim. Therefore, as the second element of the former Labor Government's response to the *Mabo* decision, the *Native Title Act 1993* (Cth) established a National Aboriginal and Torres Strait Islander Land Fund. In accordance with section 201(2), the purpose of the Fund is to assist Aboriginal peoples and Torres Strait Islanders:

> (a) to acquire land; and

[71] According to Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson: "The right to control access to and activities on traditional estates is a consistent feature of Australian indigenous law." Dodson, op cit, at 18. See also submission of Cape York Land Council to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund on the Native Title Amendment Bill 1996: "[N]on-indigenous land titles derive from Parliament and the English feudal system of land tenure; native title is rooted in traditional law and custom for the particular area. It makes sense that achieving equal protection for these differently constituted titles may involve the use of quite different legal mechanisms — in other words, the achievement of non-discrimination through substantive rather than formal equality. The [right to negotiate] protects a basic incident of native title: the right to control access and activity on indigenous land. It is a measure to achieve substantive equality. The High Court has shown increasing interest in 'substantive equality' as a litmus test for non-discrimination. Amendments which tear at the heart of a basic incident of native title will not satisfy such a test." Cape York Land Council, *Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1996*, 6 December 1996, at 3. This approach was endorsed in the minority report: Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *The Native Title Amendment Bill 1996 and the Racial Discrimination Act: Second Minority Report*, Commonwealth of Australia, December 1996, at 14, 19.

(b) to manage the acquired land in a way that provides economic, environmental, social or cultural benefits to the Aboriginal peoples and Torres Strait Islanders.

The Land Fund, seeded by Federal funding over ten years and thereafter to be self-sustaining, and an Indigenous Land Corporation are intended to enable Aboriginal and Torres Strait Islander peoples to acquire and manage land in a sustainable way. The *ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill*, introduced into the House of Representatives by the former Prime Minister on 30 June 1994, inserts a new part into the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth). In accordance with section 191B, the purposes of the Indigenous Land Corporation are:

(a) to assist Aboriginal persons and Torres Strait Islanders to acquire land;
(b) to assist Aboriginal persons and Torres Strait Islanders to manage indigenous-held land;

so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders.

The Act sets aside $200 million for the Land Fund in 1994-95, and a further $121 million per year (indexed to preserve real 1994-1995 dollar values) for the following nine years. The total commitment over ten years is circa $1.5 billion. In each financial year $45 million (again indexed) of the annual allocation will go to the ILC for land acquisition and land management activities, and to running costs. The remainder will be invested, so that when government allocations cease in 2003-4, income from these investments will fund the continuation of the ILC's core activities.

The ILC decides how to use Land Fund money to buy land, or assist in the management of land for the benefit of indigenous communities. Land granted by the ILC to a community corporation can not be disposed of without the consent of the ILC.[72] The ILC has no powers of compulsory acquisition of land, but operates as a participant in the commercial market for land. In its land management function, the ILC is required to give priority to "pursuing sound land and environmental management practices."[73] The ILC is required to prepare a national indigenous land strategy, covering the acquisition of land, land management issues and environmental issues relating to indigenous land. It is also required to develop regional strategies, covering the same issues and relating to particular regional areas.[74]

(b) The Relationship between the Indigenous Land Fund and the Native Title Act 1993

[72] Section 191S(2).
[73] Section 191E(3)(a).
[74] Sections 191 N, P.

In discussion of the *Native Title Amendment Act 1988* it is important to recall that the *Native Title Act 1993* (Cth) and the *ATSIC Amendment (Indigenous Land Corporation and Land Fund) Act 1995* (Cth) are complementary pieces of legislation. In the words of ILC Chairman David Ross:

> It is … extremely important to understand the complementary nature of the two pieces of legislation. The intention of the Land Fund legislation was to enable the purchase of land to rebuild an indigenous land base and to restore some land to indigenous people who have been dispossessed. The ILC's specific purpose is to acquire land for indigenous peoples to provide social, cultural, economic and environmental benefits for themselves and for future generations. The ILC's key criterion in land acquisition, in line with its origins in the High Court's recognition of native title, is to purchase land which is of cultural significance to indigenous peoples.
>
> Purchase of land by the ILC is not a substitute for native title. Purchase by the ILC does not restore native title rights — for example, the right to protect the unique nature of native title, which recognises the spiritual and cultural relationship with the land through the right to negotiate under the Native Title Act. The ILC has no powers of compulsory acquisition. It can only acquire land in the open market from willing vendors, and can only grant the form of title it purchases.
>
> Further, in terms of its ability to meet land needs of dispossessed indigenous people, the mechanism of purchase by the ILC is imperfect. There may be cases where the ILC will never be able to purchase and return the traditional land of particular groups of indigenous people simply because the land is not put up for sale.[75]

In a submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund in 1997, ILC Chairman David Ross stated that the general thrust of the amendments then proposed to the *Native Title Act* would be:

> to undermine the fundamental intentions of the Commonwealth Parliament when it passed the original Native Title Act and the complementary legislation which established the Aboriginal and Torres Strait Islander Land Fund and the Indigenous Land Corporation. In formulating a legislative response to the High Court's recognition of native title, the Commonwealth did not merely provide a regime to legalise the future acquisition of indigenous peoples' property rights. There was a clear intention to preserve native title where it still survived and to redress dispossession. These two pieces of legislation provided a process which would enable indigenous people to ***preserve and protect*** the unique nature of their native title and interests in land and provided the means of ***restoring land*** to the indigenous estate. The Native Title Act was designed to protect native title rights from further unlawful appropriation and to establish a process for surviving native

[75] Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Public Hearing, "Submission of the Indigenous Land Corporation by David Ross, Chairman", Canberra, 25 September 1997.

> title rights to be determined on a case by case basis, consistent with the High Court's views on the likely variable content of native title from place to place.
>
> Neither piece of legislation has damaged the property rights or interests of any other party - they merely recognise that indigenous peoples may also have interests in land. Native Title rights do ***not*** enable indigenous people to stop development, but ***do*** enable them to negotiate over future land uses and negotiate agreements, recognising that native title is a valuable and legitimate interest in land. The overall thrust of the amendments is to seek to deny those property rights over significant areas of land, to the serious detriment of native title holders and for the benefit of other private interests. This is an unprecedented treatment of the property rights of one sector of the community. It is simply unjust. It will also force back onto Governments - and ultimately to taxpayers - the responsibility of compensating native title holders for the loss of their rights to private interests. But it will also have devastating effects on indigenous peoples and the survival of indigenous cultures, as devastating, ultimately, as the period of more than 200 years prior to the recognition of native title.[76]

Where, as a result of the 1998 amendments to the *Native Title Act*, native title rights can no longer be asserted to protect or enable indigenous peoples to access places of significance, the only option will be to try to acquire the land through purchase. The substantial reduction of the area of land over which indigenous people will be able to assert native title interests will mean greater pressure on the ILC to purchase land as a means of gaining access to and control over areas of significance and as a substitute for benefits which could have been negotiated through native title processes. Again according to ILC Chairman David Ross:

> At present the ILC has the ability to secure the land needs of larger groups of indigenous people through strategic purchases of land in the context of broader native title negotiations. The extinguishment or impairment of native title rights will greatly undermine the ability of native title claimants and the ILC to negotiate such strategic outcomes. Pressure to attempt to meet all land needs through purchase will revert to the ILC.
>
> The loss of the right to negotiate and to enter agreements which could include land and financial benefits will also reduce the potential for indigenous peoples to establish an economic base. This will also place greater pressure on the ILC as the only means of access to land and to funds for the purchase of land which will provide an economic as well as a cultural base.
>
> The ILC's resources are limited. … [C]ontrary to views expressed by some groups in the aftermath of the Wik decision, the Land Fund does not represent a $1.4 billion windfall for indigenous people. The modest allocation from the Fund to the ILC annually is of the order, since 1 July 1997, of only $45 million per year. This annual allocation also funds the ILC's other primary function of management of all

[76] Ibid.

indigenous-held land as well as administrative costs. Funding at this level clearly permits of only a relative few strategic purchases per year.

> The ILC was never intended to be able to address all the land needs, or redress all the dispossession, or resolve all the disadvantage which has been and is experienced by indigenous people. The Commonwealth's intention in establishing the fund (which will itself always remain the property of the Australian people) was clearly to provide an ongoing source of funds for the gradual, strategic purchase of land to complement other measures, in particular the provisions of the Native Title Act.[77]

Thus the 1998 amendments to the *Native Title Act* have increased the pressure on the ILC as the primary mechanism for restoring land to its traditional owners and re-establishing the land base of indigenous peoples. Clearly the ILC does not have the resources to address all indigenous land needs nor can it be regarded as a substitute for native title.

4.1.13 Conclusion

The validation, confirmation, pastoral lease diversification, right to negotiate and RDA amendments to the NTA are only some of the measures contained in the NTAA which are likely to be in conflict with Australia's obligations under CERD in relation to native title. Clearly native title holders must be treated equally with other property holders. Favouring the property rights of non-indigenous people over those of indigenous people - by substantially rolling back the right to negotiate, and by impairing the enjoyment of or affecting complete or partial extinguishment of indigenous property rights - is inconsistent with Australia's international human rights obligations.

4.2 ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976 (CTH) AND THE REEVES REPORT

4.2.1 Introduction

The purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("ALRA") were to grant traditional Aboriginal land to Aboriginal people in the Northern Territory; to recognise traditional Aboriginal interests in, and relationships to land; and to provide Aboriginal people with effective control over activities on their land.

Upon the enactment of the ALRA in 1976, former Aboriginal reserves were converted to Aboriginal land and Aboriginal people could make claims to unalienated Crown land on the basis of their traditional relationship to that land. After more than twenty years, approximately forty two percent of the Northern Territory is Aboriginal land. This land is held by Aboriginal Land Trusts for the benefit of all the traditional land owners as inalienable freehold title.

[77] Ibid. See also Indigenous Land Corporation, *Annual Report 1997-1998*, 1998, at 16-17, 48-52.

The ALRA establishes Land Councils to operate as representative bodies. They are made up of elected Aboriginal people. There are currently 4 Land Councils in the Northern Territory: the Northern Land Council ("NLC"), the Central Land Council ("CLC"), the Tiwi Land Council and the Anindilyakawa Land Council. The Land Councils determine policy and assist Aboriginal people in claiming and managing their land, in protecting sacred sites and in the management of income received under the ALRA.

The ALRA was reviewed in 1980[78] and again in 1983.[79] In 1997 the Federal Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, announced a further review ("the Reeves Review") and appointed Mr John Reeves QC ("the Reviewer") to undertake the task. As one Aboriginal person noted during consultations in connection with the Review, this is many more times than non-Aboriginal land rights have been reviewed:

Aboriginal Respondent: Can I just ask you a few questions?

Reviewer:	Yes, I'm not really here to answer questions but to listen to you, but I'll try.
Aboriginal Respondent:	Yes, I know. To your knowledge, has there ever been a review of land titles held by non-indigenous community holders in Australia?
Reviewer:	I don't know what you mean …[80]

The report of John Reeves QC, *Building on Land Rights for the Next Generation*, was published in August 1998.

4.2.2 The Reeves Review and Report

(a) The Process

The consultation process conducted by the Reviewer was of concern to Aboriginal people in the Northern Territory. Consultations were rushed and conducted at inappropriate times, mainly during the wet season which is a major time for ceremony.[81]

(b) The Recommendations of the Report

The Reviewer made numerous findings and recommendations. If implemented a significant number of these recommendations would be detrimental to the principles of self-determination, non-discrimination and equality before the law. Of particular concern are proposals:

- that the NLC and CLC be replaced by 18 Regional Land Councils ("RLCs") and that the RLCs be administered by one umbrella body, the Northern Territory Aboriginal Council ("NTAC"), to be made up initially of Government appointees;

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[78] Mr B Rowland QC, *An Examination of Aboriginal Land Rights (Northern Territory) Act 1976-1980*, Department of Aboriginal Affairs 1980.

[79] Justice John Toohey, *Seven Years On: Report to the Minister For Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, AGPS 1984.

[80] Reeves Review, Alice Springs Hearing, 26 February 1998 at 52.

[81] *Aboriginal and Torres Strait Islander Commission NT News*, "ATSIC Condemns Reeves' Land Rights Act Review" December 1998.

- to remove the permit system which allows Aboriginal land owners to regulate access to Aboriginal land;

- to change the critical mining and exploration provisions of the ALRA;

- to empower the Northern Territory Government to acquire Aboriginal land compulsorily for public purposes;

- to revise the Aboriginal Benefits Reserve ("ABR") (formerly the Aboriginal Benefits Trust Account in accordance with a more commercial orientation;

- to apply Northern Territory laws which protect the rights and interests of the broader community on Aboriginal land, even where these affect the rights of Aboriginal people to use their land in accordance with Aboriginal tradition; and

- to extinguish native title on Aboriginal land and Community Living Areas.

The Review was conducted pursuant to nine terms of reference.

(i) The Effectiveness of the Legislation in Achieving its Purpose

The Reviewer found that:

> The Act and associated Northern Territory legislation have been very effective in granting traditional Aboriginal land in the Northern Territory for the benefit of Aboriginal people and in recognising traditional Aboriginal

> interests in, and relationships with, land … [but] has been less than effective in providing Aboriginal people with effective control over activities on their traditional land.[82]

The Report recommends the inclusion of a purposes clause in the ALRA to encourage the "formation of a partnership between Aboriginal people in the Northern Territory and the Government and people of the Northern Territory".[83] The Reviewer clearly considers a partnership relationship to be possible. Although he acknowledges the deep level of distrust and resentment on the part of Aboriginal people towards the Northern Territory Government, he underestimates the impact of the Government's record in resisting the land rights process and impeding the acquisition of title by Aboriginal people in the Territory.

In his submission to the Reeves Review, Mr I Viner QC, a Minister in the Coalition Fraser Government (1975-1983), described the attitude and conduct of the Northern Territory Government in these terms:

> The political attitudes of Northern Territory Governments over the last 20 years had been a disgrace, in their constant and unremitting opposition to land rights claims: the repetitive resort to anti-land rights propaganda and playing the "race card" at election after election; failure to honour the letter and spirit of the intention of the 1976 Act, or complimentary Aboriginal sacred site and Aboriginal heritage laws and, now, the Northern Territory Government's desire, through [its submission to] the Review and the drive for Statehood, to obtain compulsory acquisition powers over Aboriginal traditional lands, the weakening of the central position under the 1976 Act of Land Councils, the further diminishment of Aboriginal consent to mining, objection to native title and the denial of recognition within future Constitutional arrangements of Aboriginal customary law and traditional rights.[84]

The Northern Territory Government's policy of opposing land claims has turned what was meant to be a beneficial process into "legalistic battlefields"[85] and has sought to erode the title of Aboriginal landowners and the control they enjoy under that title. The Government has claimed that its representation in land claims has been consistent with its role as the Government of the Northern Territory. However, with few exceptions its representation at hearings has been confrontational and contrary to Aboriginal interests. By 1987 it had been to court (the High Court, Federal Court and Supreme Court) twenty four times to oppose land claims and had achieved a single partial win.

Another example illustrates the attitude of the NT Government to the ALRA: Section 73 of the ALRA provides for reciprocal Northern Territory legislation. In 1978, almost

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[82] J Reeves QC, *Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, Darwin 1998, at 76.
[83] Ibid at 77.
[84] Submission of Mr R I Viner QC, unpublished.
[85] Central and Northern Land Councils, *Our Land, Our Life: Aboriginal Land Rights in the Northern Territory*, 1995, at 7.

immediately following the passage of the ALRA, draft Northern Territory sacred sites legislation sought to diminish the rights of Aboriginal people under the ALRA. The sacred sites legislation was amended in 1989 to diminish even further the capacity of Aboriginal people to protect their sacred sites. In particular, the 1989 amendments empowered the Minister to override the Aboriginal Areas Protection Authority.

(ii) The Role, Structure and Resource Needs of The Land Councils Following The Coming Into Effect of the Sunset Clause Relating to Land Claims

The Reviewer found that the two large Land Councils, the NLC and CLC, have been successful in developing their political role and in preparing and presenting land claims, but have been less successful in performing other aspects of their representative role under the ALRA. The Reviewer asserts that they are perceived to be "bureaucratic, remote, tardy and uninterested in local Aboriginal problems".[86] He recommends their replacement by eighteen smaller RLCs, and the establishment of the NTAC as an authority under the ALRA. The members of the NTAC would initially be appointed jointly by the Commonwealth Minister and the Chief Minister of the Northern Territory from a list of nominations of Aboriginal Territorians made by Aboriginal Territorians.

The main functions of each RLC would be:

- to undertake all the functions of the present Land Council in its region with the exceptions of completing the land claims process, sacred sites assistance, and assistance with commercial ventures, which functions would initially be undertaken by the NTAC or other bodies;

- to make decisions in relation to proposals for the use of Aboriginal land in its region that do not conflict with the function above, including decisions relating to exploration and mining, tourism and specialist primary production. All agreements made by a RLC would be required to be registered with the NTAC;

- to hold in trust all Aboriginal land in its region for the benefit of all Aboriginal people who are entitled by tradition to use or occupy that land;

- to receive and spend funds made available by the NTAC for the administration of the RLC or for public purposes approved by the NTAC;

- to assist in the social and economic advancement of Aboriginals living in its region; and

- to co-ordinate and assist in the implementation of the Aboriginal social and economic advancement programs of the NTAC, the Northern Territory and Commonwealth Governments and ATSIC, in its region.[87]

[86] Reeves Report, op cit, at 117.
[87] Ibid at 600-602.

The main functions of the NTAC would be:

- to maintain strategic oversight of the activities of the RLCs relating to major agreements, delegation of their functions, their financial and administrative functions and the appointment of their CEOs;
- to fund the administrative costs of the RLCs;
- to establish an investment trust and act as a "bank" for the RLCs;
- to complete outstanding land claims;
- to act as the sole native title representative body in the Northern Territory; and
- to be responsible for receiving and distributing the mining royalty equivalents paid to the ABR and any other funds allocated to it.

It is proposed that the NTAC would consist of hand-picked representatives, not people elected by and accountable to Aboriginal communities. The NTAC would come under the direct control of the Federal Minister and the Northern Territory Chief Minister.

Indigenous representatives have suggested that the creation of the NTAC would frustrate self-determination and empowerment. Indeed, new Land Councils can already be accommodated within the existing system. Over time, Aboriginal people should be allowed to decide for themselves who their representative bodies should be. Like the Land Councils themselves, ATSIC also supports regional committees of the Land Councils being given more autonomy over decisions concerning land in their areas. However, Aboriginal people are concerned that the desire to dismantle the CLC and the NLC is for political reasons. This scepticism is not unfounded given comments in which the Deputy Prime Minister, Mr Tim Fischer described the NLC and CLC as "blood sucking bureaucracies". According to a statement released by Mr Fischer's office:

> The Northern Land Council based in Darwin and the Central Land Council based in Alice Springs have become giant, bureaucratic, bloodsucking land councils which take away from smaller communities, resources and flexible infrastructure and leadership.[88]

Although Mr Fischer later indicated regret over his choice of words he has recently been quoted as saying that the Reeves Report's recommendation that the CLC and NLC be dismembered is under consideration:

> I back John Herron's views on that as we work through the very important Reeves QC ALP [sic] report on, in effect in terms of their recommendations, "busting up" to further decentralise the land council structure of the Northern Territory.[89]

[88] "Fischer Lashes Out at Aboriginal Councils" *The Sydney Morning Herald*, 29 September 1998, at 9.
[89] "Australia's Deputy PM Slams Aboriginal Land Councils", World News, Radio National Australia, 13 January 1999.

According to Central Land Council Director Bruce Tilmouth:

> The 18 new land councils the NT Government is so keen to see established would actually be controlled by a new body called the NT Aboriginal Council (NTAC) whose members would all be appointed by the NT and Federal Ministers. NTAC would also take all the money flowing from Aboriginal land, and traditional owners would no longer have to be consulted about developments on their land…the proposed new regime would amount to a government take-over of Aboriginal land and funding.[90]

The Report also recommends that the NTAC take over ATSIC funding responsibilities as well as finances of the ABR. These would be used to deliver housing, health, education and economic development. The net effect would be to deliver tighter control of Aboriginal affairs to the Northern Territory and Federal Governments. The ATSIC Board of Commissioners has expressed concern over these funding proposals, saying that they are seen by many Aboriginal people as a "blueprint" for stripping ATSIC programs away on a national level.[91]

(iii) Access to Aboriginal Land

Section 70 of the ALRA makes it an offence for a person to enter or remain on Aboriginal land except in the performance of a function under the Act, or otherwise in accordance with the Act. Pursuant to the *Aboriginal Land Act 1978* (NT), the Land Council for the area, the traditional Aboriginal owners for the area, the Administrator of the Northern Territory and the relevant Northern Territory Minister are authorised to issue permits for access onto Aboriginal land. The Reeves Report recommends the removal of the requirement for permits to enter Aboriginal land:

> The permit system operating in the Northern Territory in relation to Aboriginal land is costly, ineffective, confusing, divisive and burdensome and, in addition, is a racially discriminatory measure. It is not widely supported by Aboriginals and it is not necessary to ensure an equal enjoyment of human rights and fundamental freedoms of Aboriginal people.[92]

In place of the permit system the Report recommends amendments to the *Trespass Act* (NT). This will "place Aboriginal landowners in a similar position to, and with similar rights to, other landowners in the Northern Territory … [and] will give Aboriginal landowners more control and it will be simple, less costly, more effective and easier to enforce than the present permit system".[93] According to the Reviewer:

> Reforms to access would not only pay dividends for Territorians at large, but would reduce opposition to Aboriginal land rights because they would no longer impose such heavy costs on non-Aboriginal Territorians. The costs of the ALRA

[90] "Divide and Rule", *Land Rights News*, December 1998, at 5.
[91] *Aboriginal and Torres Strait Islander Commission News*, December 1998, at 2.
[92] Reeves Report, op cit, at 308.
[93] Ibid.

