

Response to the Draft Baseline Study

National Human Rights Plan Secretariat
Human Rights Policy Branch
Commonwealth Attorney-General's Department

Research Unit

Jumbunna Indigenous House of Learning

8 September 2011

Dear Sirs,

RE: CONSULTATION DRAFT OF THE BASELINE STUDY

1 Introduction

- 1.1 Jumbunna Indigenous House of Learning, Research Unit ("Jumbunna") welcomes the opportunity to comment upon the Draft Baseline Report ("Baseline") provided by the Commonwealth Government.
- 1.2 Jumbunna undertakes research and advocacy on Aboriginal and Torres Strait Islander legal and policy issues of importance to Australian Indigenous people, their families and their communities. Jumbunna staff have experience as researchers, academics and practicing solicitors.

- 1.3 Jumbunna congratulates the Government on its commitment to addressing the failings of the Australian legal and political system in the protection and promotion of Human Rights for Indigenous Australians. It is disappointing that, in 2011, there are still so many areas in which Indigenous People do not enjoy the benefit of their Human Rights. The Baseline produced by the Government is a good start, however there are areas in which is insufficient. Of particular concern to us has been the absence of what we believe to be real engagement with many issues which are consistently raised with Jumbunna researchers; criminal justice issues, compensation for the Stolen Generation and Stolen Wages, the absence of Indigenous Land Rights and the difficulties with the Native Title system, and the imposition and continuation of the Northern Territory Emergency Response (“the Intervention”). Without forthright engagement with these issues and a detailed plan for addressing them, a National Action Plan (“NAP”) will contribute to a continued failure to afford Indigenous People their Human Rights.
- 1.4 These submissions are limited to those issues relating to Indigenous communities in which we have expertise and upon which we wish to comment. They commence with a list of general observations on the structure and content of the current Baseline (Section 2) before moving on to consider specific issues in relation to Aboriginal and Torres Strait Islander persons (Section 3).

1.5 Endorsements

- 1.5.1 Jumbunna has reviewed the *Comments on the Draft Baseline Study for a National Action Plan, Australia* from the Regional Office for the Pacific, United Nations Office of the High Commissioner for Human Rights dated July 2011. We endorse those comments.
- 1.5.2 Jumbunna has also been provided with a draft of the submission on behalf of the National Aboriginal and Torres Strait Islander legal services (the “NATSILS”). We strongly endorse that submission.

SECTION 2: GENERAL OBSERVATIONS ON THE BASELINE

Monitoring and Evaluation

2. The Baseline requires machinery for the monitoring and evaluation of the actions taken by the Government, set against specific criteria. This is particularly important given the lack of objectively verifiable evidence that existed at the time of the implementation of the Intervention, and the lack of consultation that occurred prior to its implementation.
3. Any NAP must include mechanisms by which the Government is compelled to systematically and transparently review the implementation of Human Rights mechanisms, including their responses to any recommendations or observations made by United Nations bodies.

Issues that the NAP should consider

4. The inclusion within a NAP of mechanisms by which the Government is compelled to systematically and transparently review the implementation of Human Rights mechanisms, including their responses to any recommendations or observations made by United Nations bodies.

Lack of Detail

5. The Baseline report requires significantly greater detail. It is not clear why, in the current draft, such significant focus is given to people trafficking and issues around the use of tasers. Whilst these are important issues, they constitute a small number of the extensive range of urgent issues that should be addressed given that the Baseline is intended to reflect a 10 year commitment to the implementation and promotion of Human Rights.
6. We endorse the comments of the Office of the High Commissioner of Human Rights that "*the Plan should address who will be responsible for implementing the different activities; the activities should be specific, realistic, measureable and should include targets and timelines for achievement*".¹ In our view such a NAP is unlikely to arise from the current Baseline, given its substantive lack of detail.

Lack of Data

7. In addition to the sources of qualitative information that currently exist, we submit that the NAP should contain detailed quantitative information (where that is available), and commitments to the establishment of quantitative information gathering mechanisms (where such information does not exist). We note that nine years have passed since the commissioning of public reports against the targets set by the Council of Australian Governments in relating to the Closing the Gap policy and yet "*for one third of the indicators...adequate data (a)re not available to measure changes over time*"². If the Human Rights Action Plan is to be effective, there must be a commitment from Government that specific measurable targets are set and baseline data gathered against which those targets can be measured.