> have probably exceeded their benefits for other Territorians because of these unnecessary costs that have been imposed on them.

In his Second Report as Aboriginal Land Commissioner in 1974, Justice Woodward stated that:

> One of the most important proofs of genuine Aboriginal ownership of land will be the right to exclude from it those who are not welcome.[94]

In 1985 in *Gerhardy v Brown*, the High Court of Australia recognised the permit system as a "special measure" under the RDA and CERD.[95] Traditional Aboriginal owners of Aboriginal land, like any other landowners, have as part of their title to the land the right to admit and exclude persons from their land. This is a fundamental aspect of land ownership under the general law and is fundamental to the achievement of the aims of the ALRA. Although the current access system may require some change, the Reeves Report's proposed amendments to the ALRA would not adequately recognise Aboriginal landholders' right to exclude people from their traditional lands.

(iv) The Operation of the Exploration and Mining Provisions

The ALRA contains a number of provisions concerning mining on Aboriginal land.[96] These include mechanisms for protecting the rights of Aboriginal people to control mineral exploration and mining on their lands. Aboriginal land owners have the right to accept or reject applications from mining companies requesting access to Aboriginal land at the exploration stage of a project. As it stands, the right to consent or refuse consent to the grant of an exploration licence is qualified. The Governor-General can override the landowners decision in the national interest.[97] A mining company that is refused access may also reapply after 5 years.

The right to consent or refuse consent is available only in respect of exploration licence applications. Once consent is given, traditional owners cannot refuse consent to the grant of a mining lease. Where landowners agree to exploration, mining or other development they have the right to negotiate the terms and conditions. The right to consent or refuse consent must be exercised within a statutory "negotiating period" which is initially twelve months on receipt of an application but can be extended under certain prescribed circumstances. If at the end of the negotiating period the Land Council has neither consented nor refused to consent, the Land Council is deemed to consent to the grant of the licence.[98]

Under the ALRA, the Federal Government pays an amount equivalent to the statutory royalties received by it and the Northern Territory Government from mining companies operating on Aboriginal land into the ABR. These funds are distributed among local

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[94] Justice Woodward, *Aboriginal Land Rights Commission, Second Report*, Australian Government Publishing Service, Canberra 1977, para 109.
[95] (1985) 159 CLR 70.
[96] Part IV ALRA.
[97] Section 40(b) ALRA. If this occurs, the applicant and the Land Council must try to agree upon the terms and conditions to which the grant will be subject.
[98] Section 42(7) ALRA.

communities affected by mining, to other Aboriginal groups on a grants basis, and to the Land Councils for their operating costs.

The Reeves Report contains the following recommendations in relation to mining and exploration:

- The ALRA and the *Mining Act* (NT) should contain provisions which allow a person to obtain a licence to enter Aboriginal land for a specific period for the purpose of reconnaissance exploration subject to various terms and conditions, including notice to be given to the RLC that such a licence has been granted; that the exploration activity is low level; that the licensee conduct activity only within a specified distance from a community living area; and that the licence holder does not enter or remain on a sacred site.

- The ALRA should be amended to provide that the relevant RLC and the holder of an existing mining lease should negotiate the terms and conditions of any renewal of that mining lease. If the parties are unable to agree on the terms and conditions, the ALRA should contain provision for the appointment of a Mining Commissioner to determine the dispute.

- Each of the proposed RLCs should have the existing power to consent to (or veto) any exploration or mining proposals in respect of Aboriginal land within their region, subject only to the existing national interest provisions.

- Each RLC should be empowered to negotiate legally enforceable agreements directly with any mining company, or a number of mining companies.

- The Northern Territory Government should be kept informed about which mining companies RLCs are negotiating with.

- The Northern Territory Government should accept whatever enforceable agreements are made between a mining company and a RLC (unless it considers the agreement should fail on other grounds) and issue the required exploration licence or mining interest accordingly.

- The Federal Government should continue to have the power to cause a proclamation to be issued that an exploration or mining project should proceed in the national interest.

- Mining companies operating on Aboriginal land should be bound by law to pay normal royalties to the Northern Territory Government (as is the case now) and all so called negotiated royalties to the relevant RLC.

- The Federal Government should continue to pay mining royalty equivalents into the ABR for the benefit of all Aboriginal Territorians.

- The NTAC should be able to refer any agreement entered into by a RLC, in relation to exploration or mining, which it considers is contrary to the best interests of the Aboriginal people of that region, to the Minister for review.

Arrangements for exploration and mining activities on Aboriginal land in the Northern Territory have been particularly contentious. Any proposed amendments to the ALRA in relation to exploration and mining would need to be examined closely to ensure that the rights of Aboriginal peoples to accept or reject mining on their land, to protect their cultural heritage and sacred sites, and to benefit from the use of their land are adequately protected and enhanced, rather than eroded.

(v) The Compulsory Acquisition Powers over Aboriginal Land

At present only the Federal Government enjoys a power of compulsory acquisition over Aboriginal land in the Northern Territory. The ALRA expressly prevents the Northern Territory Government from compulsorily acquiring Aboriginal land.[99] The Reeves Report recommends that the ALRA be amended to incorporate an extensive compulsory acquisition scheme allowing the Northern Territory Government compulsorily to acquire an estate or interest in Aboriginal land or in claimed land other than the freehold interest, for public purposes. The nature and extent of the estate or interest would be limited to that necessary for the public purpose concerned, and certain procedures would have to be followed.

Aboriginal organisations have voiced strenuous opposition to this recommendation. ATSIC asserts[100] that compulsory acquisition powers would undermine Aboriginal interest in land and undermine the principle that rights should not be diminished without consent except where national interests positively demand it and then only on terms of just compensation. The CLC believes that the prohibition against compulsory acquisition, resumption or forfeiture of Aboriginal land by the Northern Territory Government is central to the recognition and protection of the communal and spiritual nature of Aboriginal land ownership. The Human Rights and Equal Opportunity Commission submission to the Reeves Review stated that:

> Whenever possible, land should only be transferred away from traditional owners where there has been a full negotiation in good faith. Where this is not possible, however, and land is compulsorily acquired, the calculation of just terms compensation must be measured with regard to spiritual connection to land as well as economic loss.

Aboriginal organisations contend that the ALRA already provides access and security of tenure for private, public purpose and commercial activities by third parties on Aboriginal land. The only exception to the effective provision of leases and licences for public purposes on Aboriginal land has been where the Northern Territory Government has chosen not to work cooperatively with traditional landowners and Aboriginal organisations.

There is no justification for granting compulsory acquisition powers to the Northern Territory Government. Such powers would not provide greater public purpose access than currently exists, and would risk the unjust deprivation of Aboriginal people of ownership and control

[99] Section 67 ALRA.
[100] ATSIC submission to the Review of the *Aboriginal Land Rights (Northern Territory) Act 1975* (Cth), January 1998, pages 39 – 43.

of their traditional lands. The current system is satisfactory without a compulsory acquisition power. It provides the basis to negotiate strong agreements which deliver joint management of national parks, joint business ventures, employment and royalties.

(vi) The Operations of the ABR including the Distribution of Payments out of the Trust Account and the Operations of the Royalty Associations and their Reporting Requirements

The ABR's major statutory functions are to receive monies deemed the equivalent of mining royalties derived from mining operations on Aboriginal land; to make payments to Land Councils to meet their administrative expenses and for distribution to incorporated Aboriginal associations, communities and groups; and to make payments as directed by the Minister in accordance with section 64 of the Act.

The ABR funds reflect these concerns: a right to compensation for traditional owners of land directly affected by mining operations; a wider entitlement to compensation for loss of land or connection rights and associated disadvantage to Aboriginal people throughout the Northern Territory; and the need to provide Land Councils and other representative bodies with financial support that is insulated from the immediate control of Government.

In the review of the ALRA undertaken by Justice John Toohey in 1984[101], the Federal Government directed that access to mining royalty equivalents was one of five principles that were fundamental in relation to land rights. No such principles applied to the Reeves Review. In general terms, the Reviewer criticised the distribution of payments out of the ABR asserting that such payments "will only increase the dependence of Aboriginal Territorians on unearned income and prevent an accumulation of those monies for the long-term benefit of Aboriginal Territorians". Such comments confuse the objective of the payments and indeed the royalties payable under the ALRA. Mining royalty equivalents must be regarded as compensation paid to Aboriginal organisations and groups in the Northern Territory. Less than 10 per cent of ABR revenue is generated from capital investments. The Northern Territory Government has suggested that it may be more appropriate for the ABR to be established as a statutory authority with a commercial orientation. However, the role of the ABR is to provide compensation for Aboriginal bodies in the Territory. Its purpose is not in the first instance to generate revenue. Risks should not be taken with funds that are used to compensate low income beneficiaries.

The Reviewer suggests that the ABR might be transformed into some sort of fund to support commercial development or community or public infrastructure. This effectively proposes that money in the way of compensation could be directed to pay for facilities which, for other Australians, are paid out of general Government outlays. The proper role of the ABR is to provide recompense for Aboriginal people in the Northern Territory. It must not be allowed to subsidise basic public services or generate commercial revenue. In relation to the ABR, the Reviewer recommends that:

[101] Justice John Toohey *'Seven Years On' Report to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Waters*, AGPS 1984.

- the link between the ABR's funds and the mining industry be maintained to underscore the fact that the payment of these funds is based upon unique and historical factors;

- the ALRA be amended to include a clear statement of purposes for the distribution of the funds in the ABR;

- the ABR be administered by the proposed NTAC;

- the formula for the distribution of the ABR's funds be abolished and in its place the NTAC decide on distributions within the statement of purposes set out for the ABR;

- "areas affected" monies only be paid to the proposed RLCs for the benefit of those communities which can establish an actual adverse affect from mining in net terms;

- all expenditure of ABR funds and other income from activities on Aboriginal land be applied by the NTAC or the RLCs to particular purpose such as ceremonies, scholarships, housing and health.[102]

From the perspective of indigenous people in the Northern Territory, any proposed change in the nature and structure of the ABR must not be allowed to reduce monies currently distributed to Aboriginal communities or to diminish the relative autonomy of existing financial arrangements. Returns on investments should not reduce funds from other sources or diminish government responsibility to ensure that fundamental infrastructure and services are developed and maintained. As compensation payments, the use of mining royalty equivalents or any replacement revenue should be determined by the intended beneficiaries.

(vii) The Application of Northern Territory Laws to Aboriginal Land

The ALRA recognises that Northern Territory laws can apply to Aboriginal land under the ALRA, provided that they are capable of operating concurrently with the ALRA.[103] In his Report, John Reeves QC identified problems with the application of some Northern Territory laws on Aboriginal land and stated that any reform must recognise and protect the rights of Aboriginal people to use their land in accordance with Aboriginal tradition. However, he also recommended that these rights should not be absolute and should give way to laws that protect the rights and interests of the broader community, such as the supply of essential services, conservation of the environment, the maintenance of law and order, and the administration of justice.[104]

From the perspective of Aboriginal people in the Territory, the acceptability of such a recommendation will depend upon the scope of interference with Aboriginal traditions, cultural practices and land. If the application of the laws discriminates against Aboriginal enjoyment of traditional land, any amendments to the ALRA would violate the non-discrimination principle. Aboriginal organisations have asserted that Northern Territory law is capable of operating concurrently with the ALRA without particular problems. However, for any Northern Territory law to apply on Aboriginal land it must not interfere

[102] Reeves Report, at 368-369.
[103] Section 74 ALRA.
[104] Reeves Report, op cit, at 402, 412.

with the use or occupation of that land by Aboriginal people, in accordance with Aboriginal tradition. In practical terms, there have been no significant constraints on the operation of Northern Territory laws.

The Northern Territory Government has made submissions on land claims suggesting that there would be problems with uncontrolled bushfires, stock diseases or weed infestation, as examples. These problems have rarely arisen, and when they have, the real issue has been lack of resources to address the particular difficulty.

4.2.3 Conclusion

At the time of writing, the Reeves Report is under consideration by a Commonwealth House of Representatives Standing Committee. The Federal Government's official response to the recommendations of the Report is not yet known. The Deputy Prime Minister Mr Tim Fischer and the Minister for Aboriginal Affairs Senator John Herron have recently indicated support for the Report's recommendations that the Northern and Central Land Councils be dismantled and replaced by 18 smaller councils.[105]

Aboriginal organisations have reacted negatively to aspects of the Reeves Report and argue against implementation of many of its recommendations.[106]

4.3 THE EVATT REVIEW OF THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION ACT 1984 (CTH) AND THE ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION BILL 1998

4.3.1 Introduction

An issue of fundamental significance for Aboriginal and Torres Strait Islander peoples in Australia is the protection of indigenous cultural heritage. Indigenous cultural heritage includes those areas or objects which are significant to indigenous peoples because of religious and cultural beliefs; historic sites, including the built environment; human remains; archaeological sites; and traditions or oral histories and intellectual property that are or have been part of or connected with the cultural life of indigenous communities, including songs, rituals, ceremonies, dances, art, customs, laws, spiritual beliefs and stories.

4.3.2 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the "*Heritage Protection Act*"), was enacted in 1984. Its purpose is:

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[105] "Australia's Deputy PM Slams Aboriginal Land Councils", *World News from Radio Australia*, 13 January 1994.

[106] *Aboriginal and Torres Strait Islander Commission NT News*, "ATSIC Condemns Reeves' Land Rights Act Review", December 1998.

> The preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.[107]

The *Heritage Protection Act* was originally conceived as "an interim measure [to be] replaced by more comprehensive legislation dealing with Aboriginal land rights and heritage protection".[108] Comprehensive national land rights legislation has not eventuated and the *Heritage Protection Act* continues to operate.

When enacted, the *Heritage Protection Act* heralded a significant departure from the framework of existing laws and policies which emphasised the protection of relics and archaeological sites. The 1984 Act applies to any Aboriginal area or object which is of particular significance to Aboriginal peoples, in accordance with Aboriginal tradition, irrespective of whether the object or place is on Crown or private land. It does not apply to the protection of oral histories and other indigenous intellectual property.

Significantly, the Commonwealth's *Heritage Protection Act* was intended for use as a last resort to protect Aboriginal cultural heritage where State or Territory laws are ineffective or there is an unwillingness to enforce such laws.

4.3.3 CERD and Indigenous Cultural Heritage

The purpose of CERD is to enunciate the broad principle of non-discrimination on the basis of race and to specify a range of obligations in relation to the elimination of racial discrimination, both in general terms and in relation to specific human rights as the rights to own property, to inherit and to freedom of religion (articles 5(d)(v)-(vii)), and to equal participation in cultural activities (article 5(e)((vi)).

Article 6 is concerned with the provision of effective protection and remedies against racial discrimination, as well as the right to seek reparation for damage suffered as a result of such discrimination. In conjunction with articles 2 and 5, article 6 imposes an obligation on States parties to ensure that indigenous cultural heritage is preserved, protected and respected.

The CERD Committee has adopted a number of General Recommendations of relevance to the protection of indigenous cultural heritage. In particular General Recommendation XXIII concerning Indigenous Peoples calls on States parties to protect the rights of indigenous peoples to own, develop, control, and use their communal lands; as well as to recognise and respect indigenous culture and to promote its preservation. This clearly includes indigenous cultural heritage.

4.3.4 The 1996 Evatt Report

In August 1996 the Honourable Elizabeth Evatt AC reported to the Minister for Aboriginal and Torres Strait Islander Affairs subsequent to an invitation from the Minister to undertake a comprehensive review of the *Heritage Protection Act*. The *Review of the Aboriginal*

[107] Section 4.
[108] Hansard, House of Representatives, 9 May 1984, 2130.

and Torres Strait Islander Heritage Protection Act 1984 ("the Evatt Report") proposed a series of recommendations to ensure the protection of Aboriginal cultural heritage in a practical and effective manner. The policy goals of the Review included the following[109]:

- to respect and support the living culture, traditions and beliefs of Aboriginal people and to recognise their role and interest in the protection and control of their cultural heritage;
- to retain the basic principles of the Act, as an Act of last resort;
- to ensure that the Act can fulfil its role as a measure of last resort by encouraging States and Territories to adopt minimum standards for the protection of Aboriginal cultural heritage as part of their primary protection regimes;
- to provide access to an effective process for the protection of areas and objects significant to Aboriginal peoples;
- to ensure that Aboriginal peoples participate in decisions about the protection of their significant sites and that their wishes are taken fully into account; and
- to ensure that heritage protection laws benefit all Aboriginal people. The objective should be to protect living culture and tradition from the perspective of Aboriginal people.

As noted, a central feature of the 1984 *Heritage Protection Act* was the positioning of the Commonwealth as an instance of final recourse, in the event that State and Territory regimes fail to provide adequate protection of Aboriginal cultural heritage. The maintenance of this approach was a central recommendation of the Evatt Report. Another significant recommendation concerned the adoption of a national policy as the basis for laws and programmes relating to Aboriginal cultural heritage at all levels of government, with a body responsible for monitoring heritage protection nationally, co-ordinating laws and programmes, and ensuring the development of national policy at all levels of government.[110] The Evatt Report also recommended that State, Territory and Commonwealth heritage protections should meet standards for the protection of Aboriginal customary law restrictions on the disclosure and use of information about cultural heritage.[111]

Other key recommendations were concerned with measures to facilitate the development of agreed minimum standards as the basis for uniform or model laws on Aboriginal cultural heritage protection for adoption by the States and Territories and by the Commonwealth, where relevant. As part of such a system the Commonwealth would accredit State and Territory procedures that comply with minimum standards.[112] Such minimum standards would include:

- a broad definition of Aboriginal cultural heritage;

[109] Report by the Honourable Elizabeth Evatt AC, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, August 1996, at xv.
[110] Recommendations 3.1-3.2.
[111] Recommendations 4.1-4.3.
[112] Recommendations 5.2 -5.3.

- automatic/blanket protection of areas and sites falling within the definition of Aboriginal cultural heritage, with appropriate and effective criminal sanctions;

- the establishment of independent Aboriginal cultural heritage bodies, controlled by Aboriginal members representative of Aboriginal communities, with responsibility for site evaluation and for the administration of legislation;

- the separation of assessments relating to the significance of sites and areas from decisions concerning land use;

- the integration of Aboriginal cultural heritage issues with planning and development processes from the earliest stage;

- legislative recognition of agreements between land users and developers and relevant Aboriginal groups;

- provisions to ensure the right of access of Aboriginal peoples to significant sites on Crown Land for the purposes of their protection and preservation and for traditional purposes;

- and in minimum standards for State and Territory laws, criminal sanctions with adequate penalties and limited defences.[113]

Importantly, the Report recommended that the question whether an area or site should be considered of particular significance according to Aboriginal tradition should be regarded as a subjective issue, to be determined on the basis of an assessment of the degree of intensity of belief and feeling of Aboriginal people.[114] Finally, the establishment of a Commonwealth Aboriginal Cultural Heritage Committee would ensure that Aboriginal people are given a major responsibility in establishing the significance of an Aboriginal place, object or site.[115]

In summary, the Evatt Report envisages the adoption of uniform minimum standards for Aboriginal heritage protection, accompanied by an accreditation procedure that would improve the standard of protection at the State and Territory level and reduce the need to apply to the Commonwealth for protection. The Report's recommendations seek to ensure that the Commonwealth maintains its function as an instance of last resort in recognition of the significance of Aboriginal cultural heritage as a matter of national responsibility, arising under the *Australian Constitution* and international instruments, such as CERD.

4.3.5 The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 (Cth)

On 2 April 1998 the Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 was introduced into the House of Representatives to replace the 1984 *Heritage Protection Act*. At best, the Bill represents a partial implementation of the recommendations of the Evatt Report. For example, it is generally agreed that it provides satisfactory protection for

[113] Recommendations 6.1-6.9.
[114] Recommendations 8.1.
[115] Recommendations 8.4.

culturally sensitive material. However, it fails to address many of the substantive recommendations of the Evatt Report and a number of aspects of the proposed regime are likely to undermine the protection of Aboriginal cultural heritage.

The Bill diminishes the level of protection currently available under the Commonwealth and State and Territory schemes in the following ways:

- First, it provides for the accreditation of State and Territory schemes that meet prescribed minimum standards which themselves require little change to the inadequate and antiquated existing State and Territory schemes; and

- Second, it provides that where State and Territory schemes are accredited, applications for protection of sites or objects will not be accepted by the Commonwealth unless they involve matters of "national interest".

The proposed withdrawal of Commonwealth involvement upon accreditation of State and Territory schemes, in conjunction with the inadequate minimal requirements for accreditation, means that the Commonwealth would effectively abandon the field of indigenous heritage protection.[116]

4.3.6 The 1998 Bill and the Prescribed Minimum Standards

The 1998 Heritage Protection Bill envisages withdrawal of the Commonwealth where State or Territory schemes meet certain minimum standards, except in relation to matters of "national interest". By contrast, the Evatt Report recommended the accreditation of State and Territory schemes where those legislative and administrative schemes meet standards specified in the Report. In particular, Evatt recommended that the Federal Act still be available when State and Territory processes have been exhausted. In effect, the Evatt recommendation was that the Commonwealth withdraw only partially from the jurisdiction, a withdrawal generally acceptable to indigenous communities. This approach would ensure best practice among State and Territory regimes. Partial withdrawal by the Commonwealth would also reduce the possibility of duplication and delay, with the Commonwealth's ongoing supervisory and monitoring role providing a sufficient incentive for accreditation.

The Bill provides a series of minimum standards which are disturbingly general and significantly less rigorous than those proposed by Elizabeth Evatt. In a recent commentary, Evatt noted:

> The standards put forward in the report would confer benefits on Aboriginal people by giving better local protection and encouraging the development of effective local mechanisms. They would benefit the Commonwealth by reducing the potential number of applications… The minimum standards as set out in the Bill would allow accreditation of the regimes of several States which fall well below the desirable standards. Few demands are made on States to make any changes in their current laws and procedures by this loose drafting. The Minister must accredit the regime if

[116] Letter from Gatjil Djerkurra OAM, Chairman Aboriginal and Torres Strait Islander Commission, June 1998 "To Whom it May Concern", at 1.

> he is satisfied that these weak requirements are met. When set aside the consequences of accreditation, this is nothing less than an abdication of the Commonwealth responsibility. There are also some significant omissions, such as the failure to recognise the role of Aboriginal people in the process…
>
> Among the omissions in the minimum standards of the Bill is the right of access of Aboriginal people to significant sites on Crown land for the purposes of their protection and preservation and for traditional purposes… Other omissions are the involvement of Aboriginal people in the process, the protection of historic areas and blanket protection… The 1996 report aimed at ensuring that Aboriginal people participate in decisions about the protection of their significant sites and that their wishes are fully taken into account… The Bill does not give any degree of control or responsibility to Aboriginal people and does not require State/Territory regimes to establish Aboriginal heritage bodies… The failure to recognise Aboriginal responsibility in this area, or in the accreditation process itself, is a glaring omission and will leave Aboriginal people with no confidence at all in the proposed legislation…
>
> A similar deficiency arises in respect of the Commonwealth procedures under the Bill. Aboriginal people are given no role in relation to these procedures. A director, or other reviewer, must have regard to the principle that indigenous people are the primary source of information about the significance of particular areas and objects (clause 57). This falls well short of recommendation 8.1 of the 1996 report which states that the question whether an area or site should be considered an area or site of particular significance according to Aboriginal tradition should be regarded as a subjective issue to be determined on the basis of an assessment of the degree of intensity of belief and feeling of Aboriginal about that area or site and its significance.[117]

4.3.7 The 1998 Bill and the National Interest Principle

The 1998 Heritage Protection Bill envisages a regime in which there is significant reduction in Commonwealth monitoring of the enforcement of State and Territory laws. Once States and Territories are accredited, no monitoring of enforcement is required, unless the nebulous "national interest" test is satisfied. The Commonwealth can only make a protection order in cases of national interest where an application is made from a State or Territory with accredited procedures. In a 1997 Discussion Paper the Commonwealth stated that it:

> proposes that access be allowed to the Commonwealth from accredited State and Territory regimes where the Minister is of the opinion that "national interest" grounds exist. Consistent with other Commonwealth legislation, it is not proposed to define "national interest" in the legislation.[118]

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[117] "The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998", Comment by the Honourable Justice Elizabeth Evatt in a letter to Mr John Eldrige General Manager Social and Cultural Division Aboriginal and Torres Strait Islander Commission, 24 April 1998.

[118] Minister for Aboriginal and Torres Strait Islander Affairs, Discussion Paper, "National Standards for Protecting Indigenous Heritage", at 10.

This approach is unsatisfactory. The protection of Aboriginal heritage is an important national interest in itself. Moreover, the Commonwealth protective procedures proposed in the Evatt Report should be available as a mechanism of last resort in all cases. Under the provisions of the Bill, the applicant bears the onus of showing that it would be in the national interest to make a protection order. This approach misconceives the nature of Aboriginal cultural heritage as a property right belonging to a particular Aboriginal community. The principle of "national interest" encourages people to make qualitative assessments of indigenous areas and objects and:

> suggests that indigenous and non-indigenous people are capable of rating significant areas and objects against some independent criteria. It encourages people to understand indigenous heritage issues in terms of wider non-indigenous heritage values. It also encourages people to consider protection only in the context of national issues, such as the economy, which may be easily manipulated by media. These outcomes are inconsistent with the original purpose of the Heritage Protection Act and fundamentally change the nature of Commonwealth involvement in this area.[119]

4.3.8 Conclusion

The Heritage Protection Bill was debated and passed by the House of Representatives on 4 June 1998. It lapsed on the prorogation of Parliament and was consequently reintroduced on 12 November 1998, incorporating some recommendations from the Twelfth Report of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. On an encouraging note, some of the amendments to the Bill were:

- the inclusion of a requirement for the Director of Indigenous Heritage Protection to have an understanding of indigenous culture and heritage and an ability to deal with indigenous people in a culturally sensitive manner[120];

- blanket protection of heritage areas and objects, implying that all significant areas and objects, whether or not previously identified, are protected and can only be disturbed if permission is granted[121];

- requirements for explicit indigenous involvement in advance work approval processes[122]; and

- separation of decisions on significance from decisions on protection, with such decisions to be made in consultation with indigenous people.

These improvements are far outweighed by the negative aspects of the Bill which remain. Of major concern is that despite change in nomenclature from "minimum standards" to "the

[119] Aboriginal and Torres Strait Islander Commission, "The Aboriginal and Torres Strait Islander Heritage Protection Bill 1998 – ATSIC's Position – Recommendations for Change", June 1998.
[120] Hansard House of Representatives, Second Reading Speech by Mr McGauran, Member for Gippsland Minister for the Arts and the Centenary of Federation, 12 November 1998, at 257.
[121] Ibid.
[122] Ibid.

standards for accreditation of State and Territory heritage protection regimes", the standards themselves remain loosely drafted, vague and require little change. Of equal concern is the Federal Government's rejection of the suggestion from indigenous bodies, including the Aboriginal and Torres Strait Islander Commission, that "national interest" be defined in such a way that it is the very act of protecting indigenous heritage which is in the national interest. The Federal Government appears committed to minimising, if not relinquishing, its obligations as a mechanism of last resort in cultural heritage protection.

4.4 INDIGENOUS LAW AND CUSTOM IN AUSTRALIA

4.4.1 Introduction

Since 1788 non-indigenous jurisprudence in Australia has struggled to understand and/or adequately accommodate indigenous customary law. Indigenous customary law is the body of rules, values and traditions which are accepted as establishing standards and procedures to be followed and upheld.[123] These rules, values and traditions are a real force in the contemporary lives of many Aborigines and Torres Strait Islanders.

When Australia was colonised in 1788 it was colonial policy not to recognise indigenous customary law: "From the moment the Aboriginals of this country are declared British subjects they should, as far as possible, be taught that the British laws are to supersede their own".[124] Colonial practice was opposed to the view of the British House of Commons Select Committee on Aboriginals "that to require from Aborigines the observation of our laws would be absurd and to punish their non-observance of them by severe penalties would be palpably unjust".[125]

In 1827 in *R v Lowe*[126] the Supreme Court of New South Wales decided that Aborigines were subject to its jurisprudence when in conflict with Europeans. In 1836 in *R v Murrell*[127] the Full Court of the Supreme Court of New South Wales held that Aborigines were amenable to English law for offences committed against one another, and that they had no sovereign status or laws of their own. In 1841 in *R v Bonjon*[128] Willis J decided that the Supreme Court had no jurisdiction over crimes committed by Aborigines against one another. Aborigines were not amenable to English law, except when in conflict with the colonisers. In *R v Sydney* Chief Justice Dowling and Governor Gipps disagreed, pointing to the contrary decision in *Murrell*.

The rule first stated in *Murrell* and policy of non-recognition continued up until the 1970s. In 1971 in *Milirrpum v Nabalco Pty Ltd and the Commonwealth* Justice Blackburn of the

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[123] K Maddock, "Aboriginal Customary Law", in P Hands and B Keon-Cohen (eds), *Aborigines and the Law*, Sydney 1984, 212 at 230.
[124] See J Crawford, P Hennessy and M Fisher, "Aboriginal Customary Law: Proposals for Recognition", in K Hazlehurst (Ed), *Ivory Scales: Black Australia and the Law*, University of New South Wales Press 1987, at 196.
[125] Ibid at 197.
[126] [1827] NSWSC 32.
[127] (1836) I Legge 72.
[128] *Port Phillip Gazette*, 18 September 1841.

Northern Territory Supreme Court speculated that there was a system of law in existence in Australian indigenous societies in 1788. It was, he said, "a subtle and elaborate system highly adapted to the country in which people lived their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence…a government of laws not of men."[129]

In 1975 two significant pieces of Commonwealth legislation were passed which gave recognition to indigenous customary law. The *Aboriginal Land Rights (Northern Territory) Act 1976* prescribes a regime for the granting of land to Land Trusts for the benefit of groups of Aborigines entitled by Aboriginal tradition to the use of areas of land.[130] Aboriginal tradition is defined in section 3(1) as "the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied to particular persons, sites, areas of land, things or relationships." Section 71 provides that an Aborigine or a group of Aborigines is entitled to enter upon, use and occupy Aboriginal land to the extent that such entry, use and occupation is in accordance with Aboriginal tradition governing the rights of that Aborigine or group with respect to that land. The *Aboriginal Council and Associations Act 1976* (Cth) creates a scheme for the incorporation of Aboriginal community associations and councils with their own constitutions and rules. Section 43(4) of the Act provides that: "The Rules of an association with respect to any matter may be based on Aboriginal customs."

In 1977 the Australian Law Reform Commission (ALRC) commenced an inquiry into the recognition of Aboriginal customary law. Despite its conclusion that arguments for federal recognition were "compelling", the Federal Government has not undertaken to implement the recommendations contained in the ALRC's 1986 Report. Instead, indigenous customary law has continued to be accommodated on a case-by-case basis through State and Territory legislation, and at common law.

The decision of the High Court in *Mabo v The State of Queensland (No 2)*[131] represented a significant watershed in the development of the common law. It recognised the legal force of customary indigenous rights to land where those rights continue to exist.

4.4.2 Report of the Australian Law Reform Commission (1986)

The leading report on the recognition of indigenous customary law is that of the Australian Law Reform Commission. The ALRC's review commenced on 9 February 1977 and took 9 years to complete.[132] The ALRC was asked to inquire into and report on whether it would be desirable to apply, either in whole or in part, Aboriginal customary law to Aborigines, either generally or in particular areas to those living in tribal conditions only. The ALRC excluded from the scope of its inquiry the law of real property and laws with respect

[129] (1971) FLR 141 at 267.
[130] Section 11(1).
[131] (1992) 175 CLR 1.
[132] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report 31, AGPS 1986.

to intellectual property affecting Aboriginal and Torres Strait Islander art and craft. Further questions in the ALRC's terms of reference included:

(a) whether existing courts should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines; and
(b) to what extent Aboriginal communities should have the power to apply their customary laws and practices to the punishment and rehabilitation of Aborigines.

The ALRC examined a range of possible approaches to the recognition of customary laws:

- codification or specific enforcement of customary laws;
- specific or general forms of incorporation by reference;
- the exclusion of the general law in areas to be covered by customary laws;
- the translation of institutions or rules for the purposes of giving them equivalent effect (for example marriage or adoption); and
- accommodation of traditional or customary ways through protections in the general legal system.

It concluded that Aboriginal and Torres Strait Islander customary laws should be recognised in appropriate ways by the Australian legal system. The ALRC did not recommend general recognition of customary laws, rather specific, particular forms of recognition within the framework and institutions of the general law. It made recommendations in areas including recognition of traditional marriages, distribution of property, child custody, fostering and adoption, criminal law and sentencing, related evidentiary and procedural questions, hunting, fishing and gathering rights, and local justice mechanisms for Aboriginal communities.

The ALRC recommended that the recognition of Aboriginal customary laws be carried out by means of federal legislation applicable in all States and Territories, relying on the full range of the Commonwealth's constitutional powers:

> Taking into account the result of the 1967 Referendum, the fact that Aborigines live in all States and Territories, the special problems that Aboriginal people face, the welfare of Aboriginal people is a national issue and one that should, as far as possible, be dealt with through a coherent national policy. This is particularly so at the level of the basic standards to be applied. The Commonwealth has a clear legislative responsibility, in cases where State or Territory laws do not establish adequate or appropriate rules responding to the needs of Aboriginal people. This is the case even though it may be more efficient for the implementation of these standards to remain with existing State or Territory officials or bodies. Consistently with this principle, the recognition of Aboriginal customary laws as recommended by this report, should be carried through by means of a federal act applicable in all States and Territories and relying on the full range of the Commonwealth's constitutional powers.[133]

[133] Ibid, volume 2, para 1028.

The only areas excluded from the recommendation concerning federal legislation were those dealing with traditional hunting, fishing and gathering rights, and community justice mechanisms. In particular, the ALRC proposed a draft Aboriginal Customary Laws (Recognition) Bill 1986.[134] It also recommended alteration of State and Territory Governments policy in a range of areas including prosecutorial discretion, policing and community justice schemes.

As the ALRC recognised, there are no constitutional impediments to the Federal Parliament legislating for the recognition of customary law at the State or Territory level. The Federal Government has a clear responsibility where State or Territory laws fail to establish adequate procedures for accommodating indigenous customary law. In the context of Australia's international treaty obligations under the ICCPR, the ALRC noted that "failure to recognise customary law would undermine the influence of customary law and culture in Aboriginal communities with consequent adverse effects on community, political and social structures".[135]

4.4.3 Subsequent Developments

Since the tabling of the ALRC's Report, there have been significant developments in areas of law and policy concerning the position of Aboriginal and Torres Strait Islander peoples in Australia. In 1992 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) urged governments to report on progress in dealing with the ALRC's Report.[136] As noted, in *Mabo v The State of Queensland (No 2)*[137] the High Court held that there was a system of law operating in Australia prior to 1788 which was entitled to respect and recognition by the common law. The Court held that the common law recognises a form of native title in accordance with the laws and customs of indigenous people. It has been suggested that the principle involved in *Mabo* was a broader one. The Chief Justice of the Family Court of Australia, the Hon Alastair Nicholson, has noted that it "becomes extremely difficult to confine the *Mabo* decision to questions of land law and property and impossible to so confine its principles."[138]

The *Native Title Act 1993* (Cth), enacted in response to the High Court's decision in *Mabo (No 2)*, defines native title as "the rights and interests ... possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders".[139] In areas outside land law customary law is sometimes taken into consideration by judicial and law enforcement institutions. In New South Wales, Northern Territory, South Australia and Victoria traditional Aboriginal marriages may be recognised for the purpose of adoption (*Adoption of Children Act 1965*

[134] Ibid, volume 2, Appendix A.
[135] Ibid, 105-106, 108.
[136] Recommendation 219.
[137] (1992) 175 CLR 1.
[138] The Hon Alastair Nicholson AO RFD, Chief Justice Family Court of Australia, "Indigenous Customary Law and Family Law", in *Proceedings of Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995*, AGPS 1996, at 19.
[139] Section 223(1).

(NSW); *Adoption of Children Act 1964* (NT); *Adoption of Children Act 1988* (SA); *Adoption of Children Act 1984* (Vic). In NSW, traditional Aboriginal marriages are recognised as de facto relationships (*De Facto Relationships Act 1984* (NSW)). In the Northern Territory, traditional Aboriginal marriages are recognised for most purposes; for example, in matters relating to intestacy and family provision (*Administration and Probate Act 1979* (NT), Divn 4A; *Family Provision Act 1970* (NT), section 7(1A)).[140] Child and community welfare legislation in a number of jurisdictions requires that every effort is made to place Aboriginal children for care or adoption with extended family or Aboriginal people who have the correct relationship with the child in accordance with customary law.[141]

In the area of criminal law, Aboriginal law, culture and tradition may be relevant in relation to defences of provocation, duress and authorisation, in relation to applications for bail, issues of fitness to stand trial and in sentencing Aboriginal defendants.[142] The common law in the NT has made clear that judges can take customary law into account in sentencing an Aboriginal person for a criminal offence. In the 1992 case *R v Minor*, the NT Court of Criminal Appeal held that tribal payback punishment, past or prospective, is a relevant sentencing consideration and that the Court must have regard to the fact that the defendant will undergo a form of punishment in the Aboriginal community.[143]

The incorporation of customary law has been considered in the development of proposals for a Northern Territory Constitution. At a 1995 Forum on Indigenous Customary Law, the Attorney General of the Northern Territory, Steve Hatton, stated:

> Customary law for many people in the Northern Territory is a fact. Whether we recognise it or not, customary law exists and affects the lives of many Aboriginal people. If we do not recognise it, there is the potential for injustice to occur. ... Customary law in the lives of many Aboriginal people in the Northern Territory deals not just with the criminal law and the much talked about "payback" system including physical punishment and death, but with a whole social, political and judicial structure.... Customary law in the broader sense is already being incorporated in the Northern Territory. Our community government schemes, our civil law and parts of our legal system are models for the effective implementation of customary law.[144]

At the same Forum, the President of the Australian Law Reform Commission, Alan Rose, expressed the Commission's concern that:

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[140] See generally P Hennessy, "Recognition of Aboriginal Customary Law", in *The Laws of Australia - Aborigines and Torres Strait Islanders*, Law Book Co Sydney 1993, at 15.

[141] See for example *Community Welfare Act 1983* (NT), section 69.

[142] See generally M Flynn, "Criminal Responsibility of Aborigines under Australian Law" in *The Laws of Australia - Aborigines and Torres Strait Islanders*, Law Book Co Sydney 1993, at 10.

[143] (1992) 79 NTR 1 (CCA).

[144] Steve Hatton, Attorney General, Northern Territory of Australia, "Customary Law in the Northern Territory", in *Proceedings of Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995*, AGPS 1996, at 41.

> [A]n overly narrow view of what is required to implement [the ALRC's] recommendations should not prevail. In the Commission's view too much reliance so far has been placed on the existence of administrative arrangements as a method of recognition. Many of these administrative arrangements do not adequately meet the recommendations as they continue to reflect the pre-*Mabo* philosophy that Australia was terra nullius and are based more on a social welfare approach rather than recognition of the rightful place of customary laws on an equal footing with other Australian laws as part of one legal system.[145]

The Chief Justice of the Family Court of Australia, the Hon Alastair Nicholson, criticised the Commonwealth's failure to respond to the ALRC's recommendations by way of legislation:

> In dismissing its responsibilities in this way there is no evidence that the Commonwealth has sought the views of the Aboriginal and Torres Strait Islander people about these matters or that it took notice of or accepted the views obtained by the ALRC in its consultations. These were to the effect that recognition of Aboriginal customary law should be carried out by means of a federal Act applicable to all States and Territories, a view that was generally supported by Aboriginal people and their organisations.[146]

In 1994 Chief Justice Nicholson recommended amendments to the *Family Law Act 1975* (Cth) to recognise the special position of Indigenous peoples and to require the Court, when making decisions involving children of Aboriginal and Torres Strait Island descent, to take into account their traditional law and culture. In recommending these amendments, the Chief Justice was concerned that some Judges and Magistrates administering the *Family Law Act* had taken the view that the need to treat people equally before the law prevents them giving much weight to issues of identity, heritage and culture. The previous Labor Government announced that it intended to introduce an amendment to the first Family Law Reform Bill in order to achieve this object.[147]

As the third stage of its response to the 1992 decision of the High Court in *Mabo (No 2)*[148], the previous Labor Government proposed to adopt further measures to address the dispossession of and advance the cause of social justice for Aboriginal and Torres Strait Islander peoples. The Government received comprehensive "social justice package" submissions from, amongst others, ATSIC, the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Council for Aboriginal Reconciliation. The submission of the Council for Aboriginal Reconciliation recommends that the Commonwealth publish a response to the ALRC's Report as a matter of high priority, "including draft implementation legislation, for consideration by Indigenous people and the wider Australian community."[149]

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[145] Alan Rose, President, Australian Law Reform Commission, "Recognition of Indigenous Customary Law: The Way Ahead", in *Proceedings of Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995*, AGPS 1996, at 9.

[146] The Hon Alastair Nicholson, "Indigenous Customary Law and Family Law", op cit, at 19.

[147] Ibid.

[148] (1992) 175 CLR 1.

[149] Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, Commonwealth of Australia 1995, recommendation 59.

At the Federal Centenary Convention, held in Adelaide 20-23 April 1997, participants resolved by clear majority that the Australian Constitution "recognise the particular rights of indigenous peoples and give appropriate recognition to their customary law." It was resolved "that indigenous customary law be recognised and taken into account within the rule of law." At the Australian Reconciliation Convention in May 1997 there was strong support amongst participants for the recognition, including Constitutional recognition, and application of Aboriginal and Torres Strait Islander customary law and traditions within Australia's written statutes and common law, and in court procedures.[150]

4.4.4 Implementation of the ALRC Recommendations

(a) Federal Government Responses

After initial consideration of the recommendations of the ALRC's Report in late 1988, the Standing Committee of Attorneys General (SCAG) agreed to make a number of recommendations and refer major policy considerations to the Australian Aboriginal Affairs Advisory Council (now the Ministerial Council on Aboriginal and Torres Strait Islander Affairs). Between that time and mid-1994, no significant steps were taken towards implementation. In accordance with recommendation 219 of the RCIADIC, in mid-1994 the Office of Indigenous Affairs produced a *Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission*.[151] In more recent years SCAG has renewed its attention to the recognition of indigenous customary law and the recommendations of the ALRC. In November 1994 SCAG heard representations from former ATSIC Deputy Chairperson Charles Perkins and former Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson. Parallel to the meetings of the SCAG Attorneys-General were those of a Commonwealth Interdepartmental Committee convened by the Minister for Aboriginal and Torres Strait Islander Affairs.

In a 1994 response to the ALRC's Report, the Federal Labor Government implicitly rejected the recommendation of overriding federal legislation.[152] In a specific response to the ALRC recommendations concerning criminal law and sentencing, the Government stated that federal law is an "option of last resort" because criminal law is primarily a State or Territory matter.[153] The detailed recommendations of the ALRC were not addressed other than to refer in six short paragraphs to "complex…factual and historical circumstances, administrative efficiency, statutory arrangements, and legal and constitutional factors."[154] The Labor Government's response made no reference to the position of the Northern Territory. This is somewhat surprising as there is no question that the Federal Government has constitutional power to implement such legislation in that jurisdiction.[155] Nor was there

[150] Ibid.
[151] Office of Indigenous Affairs, Department of Prime Minister and Cabinet, *Aboriginal Customary Laws: Report on Commonwealth Implementation of the Recommendations of the Australian Law Reform Commission,* Commonwealth of Australia 1994.
[152] Ibid.
[153] Ibid at 11.
[154] Ibid at 9.
[155] Ibid.

any acknowledgment of the ALRC's view that the Commonwealth should assume some responsibility in this area because the dominant issue is one of ensuring basic standards of justice for Aboriginal people.