Issues that the National Acton Plan should consider

8. We endorse the view of the Equal Rights Alliance that a working group be established to ensure the collection of relevant quantitative data for the identification of Human Rights indicators, and the evaluation of programs intended to effect them. We emphasize that it is imperative that criminal justice statistics be included as relevant criteria for collection.

¹ See *Regional Office for the Pacific, United Nations Office of the High Commissioner for Human Rights, Comments on the Draft Baseline Study for a National Human Rights Action Plan, Australia, July 2011* under the paragraph titled "Overview Comments on the Draft Baseline Study".

² Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Foreward, p III. ('**Key Indicators of Indigenous Disadvantage: 2011**')

Relevant Standards

9. In our submission, the current Baseline does not suitably incorporate existing International and Domestic sources of Human Rights standards, and effective approaches to addressing Human Rights concerns. If a NAP is to be effective, it is incumbent upon the Government in developing the Baseline and the NAP to commit to engaging with these existing standards, and to meet them.

International Standards

10. International legal standards are codified in a number of sources, including conventions and declarations, customary international law and caselaw. Important guidance as to the content for fulfilment of applicable standards is provided by the concluding observations and recommendations of United Nations treaty monitoring bodies, Reports of Special Rapporteurs and developing jurisprudence. The Baseline should include the core international Human Rights treaties and their protocols that Australia has not ratified, along with an explanation for the failure to do so ratify (where relevant) and a timeline for their ratification.

Standards the Baseline should include

11. In relation to Indigenous peoples, the Baseline should incorporate the following standards, inter alia:
 - i. The Convention on the Elimination of All Forms Of Racial Discrimination ("**Convention Against Racial Discrimination**");
 - ii. UN Declaration on the Rights of Indigenous People ("**DRIP**") (including the requirement under the Declaration that all measures impacting Indigenous people should be developed with the full involvement of affected indigenous communities and the principles of free, prior and informed consent and self-determination outlined therein.);
 - iii. Concluding Observations on Australia prepared by UN treaty monitoring bodies, including the Committee on the Elimination of Racial Discrimination ("**CERD**"), Human Rights Committee ("**HRC**"), and the Committee on Economic, Social and Cultural Rights ("**CESCR**");
 - iv. Reports by the Special Rapporteur on the situation of Human Rights and fundamental freedoms of Indigenous people in relation States' obligations to Indigenous peoples ("**Special Rapporteur**") in general, and in relation to Australia in particular;

- v. ILO Convention 169;
- vi. CERD's General Recommendation 21: The Right to Self-Determination ("**General Recommendation 21**");
- vii. CERD's General Recommendation 23: Rights of Indigenous Peoples ("**General Recommendation 23**");
- viii. CERD's General Recommendation 32: The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination ("**General Recommendation 32**").

12. The Baseline should include a list of any current complaints before any United Nations body alleging a breach of Human Rights by the Australian Government, the substance of the allegations made and the Government's response to the same, the progress of the proceedings and any determinations made.

Issues that the NAP should consider

- 13. The Baseline should include a firm commitment from the Government to fulfilling its international and domestic Human Rights obligations measured against recognised standards. Jumbunna acknowledges that limitations on some Human Rights are permissible but only in extremely limited circumstances where they fulfil a legitimate and pressing purpose; where they are reasonable, necessary and proportionate; and are demonstrably justified and evidence based. Any limitation will be impermissible if imposed on a discriminatory basis.
- 14. Jumbunna also notes that treating Human Rights as a hierarchy of rights where rights embodied in one convention are treated as inconsistent with rights protected by another is impermissible at international law and fails to conceptualise a Human Rights framework of complementary rights.
- 15. The NAP should include a list of the Human Rights instruments not ratified by Australia, and any reservations made to Human Rights instruments, and set out a timeline for ratification.
- 16. The NAP should include a commitment by the Government to the legislative enactment in domestic law of the criteria for special measures outlined in CERD's General Recommendation 32 and an orthodox definition of 'special measures' as forms of preferential or favourable treatment.

Self-Determination

- 17. The right to self-determination is a foundational principle of international law and is said to be the fundamental of all Human Rights. The right is enshrined in a number of United Nations instruments including the United Nations Charter; UN International

Covenant on Civil and Political Rights ('ICCPR'); UN International Covenant on Economic, Social and Cultural Rights ('ICESCR'); and DRIP. It is widely acknowledged to be a principle of customary international law and even jus cogens, preventing a state from denying its application. It has been described by the HRC as an "essential condition for the effective guarantee and observance of individual Human Rights and for the promotion and strengthening of those rights".

18. It is well accepted in International law that the right to self-determination applies to Indigenous peoples. Jumbunna notes that Indigenous self-determination is often mistakenly perceived to be a threat to State sovereignty and territorial integrity but that self-determination has an internal and external aspect. CERD's General Recommendation 21: The Right to Self-Determination outlines Australia's obligations to engender Indigenous self-determination in this internal sense, highlighting States' obligations to facilitate the rights of all peoples to pursue freely their economic, social and cultural development without outside interference.
19. In the international arena, Indigenous peoples have lobbied for and obtained specific forms of recognition through the Working Group on Indigenous People and the Permanent Forum and as the right is expressed in the Declaration on the Rights of Indigenous Peoples, which states in articles 3, 4 & 5:
 - i. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
 - ii. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
 - iii. Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
20. Domestically, Australian governments – unlike those of the United States, Canada and New Zealand – have never formally embodied Indigenous self-determination as a fundamental principle underlying policy making. Jumbunna contends that the Baseline should seek to embody Indigenous self-determination in all actions both to fulfil Australia's Human Rights obligations and, in line with its commitment to evidence-based policy, create the conditions through which Aboriginal and Torres Strait Islander and non-Indigenous aspirations can be achieved.

Issues a NAP could address

21. The recognition in the NAP of Self-Determination as a 'foundational right';

22. A commitment to the implementation by the Government of its obligations under DRIP and other international instruments to obtain the free, prior and informed consent of Indigenous communities to any measures affecting them;
23. A commitment to the implementation of the recommendations emerging from the Indigenous Community Governance Project.
24. A commitment to the development of integrated funding arrangements for Aboriginal and Torres Strait Islander organisations and representative bodies, simplified acquittal and reporting mechanisms that are urgently needed to address the disproportionately onerous compliance requirement currently in existence.
25. The implementation of the recommendations of the report prepared for the Office of Indigenous Policy Coordination – *A Red Tape Evaluation in Selected Indigenous Communities*.

Duty to Consult

26. States' duty to consult with Indigenous peoples has increasingly been recognised in international law and has been enshrined in a number of international instruments including the Declaration on the Rights of Indigenous People ('DRIP) and ILO Convention 169 and is fundamental to the operation of United Nations Human Rights treaties such as the Convention Against All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights and the Special Rapporteur has outlined the broad scope and content of the duty to assist States to fulfil their obligations.³ The duty requires:
 - i. In general circumstances, decisions of the State can be made through democratic processes in which the public interest – including Indigenous peoples' interests – is adequately represented; however
 - ii. Special differentiated consultation procedures are required when State decisions affect Indigenous peoples' particular interests, even when those interests do not correspond to a recognised right to land or other legal requirement, and when State decisions may affect Indigenous peoples in ways not felt by others in society.
27. Genuine consultation is not merely a Human Rights issue but is more likely to result in sustainable outcomes than initiatives imposed by outsiders. Unsurprisingly, the Steering Committee for the Review of Government Service Provision in its analysis of the Closing the Gap targets noted that "cooperative approaches" and "community involvement in program design" and decision-making⁴ were a critical factor in any policy's success. As the Special Rapporteur has observed:

³ See Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, Human Rights Council, 12th sess, Agenda Item 3, UN Doc A/HRC/12/34 (15 July 2009). ('2009 Annual Report')

⁴ Key Indicators of Indigenous Disadvantage, above, note 2, 10.

[W]ithout the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programs, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset. Invariably, it appears that a lack of adequate consultation leads to conflictive situations, with indigenous expressions of anger and mistrust.⁵

28. A range of government and non-government entities have addressed the question of best practice community consultation, including the Australian Human Rights Commission ('AHRC'), which has distilled best practice guidelines for community consultations based on the Government's Best Practice Regulation Handbook encompassing pre-consultation, consultation and post-consultation phases and key elements of free, prior and informed consent and these standards should be incorporated into the Baseline and NAP.