In March 1996, the Federal Attorney-General of John Howard's Coalition Government gave tentative support to formal recognition of Aboriginal customary law in Australian legislation.[156] However he stated that the States and Territories, particularly those with a large number of Aborigines living traditional lifestyles, were responsible for carrying the issue.

(b) Northern Territory Response

The Northern Territory Government did not respond to the ALRC's Report until 1993 when it responded to recommendation 219 of the Royal Commission into Aboriginal Deaths in Custody calling upon governments to report on progress in dealing with the ALRC Report. The Northern Territory Government's RCIADIC Report stated that the Government was "researching proposals for the recognition of customary law which includes investigating the possibility of conferring a limited law-making power on individual communities to regulate social behaviour within their communities."[157]

4.4.5 Conclusion

It has been twelve years since the ALRC published its Report on *Recognition of Aboriginal Customary Laws*, recommending formal recognition and the adoption of specific federal measures. The issue has become a "moving target", with the Federal Government referring it to the States and Territories to resolve. To date recognition of customary law has taken the form of specific responses to particular needs: "Recognition, whether judicial or legislative, has been particular rather than general, has been confined to particular jurisdictions and has often depended upon the exercise of discretions rather than existing as of right."[158] Legislation, including sacred site, heritage protection and land rights legislation, has been issue specific.[159] The decision of the High Court in *Mabo v Queensland (No. 2)*[160] altered the position at common law to a considerable extent in relation to Aboriginal customary rights to land and certain customary activities on land. But indigenous customary law has not become a source of law recognised in any comprehensive way.

Formal recognition of indigenous customary law as a valid and independent source of law alongside general Australian law remains a critical issue for indigenous people in Australia. At the 1995 Forum on Indigenous Customary Law, former ATSIC Chairperson Dr Lois O'Donoghue stated that:

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[156] "Customary Aboriginal Law Gains Support" , *Canberra Times*, 30 March 1996 at 3.
[157] *Northern Territory Implementation Report* 1995, volume 2, at 240.
[158] Crawford, Hennessy and Fisher, op cit, at 198.
[159] R Sara, "Aboriginal Customary Law" (1995) 7(3) *Legal Date* at 5.
[160] (1992) 175 CLR 1.

> [T]he long standing absence of meaningful official recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and .. has substantially contributed to many of the social problems and varying degrees of lawlessness present today.
>
> Customary law is an integral and inseparable part of Aboriginal culture. As such, it is as important to Aboriginal people as are traditional lands and heritage. The failure by successive governments to recognise customary law has resulted in the erosion of Aboriginal cultures. Not only is the recognition of Aboriginal customary law an issue of Aboriginal pride, heritage and custom. It can also be, to some communities, an issue of survival.[161]

[161] Dr Lois O'Donoghue CBE AM, "Customary Law as a Vehicle for Community Empowerment", in *Proceedings of Indigenous Customary Law Forum, Parliament House, Canberra, 18 October 1995*, AGPS 1996, 57 at 58.

According to the former ATSIC Chairperson:

> Official recognition of traditions and customs would constitute a vehicle for the empowerment of those communities which do not currently have that vital access to the regulation of social control.[162]

Aboriginal and Torres Strait Islander organisations have made clear that in discussion surrounding recognition of customary law, it is unacceptable for Australia's first peoples to be viewed as another aspect of multicultural Australia. In the words of the President of the ALRC:

> Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.[163]

The customary law of Aboriginal and Torres Strait Islander peoples is entitled to special and particular treatment. As the Chief Justice of the Family Court has commented:

> [I]t is nonsensical to suggest that measures which might be thought properly applicable to Aboriginal and Islander customary law should necessarily flow to other groups who willingly came to this country and accepted the system of law which already operates here. Not so the Aboriginal and Islander people who had it imposed upon them.[164]

To some extent the work of the ALRC has been overtaken by events. In approaching issues of recognition, it will be important to re-examine the ALRC's recommendations and to progress them. As Lois O'Donoghue has noted, schemes which have been set up to attain Aboriginal participation in law and order activities (Magistrates' advisers, police aides, voluntary community patrols) demonstrate that Aboriginal communities can readily deal with their own law and order problems and settle their own disputes without recourse to the wider system. However many such schemes and programs do not involve any devolution of power and responsibility from existing institutions, particularly the police and courts. According to the former ATSIC Chairperson, recognition of indigenous customs and traditions must include the right to participate in indigenous dispute settlements and processes of law and order. In re-examining the recommendations of the ALRC it will be important to look not only at ways in which customary law might be incorporated into the

[162] Ibid.
[163] Alan Rose, "Recognition of Indigenous Customary Law: The Way Ahead", op cit, at 16.
[164] The Hon Alastair Nicholson, "Indigenous Customary Law and Family Law", op cit, at 28.

general law of Australia, but also at ways in which it might be given an independent operation of its own.[165]

4.5 IMPLEMENTATION OF THE RECOMMENDATIONS OF THE ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

4.5.1 Background

(a) The Australian Criminal Justice System: The Role of the Federal Government and State and Territory Governments

The legislative power of the Federal Parliament is defined by the heads of power enumerated in section 51 of the Australian Constitution. The heads of power do not include "criminal law". "Federal criminal law" is confined to topics that are incidental to other heads of power, for example the importation of drugs. Consequently, each of the six Australian States has primary responsibility for the administration of criminal justice. The Federal Parliament does have legislative power with respect to criminal law in the territories in accordance with section 122 of the Constitution. However, the powers conferred by the Federal Parliament on the two self-governing territories, the Australian Capital Territory (ACT) and the Northern Territory (NT), include powers that approximate those enjoyed by the States with respect to the criminal law. Legislation, supplemented by the common law, of each State, the ACT and the NT defines criminal procedure, prescribes offences and specifies the applicable sentencing regime. Each State and the ACT and the NT maintain a separate police force, independent prosecution service, prison system and system of courts.

The administration of criminal justice has, historically and with some notable exceptions, been a matter of little interest to the Federal Parliament and the Australian Government. One exception relates to the initiation of the Royal Commission into Aboriginal Deaths in Custody in 1987. However, the Constitution does enable the Federal Parliament to exercise powers in relation to the interaction of Aboriginal peoples with the criminal justice system. The Federal Parliament has legislative power with respect to "the people of any race, for whom it is deemed necessary to make special laws"' (section 51(xxvi)). The Australian Law Reform Commission has concluded that this head of power would support federal legislation covering a range of matters in relation to criminal proceedings involving an Aboriginal defendant, including the right to bail, trial procedure trial including evidence, defences and sentencing.[166]

The Federal Parliament also has legislative power with respect to "external affairs" (section 51 (xxix) of the Constitution). The "external affairs" power includes the power to make laws concerning the implementation of international treaties.[167] In 1994 in *Toonen v Australia*

[165]Ibid at 23.
[166] Australian Law Reform Commission *Report on the Recognition of Aboriginal Customary Laws,* AGPS 1986, Volume 2, Chapter 38.
[167] *Koowarta v Bjelke -Petersen* (1982) 153 (1994) CLR 168.

the United Nations Human Rights Committee expressed the view in relation to a communication under the First Optional Protocol to the International Covenant on Civil and Political Rights that provisions of the *Tasmanian Criminal Code* violated the right to privacy contained in article 17 of the Covenant.[168] The Federal Parliament, relying upon the external affairs power, enacted the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override the provisions of the *Tasmanian Criminal Code*. In addition the Federal Parliament may override any law of the ACT or NT. It can disallow a law of either within six months of its enactment.[169]

Where a criminal justice issue has been of particular concern to the Federal Government, it has sought to broker an agreement on a uniform approach by all of the States and Territories. For example, the Federal Government initiated a common approach to the regulation of firearms by the States and Territories in 1996.

(b) The Reasons for a Royal Commission into Aboriginal Deaths in Custody: 99 deaths in custody between 1980-1989

For the past 20 years the Aboriginal proportion of the total Australian population has ranged between one and two per cent. During the 1980s it became evident that the proportion of Aboriginal deaths in police custody and prison far exceeded one to two per cent. Deaths in police custody and prison in the period prior to the establishment of the Royal Commission into Aboriginal Deaths in Custody in 1987 appear in the table below.

Deaths in Police Custody and Prison
Year of Death and Aboriginality 1980-81 to 1986-87[170]

Year	Total Deaths	Aboriginal Deaths	Aboriginal Deaths as a Proportion of Total Deaths
1980-81	41	10	24%
1981-82	44	5	11%
1982-83	47	9	19%
1983-84	47	5	11%
1984-85	50	13	26%
1985-86	37	9	24%
1986-87	76	18	24%

In 1987 the Federal Government secured the agreement of the States and the Northern Territory to jointly sponsor a Royal Commission to inquire into each Aboriginal death in police custody and prison since 1 January 1980 and to further inquire into the social, cultural

[168] See UN Doc CCPR/C/50/D/488/1992 (1994).

[169] *Australian Capital Territory Self-Government Act 1988* (Cth); *Northern Territory Self-Government Act 1978* (Cth).

[170] V Dalton *Australian Deaths In Custody and Custody-Related Police Operations, 1995-96* Australian Institute of Criminology 1996, Table 3.

and legal issues underlying those deaths. Between 1987 and 1991 the Royal Commission into Aboriginal Deaths in Custody conducted separate inquiries into each of the ninety-nine Aboriginal deaths in police custody and prison that occurred between 1980 and 1989. In April 1991, a five volume national report containing 339 recommendations was finalised.[171]

(c) The Recommendations of the RCIADIC: Reduce Aboriginal Incarceration by Eliminating Racial Discrimination and Promoting Aboriginal Self-Determination

The recommendations of the RCIADIC stemmed from two fundamental findings. First, many if not all of the 99 deaths were found to have been avoidable. The RCIADIC found that 30% of the deaths were caused by suicide, 25% by external trauma and 45% by substance abuse or natural causes. Recommendations to minimise the risk of deaths of Aboriginal persons in police custody and prison addressed the areas of post-death investigations[172], custodial health and safety[173], and compliance with international obligations in relation to custodial conditions.[174]

Second, the RCIADIC found that Aboriginal people in custody do not die at a greater rate than non-Aboriginal people in custody. The reason for so many Aboriginal deaths in custody is the far greater proportion of the Aboriginal population in custody. The Aboriginal population is grossly over-represented in custody: "Too many Aboriginal people are in custody too often."[175]

The RCIADIC produced evidence that at 30 June 1989 there were 1464.9 Aboriginal persons in prison per 100,000 of the Aboriginal population compared with 97.2 non-Aboriginal prisoners per 100,000 of the non-Aboriginal population. The level of over-representation was 15.1, a ratio of 1464.9 to 97.2.[176] Similarly, a survey conducted by the RCIADIC during August 1988 revealed that 3539 Aboriginal persons were taken into police custody per 100,000 of the Aboriginal population, compared with 131 non-Aboriginal prisoners persons per 100,000 of the non-Aboriginal population. The level of Aboriginal over-representation in police custody was 27, a ratio of 3539 to 131.

The recommendations of the RCIADIC sought to respond to the causes of over-representation at two levels. First, it was found necessary to address the underlying issues contributing to over-representation. These included alcoholism, poverty, poor health, lack of education, inadequate housing and high unemployment.[177] In addressing these underlying issues the RCIADIC emphasised the importance of applying the principle of self-determination: "The thrust of this report is that the elimination of disadvantage requires an

[171] Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS 1991, Volume 5.
[172] Recommendations 6-40.
[173] Recommendations 122-187.
[174] Recommendations 328-333.
[175] Volume 1, para 1.3.1-.1.3.3.
[176] Volume 1, Table 9.3 at 226.
[177] Volume 1, para 1.7.1 ff.

end of domination and an empowerment of Aboriginal people; that control of their lives, of their communities must be returned to Aboriginal hands."[178]

At a second level, a significant number of recommendations concerned the operation of the criminal justice system itself. These were directed to ending discrimination against Aboriginal defendants.[179] Aboriginal defendants were found to be more likely to be sought by police, more likely to be charged with an offence rather than cautioned, more likely to be arrested than charged by summons, less likely to be granted bail, more likely to be in custody for public alcohol-related behaviour and, when convicted, to have fewer appropriate sentencing options.

(d) The Response of Governments to the Recommendations: The Promise of Implementation

In 1992 a joint Ministerial Forum comprising Ministers of the Federal and each State and Territory Governments published a three volume response to the 339 recommendations of the RCIADIC.[180] The overwhelming majority of recommendations were "supported" by the Federal Government and each State and Territory Government.

(e) Australia, the RCIADIC and the CERD Committee

Australia's ninth periodic report in accordance with article 9 of CERD described the completion of the RCIADIC's Report and the response of Australian governments as the most significant development in the reporting period.[181] The ninth periodic report highlighted two issues: the plans of the Federal Government to divert significant government expenditure to implementing recommendations[182]; and the crucial role of the Aboriginal and Torres Strait Islander Social Justice Commissioner in monitoring the human rights situation of indigenous people.[183]

4.5.2 Aboriginal Interaction with the Criminal Justice System Post RCIADIC

(a) Aboriginal Deaths in Custody post RCIADIC

The number of Aboriginal deaths in police custody has declined since 1991. However, there has been a commensurate increase in the number of Aboriginal deaths in prison. Overall, the publication of the RCIADIC's Report in 1991 has had little or no effect on the total number of Aboriginal deaths in police custody and prison. The number of Aboriginal deaths in custody appear in the table below:

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[178] Volume 1, para 1.7.6.
[179] Volume 1, para 1.6.2 ff.
[180] *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission,* AGPS 1992.
[181] UN Doc CERD/C/223/Add 1 (1993), para 11.
[182] Paras 44-48.
[183] Para 50.

Aboriginal Deaths in Custody 1980-81 to 1997-98
Year of Death, Custodial Authority[184]

Year	Police	Prison	Total
1980-81	7	3	10
1981-82	2	3	5
1982-83	5	4	9
1983-84	3	2	5
1984-85	8	5	13
1985-86	5	4	9
1986-87	15	3	18
1987-88	6	5	11
1988-89	10	5	15
1989-90	5	9	14
1990-91	2	5	7
April 1991 RCIADIC Report			
1991-92	5	4	9
1992-93	1	5	6
1993-94	2	12	14
1994-95	1	11	12
1995-96	1	13	14
1996-97	1	13	14
1997-98	3	16	19

One reason for the reduction in the number of Aboriginal deaths in police custody is that the total number of Aboriginal persons held in police custody has decreased. However, the total number of non-Aboriginal persons held in police custody has also decreased. The result is that there has been no change in the level of Aboriginal over-representation in police custody. The police custody rates and Aboriginal over-representation rates appear in the table below:

[184] For period to 30 June 1996, see D McDonald, *Aboriginal Deaths In Custody and Incarceration: Looking Back and Looking Forward*, Australian Institute of Criminology Canberra, 1996.

Police Custody Rates per 100000 Population
National Police Custody Surveys August 1988, 1992, 1995[185]

Year	Aboriginal	Other	Aboriginal Over-representation
1988	3539	1331	27
	April 1991 RCIADIC Report		
1992	2801	107	26
1995	2228	83	27

In 1996 an independent analysis of trends in deaths in custody, police custody rates and imprisonment rates by David McDonald of the Australian Institute of Criminology concluded that[186]:

- Aboriginal deaths in custody in Australia, particularly in Australian prisons, are markedly higher than in previous years;

- the substantial reduction in deaths in police custody can be explained by the reduction of Aboriginal people in police custody and the implementation of some RCIADIC recommendations by police, including recommendations relating to "t risk" screening; and

- the continuing increase in the number of prison deaths is a result of an increasing Aboriginal prison population. Part of the reason for the increasing prison population is the failure of States and Territories to commit to the genuine implementation of some of the key recommendations of the RCIADIC.

(b) Aboriginal Over-Representation in Prison post RCIADIC

Since 1991 both the total number of Aboriginal prisoners and the level of Aboriginal over-representation has substantially increased. It is clear that Aboriginal imprisonment rate is increasing faster than the non-Aboriginal imprisonment rate. Aboriginal imprisonment rates and the level of Aboriginal over-representation appear in the table below:

[185] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, Aboriginal and Torres Strait Islander Commission Canberra, 1997.
[186] D McDonald, *Aboriginal Deaths In Custody and Incarceration*, op cit.

Aboriginal Imprisonment Rates per 100 000 Population 1988-1997[187]

Year To	Aboriginal	Other	Aboriginal Over-representation
30 June 1988	1232.3	86.8	14.2
30 June 1989	1206.7	90.1	13.4
30 June 1990	1311.7	97.2	13.5
April 1991 RCIADIC Report			
30 June 1991	1354.2	100.3	13.5
30 June 1992	1358.8	102.9	13.2
30 June 1993	1438.4	102.0	14.1
30 June 1994	1617.6	106.4	15.2
30 June 1995	1682.1	106.5	15.8
30 March 1996	1786	97.6	18.3
30 March 1997	1,822.3	99.0	18.4

Aboriginal over-representation in prison has increased since 1991. During the same period the Federal and State and Territory Governments have all claimed to support the recommendations of the Royal Commission. An independent study prepared in 1997 for ATSIC by Chris Cunneen (Institute of Criminology, University of Sydney) and David McDonald (Australian Institute of Criminology) concluded that claims by State and Territory Governments to have implemented recommendations cannot be sustained. Further, State and Territory Governments had taken legislative actions, not envisaged by the RCIADIC, which had led to an increase in Aboriginal imprisonment:

> The critical question is why has the level over-representation not fallen significantly? Part of the answer to that question must lie with a serious questioning of the implementation of all the recommendations which were designed to attack the underlying issues of marginalisation and disadvantage. For this reason there remains an urgent need to consider these issues. However, having recognised the need to tackle the underlying issues, there is still much that can be achieved through reform of the criminal justice processes which directly lead to the custody of so many Aboriginal and Torres Strait Islander peoples throughout the country. Thus, in terms of the recommendations which were specifically aimed at reducing over-representation, there are a number of both general and quite specific answers to why levels of over-representation have not fallen. …
>
> There has been a failure on the part of governments to adequately implement specific recommendations relating to the administration of the criminal justice system.

[187] The information in this table was compiled from two sources: C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody,* Aboriginal and Torres Strait Islander Commission, Canberra, 1997; and Australian Bureau of Statistics and National Correctional Services Statistics Unit, *National Correctional Statistics: Prisons, 1997*, 1997.

> This failure represents a massive lost opportunity to resolve critical issues which lead to the unnecessary incarceration of Aboriginal and Torres Strait Islander people. There has been inadequate regard given to a key recommendation on the need for negotiation and self-determination in relation to the design and delivery of services. A failure to comprehend the centrality of this recommendation has negatively impacted on the implementation of a range of other recommendations. There has been a wider socio-political context working against the interests of Aboriginal people receiving fair and just treatment from the legal system. There has been a stronger emphasis on more punitive approaches to law and order in many Australian jurisdictions since the Royal Commission into Aboriginal Deaths in Custody reported.[188]

4.5.3 What happened to the Recommendations of the RCIADIC?

(a) Key Recommendations of the RCIADIC have not been implemented

Recommendations relevant to articles 2 (1)(a) and 5 (a) of CERD: Discriminatory Practices in the Criminal Justice System

The RCIADIC found evidence of administrative, policing and judicial practices that involve the making of invidious distinctions on the basis of the race of indigenous defendants. The independent expert study of Cunneen and McDonald concluded that every State and Territory had failed to take adequate steps to eliminate violent treatment, verbal abuse and racist language by police officers, as recommended by the Royal Commission.[189] Each State and Territory had indicated support for the recommendation to adopt regulations making it an offence for a member of the police force to engage in racist behaviour. However, there was evidence of systematic breaches of the new regulations and a failure to put in place systems to ensure compliance with them.

Every State and Territory Government had also indicated support for the recommendations concerning the review of practices to promote alternatives to police custody and to eliminate inappropriate practices.[190] A comprehensive study of these recommendations conducted in 1995 by the Crime Research Centre of the University of Western Australia examined the statistical evidence on Aboriginal over-representation in police custody after 1991 and concluded that the emphasis of policing remained on "law and order" rather than "community policing": "One Aboriginal citizen in less than seven can be expected to be arrested annually - any astonishing figure by any measure. The police lock-up is still little more than a revolving door for a significant number of Aborigines."[191]

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[188] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, op cit, at 189.
[189] Recommendation 60.
[190] Recommendations 87,88.
[191] R Harding et al, *Aboriginal Contact with the Criminal Justice System And the Impact of the Royal Commission into Aboriginal Deaths in Custody*, Hawkins Press 1995, at 120.

Recommendations relevant to articles 2(1)(c) and 5(a) of CERD: Discriminatory Laws and Policies in the Criminal Justice System

The RCIADIC concluded that a number of laws and policies of States and Territories made invidious distinctions based on the race of indigenous defendants. Article 2(1)(c) of CERD imposes an obligation on Australia to amend or rescind such laws and policies. Article 5(a) of CERD elaborates upon this obligation, requiring States parties to guarantee the right to equal treatment before tribunals administering justice. The rights of persons before tribunals include the right to adequate time and facilities for the preparation of the defence[192]; the right to legal assistance[193]; the right to the free assistance of an interpreter if the defendant cannot understand or speak the language used in court[194]; and the right to examine, or have examined, the witnesses against a defendant and to obtain the attendance and examination of witnesses on behalf of the defendant.[195]

The under-resourced and/or non-existent legal and interpreter services available to many Aboriginal defendants in Australia can be contrasted with the services available to non-Aboriginal defendants. For example, the Northern Territory Legal Aid Commission provides legal assistance in criminal proceedings in accordance with guidelines published under the *Legal Aid Act 1990* (NT). In evidence to the Senate Legal and Constitutional References Committee in 1997, the Northern Territory Director of Public Prosecutions stated that as a result of unequal resources, the services of the Aboriginal Legal Aid Service were significantly inferior to those of the Northern Territory Legal Aid Commission.[196] Whilst the Federal Government has increased funding of Aboriginal Legal Services in response to the RCIADIC, serious questions remains as to the adequacy of the such increases.