Standards the Baseline should include

29. The Baseline should adopt the statements of the Special Rapporteur as to the scope and content of the duty to consult.
30. The Baseline should incorporate as a standard the AHRC's best practice guidelines for consultation encompassing pre-consultation, consultation and post-consultation phases and key elements of free, prior and informed consent.

Issues a NAP could address

31. The expression of a commitment to the duty to consult and an acknowledge of the scope and content of that duty in line with the statements of the Special Rapporteur.
32. The undertaking by the Commonwealth to comply with the duty to consult in the development and implementation of policy relating to Indigenous Australians.
33. The adoption within Government of the AHRC's guidelines as to consultation in all consultations conducted with Indigenous communities.

Domestic Sources of Human Rights Issues

34. It is unacceptable that the current Baseline makes no reference to a number of important domestic reports on the Human Rights of Indigenous people. Of particular concern in the current draft of the Baseline Report is the absence of any reference to the Recommendations of the *Royal Commission into Aboriginal Deaths in Custody* ("RCIADIC Recommendations"). These recommendations remain as pressing today as they did when they were made in 1991, as illustrated by the deaths in custody of

⁵ Special Rapporteur on the Rights of Indigenous Peoples, 2009 Annual Report, above, note 3, [36].

Mr Doomadgee and Mr Ward. In both of those cases, and a substantial numbers of cases reported in Australia, deficiencies in police procedure, custodial conditions and flawed or biased investigations all revealed issues that were identified 20 years ago, in relation to which recommendations were made but never implemented.

35. Similarly, the recent *Doing Time - Time for Doing* report highlighted a number of issues contributing to Indigenous incarceration rates that were the subject of RCIADIC recommendations, illustrating that, in 20 years, little has been done to address the issue. Given that the Baseline is intended to be the touchstone against which the NAP will be drafted and enacted over the next decade, a failure to refer to the significant work already done by Government and NGO's in identifying existing causes is surprising.

Standards the Baseline should include

36. As a minimum the Baseline should include reports such as, but not limited to:
- i. Report of the *Royal Commission Into Aboriginal Deaths in Custody*;
 - ii. *Doing Time – Time for Doing* Report
 - iii. *Bringing them Home*
 - iv. *Will They be Heard*
 - v. Reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner
 - vi. Any Reports by State or Territory Coroners relating to Deaths in Police Custody (for instance those reports prepared annually by the NSW Office of the State Coroner).

Evidence-based policy

37. We note the statement of the Government to the effect that the NAP needs to take an evidence-based approach to setting priorities and endorse this view. Comprehensive and robust research undertaken in Australia (particularly through the Indigenous Community Governance Project at the Centre for Aboriginal Economic and Policy Research) resonates with international research findings that Indigenous self-determination is the most significant factor in achieving socioeconomic prosperity and community development. A commitment to evidence-based policy thus requires that the effective government policy should be underpinned by strengthening the capacity of Aboriginal and Torres Strait Islander peoples to set direction and to exercise genuine decision-making control, and to implement those decisions effectively.
38. We note that an evidence based policy approach requires much more than token consultation, input into government policy, or the Indigenisation of mainstream services. Instead, it is the strengthening of Indigenous governance systems that is the necessary precondition to 'successful' outcomes – whether measured against government or Indigenous aspirations. Whilst essential, this approach does not set an easily achieved task for governments. Aboriginal and Torres Strait Islander

community governance is exceedingly complex and must have legitimacy – both cultural resonance and mainstream accountability – to those that it seeks to represent. Thus, governments face the challenge of facilitating legitimate community governance, requiring highly individualised support that is the antithesis of a one size fits all approach.

39. Of particular concern to Jumbunna, is the discord between the commitment of the Government to adopt an evidence-based approach to policy and the manner in which the Intervention was instituted. A detailed analysis is not practical in this submission but in summary, Jumbunna submits that the approach adopted by the previous Government and continued by the current Government is the antithesis of an evidence-based approach.