The Northern Territory Office of Ethnic Affairs administers the Northern Territory Interpreter and Translator Service (NTITS). The service provides free on-site interpreting and translating services to enable people from diverse cultural and linguistic backgrounds to access medical, legal, educational and welfare related services of the Northern Territory Government.[197] During 1996 and 1997 the NTITS employed 173 interpreters in 36 languages. Not a single interpreter of Aboriginal languages is employed by the service.

In parts of Queensland, South Australia, Western Australia and the Northern Territory an Aboriginal language is the first language of a majority of the Aboriginal population. Significant proportions of the same Aboriginal population do not speak English well or at all.[198] According to the 1994 National Aboriginal and Torres Strait Islander Survey three-quarters of the Aboriginal population of the Northern Territory reported that they could hold a conversation in an Aboriginal language; and a significant proportion of the Aboriginal

[192] Article 14(3)(b) ICCPR; article 40(2) CROC.
[193] Article 14(3)(b) ICCPR; article 40(2) CROC.
[194] Article 14(3)(f) ICCPR; article 40(2)(b)(vi) CROC.
[195] Article 14(3)(e) ICCPR; article 40(2)(b)(iv) CROC.
[196] Senate Legal and Constitutional References Committee, *Hansard Report*, 23 January 1997 at 24.
[197] Office of Ethnic Affairs, *1997/98 Multicultural Information Directory*, at 11; Office of Ethnic Affairs, *Annual Report 1996/97*, at 11ff.
[198] Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994*, AGPS 1995.

population who speak an Aboriginal language at home either do not speak English well (27.8%), or do not speak English at all (5.3%).[199] The RCIADIC recommended legislation providing that a court be obliged to satisfy itself that Aboriginal defendants understand the proceedings and that where there is doubt, proceedings not continue until a competent interpreter is provided without cost to the defendant.[200] With the exception of legislation in Western Australia providing that a plea of guilty or confession shall not be accepted where a court is satisfied that an Aboriginal defendant does not understand the proceedings[201], this recommendation has not been implemented.

The Northern Territory Government responded to the RCIADIC recommendations concerning interpreters of Aboriginal languages with "qualified support", noting steps to develop an Aboriginal language interpreter service.[202] The Government has cited a number of reasons for the absence of Aboriginal language interpreters in criminal proceedings. Lack of availability of suitably qualified interpreters for 'hundreds' of Aboriginal languages is a consistent theme.[203] This does not acknowledge expert opinion that "hundreds" of distinct Aboriginal languages are spoken in the Territory, an efficient interpreter service could be based on the pool of interpreters that exist for the sixteen languages spoken in Central Australia and fifteen languages spoken in Northern Australia. A Trial Aboriginal Languages Interpreter Service for legal and health sectors operated between 6 January and 30 June 1997 covering all Aboriginal languages in the north of the Northern Territory. The service was funded by the Federal and NT Governments. The trial service ceased on 30 June 1997. A draft evaluation report concluded that in light of the demands placed on the trial service and its successful operation, the arguments for its continuation were unassailable.[204] In 1998 the NT Government announced that it had no plans to proceed with an interpreter service for Aboriginal languages. In a related move, the NT Department of Education decided in late 1998 to scrap the bilingual education program in Aboriginal schools.

Recommendations relevant to article 2(1)(e) of CERD: Involving Indigenous People in the Administration of Criminal Justice

Cunneen and McDonald note that each State and Territory Government claims to have in place formal and informal structures and processes to ensure that Aboriginal people are involved in developing community policing and in the introduction of procedures for negotiation with Aboriginal communities.[205] After consulting Aboriginal communities, the authors conclude:

> While there has been the establishment of particular programs which might superficially comply with the recommendations relating to the implementation of community policing, there is inadequate regard to recommendation 188 which calls

[199] Ibid.
[200] Recommendation 99.
[201] Section 49(1) *Aboriginal Affairs Planning Act 1972* (WA).
[202] *Northern Territory Implementation Report*, 1995, Volume 2, at 121-2
[203] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, op cit, at 163.
[204] The draft *Northern Territory Aboriginal Interpreter Service Trial: Evaluation Report* was completed in 1997.
[205] Recommendations 188, 214 and 215.

> on governments and their departments to respect the concept of self-determination. The development of community policing which involves Aboriginal and Torres Strait Islander people demands a foundation of respect. For many police at the local level it involves a transformation from seeing Aboriginal and Torres Strait Islander people as a problem to be policed, to seeing Aboriginal and Torres Strait Islander people as important and valued members of the broader society who have a role and a desire to formulate effective law and order policies for their communities. Far greater commitment is needed for these recommendations to be implemented as intended. [206]

Recommendations relevant to article 6 of CERD: Remedies for Victims of Discrimination

The principle domestic remedy for violations of CERD is provided by the *Racial Discrimination Act 1975* (Cth) (RDA), together with the powers of the Human Rights and Equal Opportunity Commission (HREOC) in relation to complaints of unlawful discrimination pursuant to the RDA. The RDA also operates to ensure that a State or Territory law that is inconsistent with the RDA is rendered inoperative. These mechanisms are ill-suited to Aboriginal defendants in criminal proceedings who seek redress for unlawful discrimination in the course of criminal investigation or proceedings. In particular, HREOC has no powers in relation to ongoing criminal proceedings in a State or Territory.

Recommendations relevant to article 2(2) of CERD: Special Measures in the Criminal Justice System

The RCIADIC identified a number of laws and policies which have a disproportionate adverse effect on Aboriginal people, and recommended reform. For example:

> It is well known that alcohol is a problem in most sectors of Australian society and a variety of reasons exist for this. It is the view of the Commission, however, that it is particularly problematic for Aboriginal people owing to their long-term disadvantaged position, their changed status with regard to their land, the destruction of the economic bases of their societies, and the resulting reduction in their self-esteem.[207]

Accordingly, the RCADIC found State and Territory laws that attach criminal sanctions to public drunkenness or consumption of alcohol in public to have a disproportionate effect on Aboriginal people. The Royal Commission recommended that public drunkenness be decriminalised and that legislation cast a duty on police to use non-custodial facilities for the care of intoxicated persons.[208]

The RCIADIC noted that particular characteristics made it less likely for Aboriginal defendants to be granted bail, including inability to raise bail money; the frequent lack of a fixed address; the requirement to provide a guarantee of a future court appearance;

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[206] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, op cit, at 97.

[207] Royal Commission into Aboriginal Deaths in Custody *National Report*, AGPS 1991, Volume 2, para 15.2.12.

[208] Recommendations 79-85.

inappropriate procedures regarding supervision on bail; and the inflexibility of the bail system in accommodating the conditions of life of many Aboriginal people.[209] Accordingly it recommended that the criteria for the grant of bail to Aboriginal defendants be revised.

The RCIADIC also found that an Aboriginal person presented to court for sentencing was more likely to be imprisoned than a non-Aboriginal person as a result of the likelihood of prior convictions. This in turn was a result of "extraordinary disadvantages which Aboriginal people face in their dealings with non-Aboriginal society, in their opportunity to pursue employment, in the economic options available and, in particular, in the fact that their lives are lived very much in public view and with constant police surveillance."[210] Central recommendations were concerned to ensure that legislation and administrative policy in each State and Territory reflect the principle that imprisonment be a sanction of last resort and that alternatives to imprisonment should be utilised wherever possible.[211]

Cunneen and McDonald have identified serious deficiencies in the efforts of the States and the Northern Territory to implement these important recommendations concerning imprisonment as a last resort.[212] For example, public drunkenness remains a criminal offence in Victoria, Queensland and Tasmania. In the Northern Territory it is an offence to consume alcohol in public in certain places.[213] The demand for appropriate facilities as an alternative to police cells remains high. There has been no discernible change in law and policies relating to the granting of bail. In relation to the principle that imprisonment is to be a sanction of last resort, Cunneen and McDonald state:

> The political and legislative shift in recent years has been away from imprisonment as a sanction of last resort. The move has been distinctly towards a greater emphasis on deterrence and has seen the abolition of remissions, the establishment of minimum non-parole periods and fixed sentences without the availability of parole.[214]

(b) RCIADIC Recommendations and Legislative and Administrative "Initiatives" of State and Territory Governments

In response to evidence of the discriminatory effects of the criminal justice system, courts have applied a number of principles in sentencing Aboriginal defendants. The key principle applied by courts is that "Aboriginality" may explain or throw light on the circumstances of an offence, thus pointing the way to an appropriate penalty. Aboriginal culture has been considered relevant in sentencing decisions when it reveals the defendant's motive or certain consequences for the defendant, or may lead to reconciliation of community conflict. The abuse of alcohol has been held to be a mitigating factor where it reflects the socio-economic circumstances and environment of the offender. In many cases courts have noted that the

[209] See recommendation 90 and 91.
[210] Para 22.1.5.
[211] Recommendations 92, 94, 95,112-121.
[212] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody,* op cit, at 125-156.
[213] Section 45D *Summary Offences Act 1923* (NT).
[214] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody,* op cit, at 130.

defendant's criminal behaviour must be viewed in light of his or her background and upbringing as a member of a community that has endured economic, political, cultural and social deprivation.[215]

Legislation in Western Australia and the Northern Territory has effectively removed the ability of courts to apply these carefully developed principles. This legislation has imposed an obligation on courts to impose a fixed penalty for certain offences (mandatory imprisonment). The ninth periodic report of Australia to the CERD Committee[216] noted that the Federal Government had expressed concern to the WA Government in relation to legislation providing for mandatory imprisonment of certain repeat offenders.[217] That legislation is no longer operative. However, it was replaced by provisions of the *Young Offenders Act 1994* (WA) which enable certain repeat offenders aged under 18 to be subject to a "special order" of a fixed term of 18 months in custody.

Northern Territory sentencing laws were amended by the *Sentencing Amendment Act (No 2) 1996* (NT), which commenced operation on 8 March 1997. This provides for the mandatory imprisonment of adults who are found guilty of a property offence: First offence - 14 days imprisonment; second offence - 90 days imprisonment; third and subsequent offence - 12 months imprisonment. The NT legislation applies to "property offences" which are defined to include many common offences. Aboriginal people comprise one quarter of the population of the Northern Territory and this law will have a profound effect on the level of Aboriginal over-representation in prison. A 1997 challenge to its constitutional validity was unsuccessful.[218] In that case, the plaintiff, a 23 year old Aboriginal woman from the remote community of Kalkaringi with no prior offences, had been charged with two offences covered by the mandatory sentencing scheme. These were stealing (one can of beer) and unlawful entry. The plaintiff was sentenced to the mandatory period of 14 days imprisonment. The Full Court of the Supreme Court of the Northern Territory determined that the law fell within the power of the Northern Territory as a law for "maintenance of law and order and the administration of justice" or for "courts including the procedure of courts".

The *Northern Territory (Self-Government) Act 1978* (Cth) confers power on the Federal Government to disallow a law of the Northern Territory. The Constitution clearly confers power on the Federal Parliament to override a law of the Northern Territory.

(c) The Failure of the RCIADIC Monitoring Mechanisms

The first recommendation of the RCIADIC was that the Commonwealth, State and Territory Governments, in consultation with ATSIC, agree upon a process for regular reporting of the adoption or otherwise of recommendations and their implementation.[219] The process agreed upon was that each State and Territory Government would prepare an

[215] For example *R v Yougie* (1987) 33 A Crim R 301.
[216] UN Doc CERD/C/223/Add 1 (1993).
[217] *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA).
[218] *Wynbyne v Marshall* (1997) 117 NTR 11.
[219] Recommendation 1a.

annual report on progress in implementation and that ATSIC would prepare an annual report on the progress of the Commonwealth.

In 1996 the Aboriginal and Torres Strait Islander Social Justice Commissioner conducted a substantial review of the circumstances of every death in police custody and prison in the period after the RCIADIC. He concluded that the monitoring process was ineffective.[220] There were no consequences for a State or Territory that rejected or qualified its support for a RCIADIC recommendation. The annual reports of States and Territories were found to be inaccurate in that they frequently asserted support for implementation of a recommendation that had not been implemented. They also simply reviewed current activities and provided no basis for future action. The Aboriginal and Torres Strait Islander Social Justice Commissioner concluded that an effective monitoring system would cast an obligation upon States and Territories to detail plans for developing policies and programs; set goals or targets; allocate responsibility for implementation; ensure adequate communication and training in support of plans; and establish evaluation mechanisms.

The deficiencies in the monitoring process were recognised by all Governments, except the Northern Territory, at a Ministerial Summit on Aboriginal Deaths in Custody held in July 1997. Indigenous leaders and Ministers from the Federal Government and all State Governments signed an agreement in the following terms:

> To address the over-representation of Indigenous peoples in the criminal justice system Ministers agreed, in partnership with Indigenous peoples, to develop strategic plans … The focus for these plans will address: underlying social, economic and cultural issues; justice issues; customary law; law reform; and funding levels; and will include: jurisdictional targets for reducing the rate of over-representation of Indigenous people in the criminal justice system; planning mechanisms; methods of service delivery; and monitoring and evaluation.

The NT Government refused to sign the agreement. It is apparent that the work of the Aboriginal and Torres Strait Islander Social Justice Commissioner in monitoring the implementations of the recommendations of the RCIADIC was influential in the outcome of the Ministerial Summit. It remains to be seen whether as a result of the current intention of the Federal Government to abolish the position of Aboriginal and Torres Strait Islander Social Justice Commissioner effective monitoring of the outcomes of the Ministerial Summit will occur.

4.5.4 The Result: the Impact of the Criminal Justice System on Aboriginal Peoples

One quarter of all Aboriginal people aged between 15 and 44 years of age report that they have been arrested in the last five years. [221] The result of legislation such as the mandatory

[220] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody: 1989-1996,* AGPS 1996.
[221] Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey*, Detailed Findings, Catalogue No 4190.0, AGPS 1994.

imprisonment legislation in the Northern Territory is that significant proportions of the Aboriginal population will be institutionalised in prison for periods of up to 12 months on being convicted for any property offence. In a 1988 review of the literature concerning the impact of prison on Aboriginal inmates, Midford concluded that for many Aboriginal inmates, prison necessarily involved trauma as a result of being removed from the kinship structure that is the focus of Aboriginal society. There is also trauma for the Aboriginal community: Prisoners cannot participate in culturally significant events and have difficulties forming relationships when returning to the community.[222] The evidence accepted by the RCIADIC reinforced the analysis of Midford.[223]

4.5.5 The Future: A Role for the Federal Government in relation to Aboriginal Interaction with the Criminal Justice System

The Australian Government can not rely upon domestic legal and political arrangements concerning the administration of justice to defer to States and Territories, the laws and policies of which are contrary to the obligations contained in CERD. Article 27 of the Vienna Convention on the Law of Treaties provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. There is a duty on each States - including federal States such as Australia - to bring the internal legal and political system into conformity with obligations under international law. As has been noted, the Federal Parliament and Government enjoy ample power under domestic constitutional principles to ensure that the laws, policies and practices of the States and Territories comply with CERD.

[222] R Midford "Imprisonment: The Aboriginal Experience in Western Australia" (1988) *ANZJ Crim* 168 at 174, 177.

[223] Royal Commission into Aboriginal Deaths in Custody *National Report*, AGPS 1991, Volume 3, at 308ff.

4.6 JUVENILE JUSTICE ISSUES

4.6.1 Introduction

(a) Recommendation 62 of the RCIADIC and the Responses of Governments

In its recommendation 62 the RCIADIC called on governments and Aboriginal organisations "to recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need … to negotiate … strategies to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise."[224] The RCIADIC was concerned that the extent of juvenile Aboriginal over-representation in detention was greater than that of adult Aboriginal over-representation in prison (ranging from a factor of 7 in the Northern Territory to a factor of 25 in NSW). The Commission was also concerned that a far greater proportion of the Aboriginal population than the non-Aboriginal population was under the age of 17. In the absence of urgent intervention, Aboriginal over-representation in prison would increase as the Aboriginal juvenile population grew older.

In 1992 RCIADIC's recommendation 62 in relation to juvenile justice was supported by the Federal and all State and Territory Governments.[225] The Federal Government undertook to implement a comprehensive National Aboriginal and Torres Strait Islander Youth Strategy to assist local communities to address youth issues. A key focus of the strategy would be to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice system.[226]

(b) Australia, RCIADIC and CROC (1997)

The urgency of the problem of Aboriginal over-representation in juvenile detention was noted in Australia's first report under article 44(1) of the UN Convention on the Rights of the Child (CROC).[227] The report noted that in 1994 in NSW, Victoria, Queensland and WA, Aboriginal and Torres Strait Islander juveniles were over represented in detention at around twice the rate of adults. According to the report, the administration of the juvenile justice system is primarily the responsibility of State and Territory Ministers. At a 1994 meeting all Ministers endorsed a set of principles, set out in a paper entitled Principles to Address the Over-representation of Indigenous Youth in the Juvenile Justice System, designed to reduce the number of indigenous youth in detention.

The Aboriginal and Torres Strait Islander Youth Strategy foreshadowed in the Federal Government's response to the recommendations of the RCADIC and noted in Australia's

[224] Recommendation 62.
[225] *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission*, AGPS 1992, Volume 1, at 211.
[226] Ibid.
[227] UN Doc CRC/C/8/Add 31 (1996).

first report under CROC did not eventuate. Instead, a Youth Social Justice Strategy was completed in 1995, with young Aboriginal and Torres Strait Islander people identified as a priority group. However, this strategy did not directly address the recommendations of the RCIADIC other than to fund twelve month projects in community organisations working with disadvantaged young people.

In its Concluding Observations, the Committee on the Rights of the Child expressed concern about the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system.[228] The Committee was particularly concerned about legislation in WA and the NT providing for mandatory detention and punitive measures, resulting in a high percentage of Aboriginal juveniles in detention.

4.6.2 Aboriginal Juvenile Interaction with the Criminal Justice System Post RCIADIC

The level of over-representation observed by the RCIADIC has continued. The proportion of young Aboriginal people being detained is increasing. Between June 1994 and June 1997 there was a 20% increase in the number of young Aboriginal people in detention. The figures appear in the following table.

Aborigines in Juvenile Corrective Institutions per 100000 Population 10-17 years, 1994-1997[229]

Quarter	Aboriginal	Other	Aboriginal Over-representation
Jun 1994	486.79	26.76	18.19
Jun 1995	492.47	26.86	18.33
Jun 1996	539.83	25.33	21.31
Jun 1997	582.6	23.67	24.61

The level of Aboriginal over-representation in juvenile detention is also increasing: from 18.19 in 1994 to 24.61 in 1997. The figures for Australia as a whole mask the profound variations in levels of over-representation in different States and Territories. The following table demonstrates that Queensland and WA have extremely high levels of Aboriginal over-representation in juvenile detention.

[228] UN Doc CRC/C/15/Add 79 (1997).

[229] Aboriginal and Torres Strait Islander Commission, *Implementation of the Commonwealth Government Responses to the Recommendations of the Royal Commission into Aboriginal Deaths in Custody: Annual/Five Year Report 1996/1997*, Commonwealth of Australia 1997, Volume 1.

Over-Representation Levels, Persons Aged 10-17 Years in Juvenile Corrective Institutions by State, September 1993 — June 1997 (Quarterly Averages)[230]

	Indigenous	Non-Indigenous	Over–representation
NSW	725.2	38.0	19.1
Vic	247.7	12.3	20.1
Qld	464.3	14.7	31.6
WA	722.8	22.9	31.6
SA	580.4	32.0	18.1
Tas	166.6	23.3	7.1
NT	129.8	39.6	3.3
Act	421.3	39.2	10.7
Aust	502.4	24.9	20.2

The former Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson commented frequently on the impact of the system resulting from the above statistical picture:

> The devastating impact of the operation of the juvenile justice system on the lives of Aboriginal and Torres Strait Islander children has become a thematic element of my last two reports.
>
> > In 1995:
> > *We despair watching the impact of incarceration on our young people. Fourteen year olds come home street-wise sullen men. The current system damages our children, while doing nothing to protect our communities and protect the wider community in any lasting way.*
> >
> > In 1996:
> > *These are our kids. Without denying their responsibility for their behaviour, our kids are most frequently offended against before they offend against others. Before society has any moral claim to exact punishment, our responsibilities to them must be met. This is so for all kids.*
> >
> > I have consistently drawn attention, not only to the damage to the lives of Indigenous children and their families, but also to the broader social problems which the operation of the criminal justice system is relentlessly building for the future of this country. What cannot be forgotten is that behind the statistics and statements of general principles are the lives of young children whose futures are now being shaped by their experience in police stations, courts and detention centres. What is

[230] Ibid.

> happening day in, day out, beyond the view of the rest of the community, has direct relevance for the entire Australian community. [231]

4.6.3 What happened to the Recommendations of the RCIADIC?

(a) Key Recommendation of the RCIADIC has not been Implemented

In Part 4 above concerning the recommendations of the RCIADIC, it was noted that key recommendations have not been implemented and that recent State and Territory legislation have undermined the central recommendation of the Commission that imprisonment be a sanction of last resort. The same observations apply with respect to recommendation 62 concerning the juvenile justice system. After reviewing the operation of the juvenile justice system in each State and Territory, Cunneen and McDonald concluded that:

> While most governments offer formal commitment to the recommendation and can point to some policy or consultative process that is in place, it is clear the intent of the recommendation has been lost in many areas. There is also a strong apprehension that the current political climate in relation to juvenile offending is one which is going to see more Aboriginal and Torres Strait Islander young people in custody.[232]

In March 1997 the Northern Territory Parliament passed the *Juvenile Justice Amendment Act (No 2) 1996* (NT) which provides for the mandatory detention for 28 days of a child aged 15 or over who is found guilty of a second or subsequent property offence. The definition of property offences is broad. Mandatory detention can be imposed on a child found guilty of stealing a small quantity of food. There are many other examples of recent laws and policies that will lead to more Aboriginal juveniles in custody.[233] There has been an increase in police powers to detain children in NSW and WA. In Queensland, the Government has announced that there will be renewed use of the "care and control" powers under welfare legislation as a means of responding to crime. In the NT, Aboriginal juveniles are normally proceeded against by way of arrest and other options such as a police caution are infrequently used. In Queensland and the NT juveniles who are arrested are regularly held in police cells rather than being granted bail or diverted to alternative facilities. In the town of Alice Springs in the Northern Territory, juveniles sentenced to detention are held in an adult prison as there is no juvenile detention centre.

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[231] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report* 1997, Commonwealth of Australia 1997, at 77-78.
[232] C Cunneen and D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, op cit, at 174.
[233] Ibid, Chapter 12, at 170-187.

(b) The views of the former Aboriginal and Torres Strait Islander Social Justice Commissioner

The former Aboriginal and Torres Strait Islander Social Justice Commissioner monitored developments in the juvenile justice system and published findings in annual reports in 1995, 1996 and 1997.[234] Three key points emerge from these reports.

First, each report draws attention to the seriousness and urgency of the situation. In his 1995 Report the Aboriginal and Torres Strait Islander Social Justice Commissioner stated:

> A crisis is approaching. Five years ago the Royal Commission into Aboriginal Deaths in Custody identified the over representation of our kids at every level of the juvenile justice system as having "*… potentially dangerous repercussions for the future"*. That dangerous future has arrived. At one level it is a simple matter of arithmetic. … in 6 years, by 2001 there will have been a 15 percent increase in the number of Indigenous kids in detention. In 16 years, by 2011 there will have been a 44 percent increase in the number of Indigenous kids in detention. … This is the crisis. It is on us already.[235]

Second, in each Report the Social Justice Commissioner identified steps that might be taken to address the crisis. In his 1996 Report he stated:

> [T]hrough the adoption of diversionary programmes based on the philosophy of restorative justice the necessary guidance and links can be made. Restorative justice looks to instil a sense of responsibility for the wrong done, to make reparation and plan for a future which minimises the pressures to re-offend. … This is a fundamental principle of the UN Guidelines for the Prevention of Juvenile Delinquency: "*by engaging in lawful, socially useful activities and adopting a humanistic orientation, young persons can develop non-criminogenic attitudes."* … In New South Wales the Aboriginal Mentor Program provides assistance and support to Aboriginal kids on remand or under supervision to "*encourage positive growth and facilitate reintegration into the community"*. [236]

Third, the Social Justice Commissioner highlighted the role of racial discrimination in Aboriginal involvement with the juvenile justice system. In the 1995 and 1997 reports, he stated:

> In Western Australia where Indigenous juvenile over representation is highest, the non-Indigenous juvenile incarceration rate is normal, and roughly equivalent to the national average.[237]

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[234] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Third Report 1995*, AGPS 1995; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fourth Report 1996*, AGPS 1996; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report 1997*, Commonwealth of Australia 1997.

[235] Op cit, at 15-17.

[236] Op cit, at 25-26.

[237] Op cit, at 18.

> The dividing line is one of race. Systemic discrimination removes Aboriginal and Torres Strait Islander children from their families and the rates of separation are in many places accelerating. Whatever the rationale of removal, Indigenous children are taken away from their families. … The regional variations show how rates of Indigenous arrest and detention are reflective and responsive to the laws and practices applied by the criminal justice system. Poverty, lack of education, health and housing are objective factors which drive systemic discrimination, overt racism can catalyse its operation. Overall there is the human reality of our people, our families and our communities, whose knowledge of past treatment is reinforced by current experience.[238]

4.6.4 Contemporary Separations and Juvenile Justice

(a) Findings and Recommendations

In August 1995, the Federal Government established an Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. One of the terms of reference of the "Stolen Generations Inquiry" was to examine current laws, practices and policies leading to the separation of Aboriginal and Torres Strait Islander children from their families and to advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples. The Inquiry reviewed the findings and recommendations of the RCIADIC and concluded that:

> The issues affecting Indigenous young people in the juvenile justice system have been identified and demonstrated time and time again. It is not surprising that Indigenous organisations and commentators draw attention to the historical continuity in the removal of Indigenous children and young people when the key issues in relation to juvenile justice have already been identified for some time yet the problem of over-representation appears to be deepening.[239]

The Inquiry recommended national legislation - binding on each State and Territory - dealing with a range of issues. First, national framework legislation should adopt the principle of self-determination to enable indigenous communities to formulate and negotiate agreements on measures best suited to their individual needs concerning children, young people and families.[240] Second, national legislation should prescribe national minimum standards for indigenous juvenile justice. The rules to be incorporated in the national standards legislation cover a range of issues, including the use of cautions, arrest, bail, interpreters, court procedure and sentencing options.[241]

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[238] Op cit, at 78, 79.

[239] 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*, Commonwealth of Australia 1997, at 539.

[240] Recommendation 43a.

[241] Recommendation 44.

(b) Responses of Governments

The response of the Federal Government to the Stolen Generations Inquiry did not specifically address the recommendations concerning juvenile justice other than to state: "The Report proposes measures to address contemporary separation practices, in particular legislation to govern...juvenile justice procedures. These are properly matters for the States and Territories, not the Commonwealth."[242]

No State or Territory has moved to alter legislation or policy in response to the recommendations of the Inquiry. Notwithstanding evidence of systemic indirect discrimination, the Northern Territory Government has rejected the Inquiry recommendations in relation to juvenile justice on the basis that "it is not the NT Government's policy to treat indigenous children differently to non-indigenous children."[243] It is apparent from this response and the policy of mandatory imprisonment for juveniles that the NT Government does not appreciate the obligation in article 2(2) of CERD to initiate special and concrete measures where the circumstances warrant. In light of the inaction of the NT Government, there is an obligation on the Federal Government to assume a leading role and to adopt measures to ensure that the juvenile justice system operates without denying young Aboriginal people the enjoyment of their human rights and fundamental freedoms.

4.7 THE REPORT OF THE "STOLEN GENERATIONS INQUIRY"

4.7.1 Background

The 1994 Australian Bureau of Statistics survey of Aboriginal people revealed that over 10% of Aboriginal and Torres Strait Islander people over the age of 25 reported being separated and raised in isolation from their natural families. After the "Coming Home" Conference in 1994, the former Minister for Aboriginal and Torres Strait Islander Affairs announced that the Government would consider a study into the effects of this policy. The Federal Labor Government's 1995 *Justice Statement* announced the establishment of an Inquiry into the Removal of Aboriginal and Torres Strait Islander Children to trace the practices that resulted in the compulsory separation of Aboriginal and Torres Strait Islander children from their families and to examine policies relating to the placement of Aboriginal and Torres Strait Islander children today.[244]

[242] Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, Press Release, 16 December 1997.
[243] Northern Territory Response to the Human Rights and Equal Opportunity Commission Report on the Stolen Generations, 1997.
[244] Attorney-General's Department, *Justice Statement*, Office of Legal Information and Publishing 1995, at 172.

4.7.2 The Inquiry

On 2 August 1995 the former Attorney-General requested the Human Rights and Equal Opportunity Commission to "trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies". The "Stolen Generations Inquiry" was headed by former Justice of the High Court of Australia, Sir Ronald Wilson, and the then Aboriginal and Torres Strait Islander Social Justice Commissioner Michael Dodson. The report of the Inquiry, entitled *Bringing them Home*, was tabled in Federal Parliament on 27 May 1997.[245]

The Inquiry concluded that between one in three and one in ten indigenous children were forcibly removed from their families and communities in the period 1910-1970. In that time, not one family escaped the effects of forcible removals. Most families were affected, in one or more generations, by the forcible removal of one or more children. The Inquiry found that from about 1946, laws and practices which, for the purpose of eliminating indigenous cultures, promoted the removal of indigenous children for rearing in non-indigenous institutions and households were in breach of the international prohibition of genocide. From about 1950, the continuation of separate laws for indigenous children breached the international legal prohibition of racial discrimination. From this period, many indigenous Australians were victims of gross violations of human rights.

4.7.3 Principal Recommendations

On the issue of compensation or reparation, the Inquiry was required to examine "the principles relevant to determining the justification for compensation for persons or communities affected by such separations." The Inquiry recommended that reparation be made to all who suffered because of forcible removal policies, including individuals who were removed as children; family members who suffered because of their removal; communities which, as a result of the forcible removal of children, suffered cultural and community disintegration; and descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.[246] Citing the approach of Professor Theo van Boven, Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities[247], the Inquiry recommended that reparation should consist of acknowledgment and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation.[248] It found that any individual affected by the removal policies should be entitled to make a claim for compensation, including parents, siblings and other family members in appropriate cases. To overcome the pitfalls of costly, time-consuming litigation and inconsistency of results, the Inquiry recommended that the

[245] *Bringing them Home*, op cit.
[246] Recommendation 4.
[247] *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr Theo van Boven pursuant to Sub-Commission resolution 1995/117*, UN Doc E/CN 4/Sub 2/199617 (24 May 1996).
[248] Recommendation 3.

Council of Australian Governments (COAG) establish a joint National Compensation Fund.[249] The Inquiry emphasised the need for culturally appropriate assessment criteria and procedures for the determination of compensation claims which are expeditious, non-confrontational, non-threatening and which accommodate cultural and linguistic ends.

Other recommendations related to the need for Commonwealth legislation to implement the Genocide Convention domestically[250] and to the development of national standards legislation to establish minimum standards of treatment for indigenous children.[251] An objective of national minimum standards would be the elimination of removals of indigenous children from their families and communities consistent with the Convention on the Rights of the Child and the right of self-determination.

4.7.4 The Government's Response

Various aspects of the Federal Government's response to the Report of the "Stolen Generations Inquiry" have been a major disappointment to indigenous Australians. Whilst the Prime Minister has expressed deep personal sorrow for actions of the past, he and the Minister for Aboriginal and Torres Strait Islander Affairs have repeatedly ruled out the possibility of any formal apology. The Government has stated that there is no practical or reasonable way to address the recommendation concerning compensation. The Ministerial Council on Aboriginal and Torres Strait Islander Affairs has decided that national standards for indigenous children would be inappropriate and that the question of standards is a matter for each State and Territory to address. In a number of critical areas, such as school curricula and training, family reunion assistance, and mental health services, the Federal Government has effectively passed responsibility to the States and Territories.[252]

4.8 ECONOMIC AND SOCIAL INDICATORS

4.8.1 Introduction

The following section provides a selection of statistics which highlight the disparities between indigenous and non-indigenous Australians in the enjoyment of economic, social and cultural rights. The selection should not be viewed as comprehensive, rather as representative of recent research in relation to key indicators such as health, education, employment, housing and welfare. Until 1994 there was no comprehensive national survey of the lives of Aboriginal and Torres Strait Islander peoples.

The National Aboriginal and Torres Strait Islander Survey (NATSIS) was the first nation-wide survey of indigenous peoples. It was conducted from April to July 1994, with the aim of providing Aboriginal and Torres Strait Islander people and Commonwealth, State and Territory governments with statistics in relation to a range of social, demographic, health and

[249] Recommendation 15.
[250] Recommendation 10.
[251] Recommendation 44.
[252] The Hon Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, "Bringing Them Home Government Initiatives", 16 December 1997.

economic areas. It was part of the Federal Government's response to the Royal Commission into Aboriginal Deaths in Custody. Although valuable in providing much-needed information about indigenous peoples in areas such as family and culture, health, housing, education and training, employment and income, law and justice, the NATSIS was by no means conclusive.

The 1988 Interim Report of the Royal Commission into Aboriginal Deaths in Custody had concluded that the over-representation of indigenous people in the criminal justice system is inextricably linked to their social, economic and physical health and well-being. Echoing these views, the July 1997 Ministerial Summit on Indigenous Deaths in Custody concluded that underlying social, economic and cultural issues must be addressed in order to reduce the over-representation of indigenous people in the criminal justice system.

4.8.2 Population

Between 1991 and 1996 there was a 33% increase in the number of people in Australia who identified as indigenous. This means that indigenous people now make up 2.0% of the total Australian population, an increase from 1.6% in 1991. Over half (55.8%) of Australia's indigenous population was counted in two States: New South Wales (NSW) and Queensland. A further 14.4% was counted in Western Australia (WA) and 13.1% in the Northern Territory (NT). Indigenous people represented only 3% or less of the total populations in each State, although in the NT indigenous people made up 26.4% of the population.

4.8.3 Health

(a) Mortality

When the most recent comprehensive study of indigenous mortality was carried out in 1992-94, the Australian Bureau of Statistics considered only Western Australia, South Australia and the Northern Territory to have an acceptable quality of identification on death records.[253] As a result there are no accurate national figures which compare indigenous and non-indigenous mortality and life expectancy rates. However the 1997 Australian Bureau of Statistics publication *The Health and Welfare of Aboriginal and Torres Strait Islander People* estimates indigenous life expectancy to be 15-20 years less than that of non-indigenous Australians.

Moreover, figures from Western Australia, South Australia and the Northern Territory indicate a significant disparity between indigenous and non-indigenous rates in those jurisdictions. In 1992-94 indigenous Australians in WA, SA and the NT experienced much higher rates of death than non-indigenous Australians. The rate was 3.5 times greater for

[253] B Anderson, B Keldeep and J Cunningham, *Occasional Paper: Mortality of Indigenous Australians* 1994, Aboriginal and Torres Strait Islander Health and Welfare Information: A Joint Programme of the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, AGPS 1996, at 1.

males and approximately 4 times higher for females. The differences were particularly pronounced for those aged 25-54 years, for whom the death rate was 6-8 times higher.[254]

In those areas with sufficient mortality data age specific death rates are higher for Aboriginal and Torres Strait Islander people than for other Australians at virtually every age. Specifically, indigenous men aged 35-44 die at a rate 7.9 times higher than other Australian men, while indigenous women in the same age group die at a rate of 8.2 times the average for Australian women.[255]

(b) Infants

In all States the perinatal mortality rate is higher for babies of indigenous mothers than for babies of non-indigenous mothers. In SA, where this disparity is most pronounced, the mortality rate for babies of indigenous mothers is almost four times than the non-indigenous perinatal mortality rate.

In the NT, where in 1994 35% of all births were indigenous, a 1994 Midwives Collection Report found that:

- nearly half of all indigenous mothers had a medical condition complicating their pregnancy compared with 17% of non-indigenous mothers;
- 4.4% of indigenous mothers and 0.3% of non-indigenous mothers had no antenatal care; and
- nearly 30% of indigenous mothers had to travel away from their home location to give birth, mainly due to the remoteness of much of the NT's indigenous population.

(c) Disease

Diabetes

Death rates for diabetes mellitus increased between 1985 and 1994 by almost 10% per year for indigenous males and by over 5% per year for indigenous females. By 1994, recorded indigenous death rates for diabetes were 17 times greater for indigenous females than for non-indigenous females.[256] A survey commissioned by the Federal Minister for Health and Family Services found that in 1994-95, 40% of Torres Strait Islanders surveyed over the age of 35 years had diabetes.[257]

Trachoma

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[254] Ibid.

[255] Australian Institute of Health and Welfare, *Australia's Health 1996: The Fifth Biennial Report*, AGPS 1996, at 21.

[256] Anderson, Keldeep and Cunningham, op cit, at 21.

[257] H Taylor, "Eye Health" in Aboriginal and Torres Strait Islander Commission, *Report of a Review commissioned by the Commonwealth Minister for Health and Family Services*, Commonwealth of Australia 1997 at 71.

Trachoma is chronic conjunctivitis caused by repeated episodes of infections with the obligatory intracellular bacterium, Chlamydia trachomatis. The early stages of infection are largely seen in young children and if long-standing and moderately severe lead to "cicatricial trachoma" in later life. Sever scarring of the eyelids causes in-turning of the eyelashes, opacification of the cornea and blindness. Australia is noted by the World Health Organisation as one of 54 countries that still has hyperendemic blinding trachoma.[258]

For those areas where recent data is available, substantial numbers of children are affected by follicular trachoma. The prevalence in many areas appears to be at hyperendemic levels; that is, more than 20% of children under 10 years of age have follicular trachoma.[259]

Blindness

The NT Eye Health Program found that overall Aboriginal people in rural Australia suffer from blindness at a rate nearly ten times that of non-Aboriginal people. The rates of blindness were 1.49% in Aboriginal people compared with only 0.16% on non-Aboriginal people.[260]

Cervical Cancer

In 1992-94 the standard mortality rate from cervical cancer recorded for indigenous women was over eight times that of non-indigenous women.[261]

Tuberculosis

A 1993 study of tuberculosis in Australia found that although rates of the disease had fallen and remain amongst the lowest in the world, the notification rate of tuberculosis for Aboriginal and Torres Strait Islander people was seven times the rate of other Australians born here.[262]

Gonorrhoea and Chlamydia

In a 1997 study of Central Australian Aboriginal communities, 20.9% of men tested were found to be infected with either gonorrhoea or chlamydia.[263]

Smoking

[258] Ibid at 83.
[259] Ibid at 83
[260] Taylor, op cit, at 98.
[261] Anderson, Keldeep and Cunningham, op cit, at 16.
[262] J Hargraves, "Tuberculosis in Australia" (1995) 19 *Communicable Diseases* at 334-43.
[263] S Skov et al, "Urinary Diagnosis of Gonorrhoea and Chlamydia in Remote Aboriginal Communities" (1997) 166 *Medical Journal of Australia* at 468-471.

Approximately half of all deaths among indigenous people are due to circulatory disease, respiratory disease or cancer. While these diseases are a major cause of death for many non-indigenous people, they are recorded as the cause of death 1.5-8 times more frequently for indigenous people, depending on age.[264]

4.8.4 Housing

Recent statistical information suggests that indigenous households are about twice as likely as other Australians households to be in need of housing assistance. Almost 4 in 10 households are estimated to have either insufficient income to meet basic needs (even before taking housing into account) or not enough income to afford adequate housing. The 1996 Australian Bureau of Statistics *Census of Aboriginal Population and Housing* found that by far the majority of indigenous households were renting, with 64% of private households falling into this category. This compares with 26% of non-indigenous private households who rented homes. The home ownership rate for indigenous households was 31%, compared to around 72% home ownership rate for the non-indigenous population.[265]

In 1994 an estimated $3.1 billion was required to cover the accumulated backlog of indigenous housing and infrastructure needs in rural, remote and urban areas. According to the Aboriginal and Torres Strait Islander Commission, this backlog will take 20 years to address at existing levels of funding.[266]

The 1994 study by the Australian National University's Centre for Aboriginal Economic Policy Research, *The Housing Needs of Indigenous Australians 1991*, found that:

- 34% of discrete communities had a water supply below the standard set by the Federal Government as safe for human consumption;
- 13% of discrete communities did not have a regular water supply;
- 64% of discrete communities had less than 50% of their internal roads sealed; and
- 71% of discrete communities had less than 50% of their access roads sealed or had no road access.[267]

Aboriginal and Torres Strait Islander peoples are the most disadvantaged group in the Australian community with respect to housing. In particular:

- 38% of indigenous families are living in housing need, compared with 17% of all families in housing need [268]; and

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[264] See Australian Bureau of Statistics, *Occasional Paper: Mortality of Indigenous Australians 1994*, AGPS 1996, at 15.

[265] Australian Bureau of Statistics, *Census of Population and Housing: Aboriginal and Torres Strait Islander 1996*, AGPS 1996. See also Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings*, AGPS 1995.

[266] Aboriginal and Torres Strait Islander Commission, *Annual Report 1994*, AGPS 1995, at 148.

[267] See R Jones, *The Housing Needs of Indigenous Australians 1991*, Centre for Aboriginal Economic Policy Research, Australian National University 1994.

[268] Australian Council of Social Services, *Federal Budget Priorities Statement 1996-97*, ACOSS Paper No 79, June 1996.

- indigenous families are 20 times more likely to be homeless than non-indigenous families.[269]

4.8.5 Education

(a) Higher Education

It has been found that over 75% of those indigenous students who did not finish their university degrees discontinued university in the first year of study. The fact that 75% of indigenous students left university before completing first year suggests that education support networks and processes are failing indigenous students.[270]

(b) School Education

In the Northern Territory there are very few secondary aged students in remote Aboriginal communities studying at the intermediate level. The poor performance of Aboriginal students may be attributable to English being a second language for many of them.[271] In the 1996 Australian Census, it was found that as a proportion of the total population aged five years and over, the NT recorded the highest percentage of people speaking a language other than English at home (22.5%). 70.9% of those people spoke an indigenous language.[272]

Only 2.8% of indigenous people surveyed in 1996 said they had never attended school, compared with 4.6% in 1991. This compares with 0.73% of non-indigenous Australians who have never been to school.[273]

A higher proportion of indigenous Australians leave school aged 14 or younger, and 60.6% of Aboriginal and Torres Strait Islander students leave school aged 16 or younger.

(c) Aboriginal Study Assistance Scheme (ABSTUDY)

The ABSTUDY scheme was introduced in 1969 to provide income support for indigenous people in study and an incentive to study for those not currently within the education system. In 1977 the Federal Government launched a review of the scheme to ensure that indigenous students receive the most appropriate forms of assistance, and with a view to maximising indigenous participation and retention rates.[274] At the same time, ATSIC commissioned a

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[269] R Jones, *The Housing Needs of Indigenous Australians 1991*, op cit, at 158.
[270] C Bourke, J Burden and S Moore, *Factors Affecting Performance of Aboriginal and Torres Strait Islander Students at Australian Universities: Case Study,* Department of Employment, Education, Training and Youth Affairs Evaluations and Investigations Program, Higher Education Division, 1996 at 116.
[271] Legislative Assembly of the Northern Territory, *Report of the Provision of School Education Services for Remote Communities in the Northern Territory*, Public Accounts Committee Report No 27, August 1996, at 13-21.
[272] Ibid.
[273] 1996 Australian Census data.
[274] Department of Employment, Education, Training and Youth Affairs, *Review of the Aboriginal Study Assistance Scheme: Discussion Paper*, Canberra, November 1997.

separate review of the ABSTUDY scheme. The ATSIC review found that education systems were failing indigenous Australians at all levels in terms of equitable participation and achievement.

ATSIC considers that ABSTUDY and its forerunners have contributed significantly to the modest indigenous educational successes to date. In light of declining educational participation and attainment (absolutely in secondary education and relative to population in terms of higher education), and the emerging crisis in indigenous employment, there remains a need for a continued public investment in a special indigenous student assistance scheme and thus in employment.[275]

The Government recently introduced changes to the benefits available under the ABSTUDY scheme, by tightening the eligibility criteria and aligning the rates of income support with those available to non-indigenous students. These changes were introduced without any consideration of who would be affected by them. In particular, ATSIC believes that indigenous students over 21 years of age will be worse off. No compensatory measures have been proposed to ensure that changes to ABSTUDY will not adversely affect the goal of closing the educational gaps between indigenous and non-indigenous Australians.

4.8.6 Income

A 1975 report found that Aboriginal and Torres Strait Islander people in both rural and urban Australia were the poorest Australians.[276] In 1996 indigenous people and households still had low incomes and a high proportion of indigenous people reported that they received their main source of income from government payments.[277] The Community Development Employment Projects (CDEP) scheme has been a major source of income and work in many communities, especially in rural areas where alternative employment opportunities may be limited. [278]

An estimated 59% of Aboriginal and Torres Strait Islanders receive an income less than $12, 000 and a further 9% receive no income at all.[279] In 1996 the overall average income for indigenous people was $14,200; 30 per cent less than that of $21,000 for the total population. While this is partly due to the relatively low indigenous employment/population

[275] O Stanley and G Hansen, *ABSTUDY: An Investment for Tomorrow's Employment*, ATSIC Canberra 1998.
[276] R Ross and A Mikalsuskas, "Income poverty among Aboriginal families with children: Estimates from the 1991 Census" in J C Altman and B Hunter, *Indigenous Poverty since the Henderson Report*, Discussion Paper No 127, Centre for Aboriginal Economic Policy Research, Australian National University, April 1997.
[277] Australian Bureau of Statistics, *Health and Welfare: Aboriginal and Torres Strait Islander Peoples*, No 4704.0, Commonwealth of Australia 1997, at 4.
[278] Ibid.
[279] Q Beresford and P Omaji, *Rites of Passage: Aboriginal Youth, Crime and Justice*, Fremantle Arts Centre Press, Fremantle 1996.

ratio and the greater dependence of indigenous people on government spending, it also reflects an overall lower occupational status.[280]

4.8.7 Employment

In 1994, when the most recent comprehensive survey of indigenous employment was conducted, the total number of indigenous people in the labour force was estimated at 105 200. This gave a labour force participation rate of 58% of persons aged 15 and over.[281] While the total unemployment rate of the general Australian labour force was 10.5% in 1994, the unemployment rate for Aboriginal and Torres Strait Islanders in the labour force was 38%. Australia's unemployment rate for 15-19 year olds was 23.8%[282], compared with 50% for Aboriginal and Torres Strait Islander youth.[283] Considerable differences existed between States, with NSW recording the highest indigenous unemployment rate at 46%, followed by SA with 45%. The lowest unemployment rate for indigenous people was recorded in Tasmania with 29%.[284]

The Australian National University's Centre for Aboriginal Economic Policy Research recently completed a report for ATSIC on employment, entitled *The Job Still Ahead: Economic Costs of Continuing Indigenous Employment Disparity*. This report analyses and makes projections in relation to indigenous employment based on 1996 Census data. Looking at the period to 2006, the report concludes that there will be enormous challenges in improving upon or even maintaining the current employment position of the indigenous workforce.

Between 1991 and 1996 there appears to have been some improvement in the comparative employment position of indigenous people: Figures suggest that the unemployment rate has fallen from 30.8% to 22.7%. However, the Australian Bureau of Statistics has urged caution in the interpretation of these figures, as the 1996 Census saw a substantial increase in the number of people who identified as indigenous.

As the anticipated rate of indigenous employment growth (1.3%) is less than the anticipated rate of indigenous population growth (2.3%), 1996 Census information and year 2006 projections suggest that the indigenous employment rate will decrease and the unemployment rate will increase. The major underlying factor is the projected rapid growth of the indigenous working-age population. It is estimated that this will grow by 64,700 persons or 28% between 1996 and 2006; more than twice the 11.6% rate expected for the Australian population as a whole.

To achieve employment equity with the rest of the Australian population, an additional 77,000 indigenous people would have to be employed during the period 1997 to 2006. On

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[280] J Taylor and B Hunter, *The Job Still Ahead: A Report for ATSIC*, Centre for Aboriginal Economic Policy Research, Australian National University, September 1998.
[281] Ibid.
[282] Australian Bureau of Statistics, *Australian Social Trends*, Commonwealth of Australia 1997, at 90.
[283] Australian Bureau of Statistics, 1994 Detailed Summary, AGPS 1994, at 45.
[284] Ibid.

available estimates, the jobs which will be created are likely to fall short of this by about 56,000. Moreover, *The Job Still Ahead's* projection of 21,000 additional jobs by 2006 is based upon the assumption that more than half of any new jobs will be generated through ATSIC's Community Development Employment Projects (CDEP) Scheme. Under the CDEP scheme some 32,000 participants forgo the income support entitlement for which all Australians are eligible. The work they perform is, in the main, part-time and relatively low paid. The 1996 Census established that CDEP participants comprise 20% of the indigenous workforce. If CDEP participants were counted as unemployed, unemployment statistics for indigenous Australians would exceed 40%.

Indigenous employment needs translate to over 7,000 new jobs per annum. This is some three times the 2,400 jobs created per annum through government employment and related policy during the first half of the 1990s. As the economy is likely to grow at below trend rates in the period to 2006, the task of improving the employment status of indigenous Australians and providing gainful employment to those indigenous people entering the labour force presents a major challenge.

4.9 MAJOR POLICY DEVELOPMENTS IN INDIGENOUS AFFAIRS

4.9.1 Discontinuance of "Social Justice Package" Process

The High Court's recognition of the continued existence of native title in the 1992 decision of *Mabo v The State of Queensland (No 2)*[285] opened the way for recognition of the special status of Aboriginal and Torres Strait Islander peoples and broader acceptance of the rights and aspirations of indigenous Australians arising out of their prior ownership and continuing dispossession. As the second stage of the former Labor Government's response to the decision of the High Court in *Mabo (No 2)*, the *Native Title Act 1993* (Cth) established a National Aboriginal and Torres Strait Islander Land Fund. As the third stage of its response to the High Court's decision in *Mabo (No 2)*, the previous Federal Government proposed to adopt further measures to address the dispossession of, and advance the cause of social justice for Aboriginal and Torres Strait Islander peoples.

The Government received comprehensive "social justice package" submissions from, amongst others, ATSIC, the Aboriginal and Torres Strait Islander Social Justice Commissioner and the Council for Aboriginal Reconciliation. These submissions address a vast range of issues, including constitutional reform, political representation, reparations and compensation, regional agreements, indigenous self-government, a treaty, cultural and intellectual property, recognition of customary law, and economic development. They are informed by a fundamental shift from welfare and dependence to the recognition of the right of indigenous Australians to the same rights as other Australians (equality rights) and to particular rights by virtue of their dispossession and distinct status as the first peoples of Australia (indigenous rights).

[285] (1992) 175 CLR 1.

(a) Compensation

An issue central to many "social justice package" submissions was that of compensation. For example, ATSIC's submission stated that "a fundamental principle of social justice is that there should be compensation for past dispossession of land and dispersal of the indigenous population." ATSIC's submission noted the importance of a comprehensive and soundly based compensation package, and called on the Federal Government to "support the principle of negotiating compensation and/or reparations, including at a local or regional level, with Aboriginal and Torres Strait Islander peoples as part of any proposal for a treaty or document of reconciliation." ATSIC's submission proposed the commissioning of reports into the following compensation/reparations issues:

- mining royalties as a basis for general compensation/reparations;
- land rates and property taxes as a basis for general compensation/reparations ;
- co-extensive title;
- compensation/reparations and regional agreements;
- personal compensation for forced removal of Aboriginal peoples from their families, loss of land, language, law and culture.[286]

The submission of the Council for Aboriginal Reconciliation referred to the desirability of further broadly-based policy debate on the issue of compensation or reparations for past dispossession and recommends the establishment of "a Joint Select Committee drawn from the House of Representatives and the Senate to inquire into the general issue of compensation or reparation to Aboriginal and Torres Strait Islander peoples for their dispossession as a result of colonisation and that such Committee be required to report within two years of its establishment."[287]

(b) Political representation and self-government

Central to a number of "social justice package" submissions was a series of recommendations concerned with political representation and self-government. Under the heading "Political Representation", ATSIC recommended that the Commonwealth Government investigate the possibility of reserved seats in the Australian Parliament; that full voting membership of the Council of Australian Governments (COAG) be extended to the Chairperson of ATSIC; and that the development of ATSIC as a self-determining organisation be fostered and that the Government be open to ways of strengthening the principle of self-determination within its structures.[288] Under the heading "Indigenous Participation in the Structure of Government", the Council for Aboriginal Reconciliation recommended consideration of separate indigenous seats in the House of Representatives and the Senate based on an indigenous electoral roll; as well as full membership of the

[286] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995, recommendation 33.
[287] Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, Commonwealth of Australia 1995, recommendation 19.
[288] Recommendations 25, 29 and 30.

Ministerial Council on Aboriginal and Torres Strait Islander Affairs for the Chairperson of ATSIC.[289]

As well as recognising the desirability of strengthened indigenous participation in the structure of government through dedicated seats in Parliament and an enhanced role for ATSIC, the "social justice package" submissions of ATSIC and the Council for Aboriginal Reconciliation affirmed the significance of indigenous self-government and regional agreements. ATSIC submitted that the Commonwealth Government should acknowledge that indigenous self-government is a self-determination option for some Aboriginal and Torres Strait Islander peoples; and that indigenous self-government may be the subject of Regional Agreements.[290] The Council for Aboriginal Reconciliation referred to widespread approval for the concept of regional agreements, leading possibly to forms of autonomy and localised self-government, and recommended that the Commonwealth provide funding to underwrite the costs of indigenous negotiating structures for a number of regional agreements. In the selection of projects for this purpose, expressions of interest also be sought from urban communities or organisations.[291]

In a chapter entitled "Regional Agreements", the submission of the former Aboriginal and Torres Strait Islander Social Justice Commissioner noted the many forms that regional agreements can take and the many topics they can include, such as the strengthening of the powers and resources of Aboriginal local government, policing and community justice. The Social Justice Commissioner recommended that the Australian Government:

- endorse the option of regional agreements, where initiated by Australian indigenous peoples, as a process for their greater recognition and empowerment through recognising land ownership and citizenship rights; and
- fund trial projects in at least four regions where communities resolve to pursue negotiated settlements on a regional basis.[292]

(c) Approach of the Current Federal Government

In May 1996 ATSIC was advised that the Coalition Government did not intend to announce specific initiatives in response to the social justice reports. The Government expected ATSIC and the Council for Aboriginal Reconciliation to pursue implementation of appropriate recommendations in the course of performing their usual functions.

4.9.2 Abolition of the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner

[289] Recommendations 15 and 18.
[290] Recommendation 38; see also recommendations 39-44.
[291] Recommendations 20-21.
[292] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Social Justice Strategies and Recommendations: Submission to the Parliament of Australia on the Social Justice Package*, April 1995, at 27, 29-31.

As part of the Commonwealth's response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody, the office of Aboriginal and Torres Strait Islander Social Justice Commissioner was created in 1993 within the Human Rights and Equal Opportunity Commission (HREOC). The "Social Justice Commissioner" reported annually to the Attorney-General on the enjoyment and exercise of indigenous human rights by Aboriginal persons and Torres Strait Islanders. The Social Justice Commissioner was given no complaint handling functions. The first appointment to the position of Aboriginal and Torres Strait Islander Social Justice Commissioner was Aboriginal lawyer, Michael Dodson.

In September 1997 the Attorney-General announced the Government's intention to restructure HREOC. Renamed the Human Rights and Responsibilities Commission, it will consist of a full-time President and three Deputy-Presidents, responsible for the areas of race discrimination and social justice; human rights and disability discrimination; and sex discrimination and equal opportunity. A distinct portfolio in the area of Aboriginal and Torres Strait Islander Social Justice would not be retained. These changes are the subject of the *Human Rights Legislation Amendment Bill (No 2) 1998* (Cth). At the time of writing, the Bill has not yet been passed. However upon the expiry of his first term in January 1997, Michael Dodson was not reappointed and the Race Discrimination Commissioner has been acting in the position of Aboriginal and Torres Strait Islander Social Justice Commissioner since that time.

4.9.3 Abandonment of Self-Determination as Policy

It is with disappointment and outrage that indigenous Australians have noted the decision of the Australian Government to withdraw its support for the concept of self-determination in domestic indigenous affairs policy and in the development of a United Nations Draft Declaration on the Rights of Indigenous Peoples[293]. The decision of Federal Cabinet to abandon the term "self-determination" for indigenous peoples was first reported on 22 August 1998. The Foreign Minister was reported to have confirmed that Australia would urge the UN to abandon the term self-determination for indigenous peoples and replace it with concepts of "self-management" or "self-empowerment." According to the Foreign Minister:

> We don't want to see a separate country created for indigenous Australians. We will ... be arguing ... that it might be better to use the term self-management rather than leaving an impression that we are prepared to have a separate indigenous state.

The Government's rejection of self-determination signals a significant departure from established policy in Australia where self-determination has been policy in indigenous affairs since 1972. The present emphasis on the term dates from 1987 when then Minister for Aboriginal Affairs Gerry Hand stated that he saw self-determination as "a vital issue", which must ensure "that Aboriginal and Islander people are properly involved in all levels of the

[293] See M Dodson and S Pritchard, "Recent Developments in Indigenous Policy: The Abandonment of Self-Determination?" (1998) (4) 15 *Indigenous Law Bulletin* 4.

decision-making process in order that the right decisions are made about their lives."[294] In 1990 the House of Representatives Standing Committee on Aboriginal Affairs defined self-determination as:

> Aboriginal control over the decision-making process as well as control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development. It means Aboriginal people having the resources and the capacity to control the future of their own communities within the legal structure common to all Australians.[295]

In 1991 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) noted that: "The anger in the demands for self-determination is so strong because the totality of control is so recent, and the effects of it are continuing and remain painful."[296] The Royal Commission recommended:

> That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self-determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will substantially affect Aboriginal people.[297]

During the 1990s the concept of self-determination was increasingly accepted as central to the achievement of indigenous aspirations in Australia. State and Territory Governments recognised the application of self-determination in their responses to the RCIADIC and elsewhere. The National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders, endorsed by the Council of Australian Governments in Perth in December 1992, stated that in making the National Commitment the Governments of Australia had as guiding principles, amongst others, "empowerment, self-determination and self-management by Aboriginal Peoples and Torres Strait Islanders."

In his first annual report as former Aboriginal and Torres Strait Islander Social Justice Commissioner, Michael Dodson stated:

> [T]he crucial importance of self-determination to Aboriginal and Torres Strait Islander peoples is little appreciated by non-indigenous Australians. Correctly understood, every issue concerning the historical and present status, entitlements, treatment and aspirations of Aboriginal and Torres Strait Islander peoples is implicated in the concept of self-determination. The reason for this lies in the fact

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[294] Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS Canberra 1991, Volume 2, at 526.

[295] House of Representatives Standing Committee on Aboriginal Affairs, *Our Future, Our Selves: Aboriginal and Torres Strait Islander Community Control, Management and Resources*, AGPS 1990, at 12.

[296] Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS 1991, Volume 2, at 503-503.

[297] Recommendation 188.

> that self-determination is a process. The right of self-determination is a right to make decisions. These decisions affect the enjoyment and exercise of the full range of freedoms and human rights of indigenous peoples.[298]

ATSIC's 1995 "social justice package submission", *Recognition, Rights and Reform*, urged that:

> the relationship between the Commonwealth Government and the Aboriginal and Torres Strait Islander peoples [be] founded in full acceptance and recognition of the fundamental rights of Aboriginal and Torres Strait Islander peoples to ... self-determination to decide within the broader context of Australian society the priorities and the directions of their own lives, and to freely determine their own affairs.[299]

ATSIC's submission continued:

> There is no right more fundamental for Indigenous people than that of self-determination. It is central to addressing the general disadvantage and oppressed condition of Aboriginal and Torres Strait Islander peoples. It underlies the establishment, the functions and the operations of ATSIC and the Regional Councils. ... As an aspirational concept the right of self-determination underpins a variety of broader goals and objectives, including:
>
> - an entitlement to land and compensation for dispossession;
> - recognition of customary law;
> - the reassertion and development of community self governance;
> - the negotiation of flexible forms of self government;
> - the negotiation of involvement in Commonwealth, State/Territory and local Government policy, planning and service delivery;
> - the development of an Indigenous economic base;
> - sharing in the mineral and other resources of the land;
> - collective rights in relation to the protection of sites and cultural property;
> - the authority to negotiate a treaty or document of reconciliation.
>
> Self-determination should not be constrained to operate within the existing legal and political structures. Structures must be able to be changed to take account of indigenous rights.[300]

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[298] Aboriginal and Torres Strait Islander Social Justice Commissioner, *First Report 1993*, AGPS 1993, at 41.

[299] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995, paras 3.25-3.26.

[300] Ibid, paras 3.25-3.26.

The current Coalition Government's abandonment of self-determination was foreshadowed in November 1996, when Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, delivered the 9th Annual Joe and Enid Lyons Memorial Lecture. This lecture outlined the broad aims of the Coalition Government's policy in relation to indigenous Affairs. According to Senator Herron, this policy is based upon the principle of self-empowerment through economic independence:

> We must accept the diversity of indigenous people and allow people greater control over their own lives and own communities. Furthermore, self-empowerment enables Aborigines and Torres Strait Islanders to have a real ownership of [their] programmes thereby engendering a greater sense of responsibility and independence … In this sense, self-empowerment varies from self-determination in that it is a means to an end - ultimately social and economic equality - rather than merely an end in itself.

The abandonment of self-determination as a cornerstone of indigenous affairs policy reflects a serious deterioration in relations between the Federal Government and indigenous organisations, communities and leaders. Around the world, governments are grappling with the difficult task of addressing relations between indigenous peoples and other groups in national society. In this process, indigenous representatives have consistently emphasised the centrality of self-determination to their aspirations. Indigenous participants in the UN's standard-setting activities have left little doubt that the integrity of any instrument on the rights of indigenous peoples will depend on its recognition of our right of self-determination. In 1993 Ambassador Dr Ted Moses stated:

> The indigenous peoples ask to be accorded the same rights which the United Nations accords to the other peoples of the world ... We ask simply that the United Nations respects its own instruments, its own standards, and its own principles. We ask that it apply these standards universally and indivisibly.

At the same session of the WGIP, former ATSIC Chairperson Dr Lois O'Donoghue stated:

> The call for self-determination in the Declaration on the Rights of Indigenous Peoples is not a new or different right that applies to us as Indigenous peoples ... Self-determination for the member states of the United Nations has taken many forms. The same will happen ... in the evolution of self-determination for Indigenous peoples. There is not a single future to which we must conform, there are multiple futures. And multiple futures within the same environment.

It is important to recall that in 1992 Australia became one of the very first States to express support for self-determination in the Draft Declaration. In a working paper circulated by Australia at the first session of this Working Group in 1995, it was stated:

> In Australia's view self-determination is not a static concept, but rather an evolving right which includes equal rights, the continuing right of peoples to decide how they should be governed , the right of people as individuals to participate fully in the

> political process (particularly by way of periodic elections) and the right to distinct peoples within a state to make decisions and administer their own affairs (relevant to both indigenous peoples and minorities.

According to this working paper, self-determination does not, except in the most exceptional circumstances, equate to a right to secession. With reference to the Friendly Relations Declaration (General Assembly resolution 2625), Australia's view was that self-determination must be exercised in ways which are consistent with the territorial integrity of the state, "so long as the government of that state is representative." Three years later there is, according to the Australian Foreign Minister, the spectre of separate indigenous states lurking in the concept of self-determination for indigenous peoples. It is noteworthy that in 1997 at the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Norway supported the principle that indigenous peoples qualify in the same way as non-indigenous peoples. Argentina, Canada, Chile, Finland, Mexico, New Zealand, Switzerland and Venezuela recognised the importance of the right of self-determination, subject to adequate protection of States' territorial integrity. Bolivia, Colombia, Denmark and Fiji supported the provision on self-determination, as drafted. Many delegations described the exchange on self-determination as a valuable and significant step towards mutual understanding. In 1998 Brazil and Sweden were amongst those States to support the concept of self-declaration, subject to appropriate qualifications.

It is also interesting as note the conclusions of a UNESCO Expert International Conference on The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention, held in Barcelona 21-27 November 1998. The participants concluded that:

> The principle and fundamental right to self-determination of all peoples is firmly established in international law, including human rights law, and must be applied equally and universally.

The participants described self-determination as an "ongoing process of choice" with "a broad scope of possible outcomes and expression suited to different specific situations." Possible outcomes included guarantees of cultural security, forms of self-governance and autonomy, effective participation at the international level and land rights.

In Australia different communities and organisations have articulated their desires for greater self-determination in different ways. Some seek self-government within the Australian Federation. ATSIC and the Torres Strait Regional Authority are an important part of the message of self-determination. The forms in which self-determination will be realised will vary in accordance with particular customs, needs, aspirations and political realities. It is significant that not a single indigenous organisation in Australia has expressed a desire for independent statehood. As Michael Dodson stated on behalf of ATSIC at the fourth session of the UN Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous peoples in December 1999: "The image of separate Black states is a misleading and mischievous representation of indigenous Australians' actual aspirations in relation to self-determination."

Indigenous Australians have argued both nationally and in the context of the UN's standard-setting activities that fundamental issues of equality and non-discrimination are at stake in the approach taken by States to the issue of indigenous peoples' self-determination. They have argued that to proclaim self-determination as a right of all peoples, and at the same time to deny or seek to limit its application to indigenous peoples, offends the prohibition of racial discrimination. ATSIC and other indigenous organisations in Australia are aware that building new relations between indigenous peoples and colonising States based upon mutual respect, understanding and distinct indigenous rights will take time and require patience. The Australian Government's advocacy of terms such as "self-empowerment" and "self-management" which have no basis in political theory or international law is a matter of grave concern.

4.9.4 Threats to ATSIC

(a) Introduction

The Aboriginal and Torres Strait Islander Commission was established under an Act of the Australian Parliament in 1989 to give effect to the principles of respect, recognition of rights and participation in decision making. It is a unique, decentralised organisation which gives effect to a policy of self-determination, and combines elected indigenous leadership, policy making, program delivery and administrative functions. The first objective of ATSIC as identified in section 3(a) of the *ATSIC Act 1989* (Cth) is "to ensure the maximum participation of Aboriginal persons and Torres Strait Islanders in the formulation and implementation of government policies that effect them". ATSIC has three major functions:

- To deliver programs to Aboriginal and Torres Strait Islander peoples;
- To advocate for Aboriginal and Torres Strait Islander peoples; and
- To provide advice to the Minister on indigenous affairs.

Change in indigenous affairs policy since the election of the Coalition Government in March 1996 and subsequent actions taken by the Government have created a climate of instability and severely eroded ATSIC's capacity to fulfil its statutorily mandated functions.

(b) Casting Doubt on the Financial Accountability of Indigenous Organisations

ATSIC recognises that a partnership with the Federal Government, based on mutual respect and understanding, is crucial to securing the objectives of the *ATSIC Act*. In public discussion of ATSIC, the Government has focused almost exclusively on the issue of "accountability", even though ATSIC is already one of the most closely scrutinised governmental agencies.

One of the first initiatives of the Coalition Government was to appoint a "Special Auditor" to examine ATSIC grants to determine whether funded organisations were "fit and proper" to receive funding. The appointment of the Special Auditor was later found to be unlawful by the Federal Court, however ATSIC agreed to allow the process to be completed. The

report of the Special Auditor found that 95% of ATSIC funded organisations were in compliance with ATSIC's funding obligations and only 5% were having difficulties with their financial management. ATSIC welcomed the report and in the light of its findings instituted a further review of 130 organisations. In addition ATSIC used the report to implement system changes to improve and streamline accountability requirements.

(c) A Focus on Welfare

Since taking office in March 1996 the Government has set the priority of improving the health, housing, education, and employment outcomes for indigenous people. This has been accompanied by a shift in Government policy away from the recognition of indigenous rights. Moreover, of the four priority areas identified by the Government in March 1996, only health has received a significant funding increase in the Federal Budget.

(d) Undermining the Principle of Elected Indigenous People determining their own Priorities

Since 1996 core legislative responsibilities which directly impact on the maintenance of indigenous culture and identity have been shifted from the Commonwealth to the States and Territories. In 1996, $470 million was cut from ATSIC's Budget over four years. These cuts forced the closure of two major programs, the Community Youth Support program and the Community Training program. As a consequence a number of projects which had been introduced in response to the recommendations of the Royal Commission into Aboriginal Deaths in Custody ceased. These had been designed to empower indigenous communities and to reduce the disproportionate number of indigenous people being arrested and imprisoned. There has been no equivalent increase in funding to Aboriginal programs through other agencies.

The Government has not refuted continuing media speculation that major programs will be transferred from ATSIC, including housing and infrastructure, business programs and Aboriginal legal services. This would represent the removal of over a third of ATSIC's remaining budget, the exclusion of Aboriginal and Torres Strait Islander elected representatives' involvement in determining significant justice issues and a further mainstreaming of indigenous affairs.

(e) Lack of Consultation

In March 1998 the ATSIC Board, concerned about the direction of Federal Government policy, passed a vote of no confidence in the Federal Minister for Aboriginal and Torres Strait Islander Affairs. The vote of no confidence was a considered response to the Minister's dismissive attitude to the Board. In their public statement the Board said that "Rather than wait for the abolition of ATSIC, the elected Indigenous agency, the Board decided to draw a line in the sand". The issues of concern have become more difficult since that time and relate to the transfer of substantial funds and responsibilities away from ATSIC, including the transfer of significant funds out of ATSIC's budget to establish a separate Office of Indigenous Policy in the Department of Prime Minister and Cabinet.

The impact of these changes has reduced ATSIC's capacity to plan and control its budget, to advise on indigenous appointments and to operate as the principal adviser to government on Aboriginal and Torres Strait Islander affairs.

The Government's conduct in the debate over amendments to the *Native Title Act 1993* (Cth) also highlighted indigenous concerns about a lack of consultation. At the critical stage in July 1998 the Government failed to consult with the ATSIC Board, and the elected representatives of the people most affected by the amendments. In contrast, industry groups were afforded easy access to the Government at all times during the negotiations. The Government has since removed responsibility for the administration of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) from ATSIC, again without consultation.

ATSIC has also been excluded from consultation processes on other policy matters directly affecting indigenous peoples; for example, abandonment of the policy of self-determination, changes to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), consideration of the United Nations Draft Declaration on the Rights of indigenous Peoples, and other international human rights matters concerning indigenous peoples.

4.9.5 Process of Reconciliation

The Council for Reconciliation was established by the *Council for Aboriginal Reconciliation Act 1991* (Cth) to:

> promote a process of reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community, based on an appreciation by the Australian community as a whole of Aboriginal and Torres Strait Islander cultures and achievements and of the unique position of Aborigines and Torres Strait Islanders as the indigenous peoples of Australia.

Consistent with this object, the Council is required to:

> promote by leadership, education and discussion a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders and of the need to redress that disadvantage.

In early 1994 the Federal Government asked the Council for Reconciliation to consider, amongst other matters, whether there should be a formal place within the reconciliation process for "a document or documents of reconciliation". In its 1995 "social justice package" submission the Council opined that "the nation should acknowledge that agreements between indigenous communities and various sectors of the wider community,

formalised in a document or documents, will assist the process of reconciliation."[301] ATSIC's "social justice package" submission stated that "a treaty must forge the ground rules for relationships between indigenous and non-indigenous Australians based on justice and equity and the proper recognition of indigenous rights." ATSIC's submission noted that consultations had supported the concept of a treaty underpinned by regional agreements and that the initial stage in the development of a treaty should be "the development of a framework agreement negotiated after both indigenous peoples and Government have developed settlement principles."[302]

In its February 1996 Aboriginal and Torres Strait Islander Affairs Policy, the Coalition stated that "it is totally committed to the reconciliation process, and endorsed the work of the Council for Aboriginal Reconciliation." In his 18 November 1996 Joe and Enid Lyons Memorial Lecture, the Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron reiterated that the Prime Minister has dedicated the Coalition to continuing the reconciliation process as an integral part of its commitment to a fairer and more just society. However, the Minister did not personally concur with the view "held in some quarters that reconciliation will not be achieved until and unless indigenous and non-indigenous leaders sit down together and sign a document of reconciliation." In late 1998 the Prime Minister announced his intention to formalise a document of reconciliation by the year 2000 but didn't indicate the role he saw in the process for indigenous leaders.

From the perspective of indigenous Australians, the success of the process of reconciliation will depend on whether it is truly able to address the aspirations and entitlements of Aboriginal and Torres Strait Islander peoples. These include indigenous aspirations to self-determination. As Professor Erica-Irene Daes, Chairperson-Rapporteur of the UN Working Group on Indigenous Populations, stated in Canberra in July 1993:

> What then, is the relationship between reconciliation and self-determination? There can be no reconciliation without self-determination.

In addition, indigenous leaders have indicated that any document of reconciliation must also:

- grapple with the question of an apology, in particular to the "stolen generations" but to the indigenous peoples of Australia more broadly;
- acknowledge not only the systematic discrimination against indigenous Australians in the enjoyment of so-called "citizenship" or "equality" rights, but also recognise distinct indigenous rights, including in the areas of land and waters, cultural heritage and customary law;
- create or initiate a process leading to the creation of a mechanism for the justiciability or enforceability of distinct indigenous rights; and

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[301] Council for Aboriginal Reconciliation, *Going Forward: Social Justice for the First Australians*, Commonwealth of Australia 1995, at 40.

[302] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: Report to Government on Native Title Social Justice Measures*, Commonwealth of Australia 1995, at 64; recommendations 46-47.

- be the outcome of genuine negotiations with a truly representative, broad cross-section of indigenous communities and leaders.

4.10 CHANGES TO THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

In recent years the procedures for the enforcement of the determinations of the Human Rights and Equal Opportunity Commission (HREOC) have been the subject of uncertainty. In February 1995 the High Court of Australia ruled in the *Brandy case* that the legislative scheme for the enforcement of HREOC determinations through the registration of HREOC determinations with the Federal Court was constitutionally invalid.[303] The scheme by which HREOC orders become enforceable as orders of the Federal Court upon registration had been introduced by an amending Bill which became operative on 13 January 1993. As an interim measure the previous Government reinstated the scheme for enforcement of HREOC determinations which existed prior to the 1993 amendments; that is the instituting of fresh proceedings in the Federal Court and hearing of the matter *de novo* following a HREOC Inquiry into an unconciliated matter.

In 1996 a tripartite Review Committee reported to the Government on options for a constitutionally sound, permanent mechanism for the enforcement of Federal anti-discrimination legislation. Its recommendations included the creation of a new Human Rights Division of the Federal Court and the division of complaint-handling in two stages: First, an attempt at conciliation by HREOC; and where the matter could not be conciliated, proceedings *de novo* could be commenced in the Federal Court. On 28 January 1996 the previous Attorney-General announced changes in accordance with these recommendations.

The *Human Rights Legislation Amendment Bill 1996* was introduced on 4 December 1996. The Bill proposed two significant structural changes to the operation of Federal anti-discrimination legislation:

- In response to *Brandy* decision, the Bill repealed HREOC's inquiry/determination functions and implemented a scheme by which complaints not resolved through conciliation may be continued by way of an application to the Federal Court to obtain an enforceable determination.

- The Bill proposed to centralise all complaint investigations and conciliation procedures which arise under the *Racial Discrimination Act 1975*, as well as the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992* in the office of the President of HREOC. The President becomes the Chief Executive officer of HREOC and responsible for all complaint-handling under federal anti-discrimination and human rights legislation.

[303] *Brandy v Human Rights Commission* (1995) 127 ALR 1.

Under the Bill the President could not delegate to another Member of the Commission any inquiry or conciliation functions. This is a key aspect of its centralising objective. The other key structural change to the complaint-handling machinery was a shift to the Federal Court once conciliation has been terminated. The Bill provided a role of amicus curiae (friend of the Court) for the Commissioners, including the Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, where orders sought might have a significant effect on non-parties; proceedings have significant implications for the operation of the legislation; or it is in the public interest. The role of Commissioners as *amicus curiae* was said to reflect the newly defined role of Commissioners as human rights advocates and educators rather than officers integrally involved in the conciliation and inquiry process.[304]

The 1997 Human Rights Legislation Amendment Bill retained HREOC's current structure but transferred complaint handling functions from the Race Discrimination, Sex Discrimination and Disability Discrimination Commissioners to the HREOC President.[305] The Government subsequently announced that HREOC would be renamed the Human Rights and Responsibilities Commission, the portfolio of Aboriginal and Torres Strait Islander Social Justice Commissioner removed and the remaining portfolios merged into positions of three Deputy Presidents. These changes are the subject of the Human Rights Legislation Amendment Bill (No 2) 1998 (Cth).

The 1998 Bill proposes that the Deputy Presidents will exercise an amicus curiae role, subject to the leave of the Attorney General and the Court, in proceedings in which they think the orders sought may affect to a significant extent the human rights of persons not party; in proceedings that have significant implications for the administration of the relevant legislation; and in proceedings that involve special circumstances that satisfy them that it would be in the public interest to assist the court as amicus curiae.

Three aspects of the current state of federal anti-discrimination legislation law and practice have been the subject of sustained criticism from indigenous and other non-governmental quarters:

- Parliament's continuing delay in passing legislation designed to address the problems created by *Brandy* means that the system for enforcement of federal anti-discrimination is fraught with uncertainty and insecurity.

- The abolition of the distinct portfolio of Aboriginal and Torres Strait Islander Social Justice Commissioner means that there is no adequately resourced agency specifically responsible for monitoring the human rights of the most disadvantaged group in Australian society.

- The proposal that the exercise of an amicus curiae role by the Deputy-Presidents will be subject to the leave of the Federal Attorney General will give

[304] K Guest, *Human Rights Legislation Amendment Bill 1996*, Law and Bills Digest Group, 28 January 1997, Bills Digest No 75 1996-97, at 13.
[305] *Human Rights Legislation Amendment Bill* 1996, new section 8(6)

> rise to significant conflicts of interest. In many cases in which human rights issues arise and are the subject of complaints, the Federal Government is the respondent. It must be a matter for the Federal Court and not the Attorney-General to decide whether to allow HREOC a role in human rights proceedings before it. The proposal seriously threatens the role of HREOC as an independent human rights watchdog. It also undermines the principle of separation of powers in that a political decision will precede the exercise of judicial discretion.[306]

4.11 INCITEMENT TO RACIAL HATRED

Article 4(a) of CERD imposes an obligation on States parties to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, acts of racist violence and incitement to such acts. Upon ratification of CERD in 1975, Australia entered a reservation to article 4(a), stating that "Australia [was] not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention". However, it was the intention of the then Australian Government to seek legislation from Parliament specifically implementing the terms of article 4(a).[307]

In 1991 the *Report of the National Inquiry into Racist Violence* found that "Aboriginal-police relations ha[d] reached a critical point due to the widespread involvement of police in acts of racist violence, intimidation and harassment."[308] The Inquiry recommended criminalising "racist violence and intimidation" and "incitement to racial hatred and racist violence which is likely to lead to violence".[309] The 1991 Final Report of the Royal Commission into Aboriginal Deaths in Custody referred to the need for legislation proscribing racial vilification, however not involving criminal sanctions.[310] In its 1992 report on *Multiculturalism and the Law*, the Australian Law Reform Commission recommended that the Commonwealth amend the *Crimes Act 1914* (Cth) to make racist violence an offence under federal law.[311] A majority of Commission members recommended making incitement to racist hatred and hostility a civil wrong, susceptible to conciliation and civil remedies, but not a criminal offence.[312] Two dissenting members, including then President Elizabeth Evatt, proposed a new provision for the *Crimes Act 1914* (Cth) relating to incitement to racist hatred or hostility.

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[306] See generally Combined Community Legal Centre's Group (NSW) Human Rights and Discrimination Sub-Committee, "Submission on the Human Rights Legislation Bill (No 2) 1998", paras 2.1 and 5.1.
[307] United Nations, *Human Rights: Status of International Instruments*, New York 1987, at 99.
[308] Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence*, AGPS 1991, at 387.
[309] Ibid, at 298, 389.
[310] Royal Commission into Aboriginal Deaths in Custody, *National Report*, AGPS 1991, recommendation 213.
[311] Australian Law Reform Commission, *Multiculturalism and the Law*, Report 57, AGPS 1992, para 7.33.
[312] Ibid, para 7.47.

In 1992 a Bill was introduced into the House of Representatives which proposed to make racial vilification unlawful and racial incitement a criminal offence. The Bill lapsed when Parliament was dissolved for elections in March 1993. In 1994 an amended Racial Hatred Bill 1994 (Cth) was tabled, which proposed amendments to the *Racial Discrimination Act 1975* (Cth) to make racial vilification unlawful, as well as amendments to the *Crimes Act 1914* (Cth) to make racial incitement a criminal offence. During 1995 the Bill was amended in the Senate, and the criminal provisions removed. A new part was inserted into the *Racial Discrimination Act* 1975 (Cth) to enable the Human Rights and Equal Opportunity Commission to deal with complaints of offensive behaviour based on racial hatred. The *RDA*, as amended, makes it unlawful to do any act that is reasonably likely "to offend, insult, humiliate or intimidate another person or a group of people" because of the race of that person or group. In the Senate the Coalition and Greens voted down the proposed amendments to the *Crimes Act* which would have created federal offences in relation to threats to cause physical harm or to destroy or damage property because of race, as well as the intentional incitement of racial hatred.

The previous Labor Government issued a media release on 30 August 1995 indicating that it would accept the amendments as an interim measure, but remained committed to the introduction of further legislation to impose criminal sanctions for extreme racist behaviour. The Federal Coalition Government has a particular commitment to freedom of speech. The Liberal and National Parties' February 1996 Law and Justice Policy states that "our objection to recent Government racial vilification legislation rested on its unnecessary transgression of this right of free speech." Given the recent passage of the Racial Hatred Bill, however, in Government the Coalition would "retain the Act and review its operation ... We would seek bipartisan support for any future changes to the legislation."

Accordingly, the CERD Committee's recommendation in 1994 that Australia withdraw its reservation to article 4(a) of the Convention remains unimplemented. In Australia incitement to racial hatred has not been made a criminal offence.

4.12 RACIAL DISCRIMINATION, THE AUSTRALIAN CONSTITUTION AND THE HINDMARSH BRIDGE AFFAIR

The effect of the limited number and narrow interpretation of Australian constitutional guarantees of individual rights, combined with the lack of a comprehensive charter of rights, is that the prevention of discrimination in Australia is largely determined by the terms of specific legislative regimes. The prohibition of discrimination remains at the mercy of the Federal Parliament which enacts anti-discrimination statutes and is subsequently free to repeal or legislate contrary to them.

For some time, indigenous Australians had hoped that an exception might arise in relation to racial discrimination. In 1901 section 51(xxvi) of the Constitution gave the Commonwealth power to make laws with respect to "the people of any race, other than the aboriginal race, in any State for whom it is deemed necessary to make special laws". Section 51(xxvi) was amended in 1967 to delete the words "other than the aboriginal race in any State." This amendment gave Federal Parliament the power to make special laws with respect to the

people of the Aboriginal race. Whether the power could be used to support discriminatory as well as benevolent laws was unclear.

Since 1994 the Hindmarsh Bridge affair has revealed the limitations of the Australian Constitution in securing protection for Aboriginal groups against racially discriminatory legislation. Hindmarsh Island (Kumarangk), situated in the Murray River delta in South Australia, is connected to the mainland only by a cable-drawn vehicular ferry. In 1989 it was proposed that a bridge be constructed linking the island to the mainland. The development was opposed by a group of Ngarrindjeri women claiming to be the custodians of secret "women's business" concerning the creation and renewal of life for which the island had traditionally been used.

After several inconclusive applications by the Ngarrindjeri women under section 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), the Coalition Government enacted the *Hindmarsh Island Bridge Act 1997(Cth)*to prevent any further application by the women. The *Bridge Act* purported to exclude the "Hindmarsh Island bridge area" from the operation of the *Heritage Protection Act* so far as any objection to the building of the bridge was concerned.

In an application to the High Court the Ngarrindjeri women argued that the race power in section 51 (xxvi) of the Constitution was confined, in it application to Aboriginal people, to laws *for their benefit*. The decision for the High Court thus turned largely on the question of whether the race power could be relied upon for the enactment of legislation *adverse to Aboriginal people*. In its decision of 1 April 1998 in *Kartinyeri v The Commonwealth*, the Court did not resolve the issue. Five of the six justices upheld the *Bridge Act* as a partial repeal or amendment of the *Heritage Protection Act* which was itself supported by section 51(xxvi). According to Brennan CJ and McHugh J the *Heritage Protection Act* was clearly for the benefit of Aboriginal peoples so that even if the power were confined as suggested, both the *Heritage Protection* Act and its partial repeal would be valid. Accordingly it was unnecessary to decide the constitutional question of whether section 51(xxvi) was subject to the limitation proposed by the applicants.

According to Justice Gaudron the test of constitutional validity was not "whether it is a beneficial law" but "whether the law in question is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference which the Parliament might reasonably judge to exist." Justices Gummow and Hayne stated that it "may be that the character of the law purportedly based on s 51(xxvi) will be denied to a law enacted in 'manifest abuse' of judgment." However the argument that the text of s 51(xxvi) can be confined to beneficial laws should be rejected. Justice Kirby, the sole dissentient, noted that the race power "permits special laws for people on the ground of their race. But not so adversely and detrimentally to discriminate against such people on that ground." According to Justice Kirby this conclusion was reinforced by the principle that where the Constitution is ambiguous, the High Court should prefer the meaning which conforms with the universal and fundamental human rights enshrined in international instruments.

The High Court's failure to clarify the scope of the race power was a major disappointment for many indigenous Australians. This failure leaves it open for the Federal Parliament to enact legislation contrary to the obligations contained in CERD and Australia's *RDA*, arguing by reference to the High Court's decision in *Kartinyeri* that such legislation is constitutionally lawful. Thus indigenous Australians and their legal advisers are doubtful about the utility of pursuing a constitutional challenge to the racially discriminatory provisions of the *Native Title Amendment Act 1993* (Cth). Indigenous organisations continue to argue the need to entrench in the Constitution a prohibition of racial discrimination together with other human rights protections and guarantees.

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