40. In particular, the Intervention was commenced without any consultation with Aboriginal people whatsoever and in astonishing haste, and introduced measures that undermine Aboriginal decision making mechanisms and reduce the capability of Aboriginal organisations. These measures include the statutory imposition of compulsory five year leases over Aboriginal freehold land, extraordinary powers given to the Minister to intervene in the operation of Aboriginal organisations where negotiations break down or organisations refuse to adopt Government recommendations; appointment of Government Business Managers and removal of the future act process under the *Native Title Act 1993* (Cth). The evidence as to effective Government policy should require the facilitation of effective governance institutions to implement decisions but these must have cultural legitimacy with the community.

Issues a NAP could address

41. A commitment on behalf of the Government to act on the basis of independently verified evidence in developing and implementing policy.

SECTION 3 – SPECIFIC ISSUES FACING INDIGENOUS COMMUNITIES

Legal Protection

42. Australia has relatively weak legal protections for Human Rights, particularly in relation to economic, social and cultural rights. It lacks a federal Human Rights Act, (notwithstanding there is significant support for such an act within the Australian community) and it's constitutional protections are limited. The Baseline should reflect the decision of the Government to adopt the approach of a National Human Rights Action Plan rather than the enactment of a national Human Rights Act.

Issues the NAP should address

43. The NAP should commit to the enactment of a National Human Rights Act and establish a timeframe for doing so.

Anti-Discrimination

44. Throughout our shared history, Aboriginal and Torres Strait Islander people have enjoyed little protection from laws that are overtly discriminatory. Likewise, the legal

system has offered scant relief from laws and policies that have appeared neutral, but have been administered to the detriment of Aboriginal and Torres Strait Islander peoples. The impacts of such laws and policies have been profound, as demonstrated by the stories of the members of the Stolen Generations, so powerfully described in *Bringing Them Home*.⁶

45. The winding back of the rights of native title holders in 1998 and the imposition of racially discriminatory measures under the guise of the Intervention in 2007, highlight the ongoing lack of protection for the Human Rights of Aboriginal and Torres Strait Islander peoples. Therefore, it is imperative that the Parliament enact legislation that protects the fundamental Human Rights of all Australians. This step would not only confirm that we have come to terms with our past, but it would also convey the powerful message that the Human Rights of all Australians are worthy of protection.
46. The instrument that purports to implement Australia's obligations under the Convention Against Racial Discrimination is the *Racial Discrimination Act* ("RDA"). The RDA is a Commonwealth Act, and is such, susceptible to suspension or revocation by the Act of the Australian parliament at any time. The Baseline should acknowledge CERD's Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005), and to Australia's tenth, eleventh, twelfth periodic reports (2000), where it expressed its concern as to the absence from Australian law of any guarantee against racial discrimination that would override a law of the Commonwealth (article 2).
47. The Committee recommended that Australia work towards the inclusion of an entrenched guarantee against racial discrimination. In addition, in relation to the operation of the RDA, CERD noted with concern the difficulty in establishing claims of racial discrimination in the absence of direct evidence and called upon the Australian government to reverse the onus, so that the respondent was required to provide evidence of an objective and reasonable justification for differential treatment.
48. As a law of the Federal Parliament, the RDA can be – and has been – overridden by the Federal Parliament. In fact, the operation of the RDA has ever been suspended on four occasions and, on each occasion, suspension related to the enactment of Commonwealth legislation to the detriment of the rights and interests of Indigenous Australians. This constitutes a fundamental breach of faith between the Government and Australian Indigenous peoples and is a profound violation of the norm of non-discrimination, which is one of the fundamental principles underpinning international Human Rights law.
49. The most recent suspension of the RDA related to the Intervention, in order to facilitate its rapid implementation by precluding all potential legal challenge alleging racial discrimination.
50. In addition to declaring that the measures of the Intervention were 'special measures', each of the three statutes enacting the Intervention explicitly excluded the operation of Part II of the RDA, which prohibits direct and indirect discrimination and provides for equality before the law in the enjoyment of rights, regardless of race, colour, national or ethnic origin. The Intervention legislation also excluded Northern Territory and, where relevant, Queensland, anti-discrimination laws from having

⁶ National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home* (1997).

effect. The suspension was extremely broad, applying not only to the provisions of the Intervention but also to any acts (including omissions to act) done under or for the purposes of the provisions.

51. The suspension of the RDA was no academic exercise and led Aboriginal people – especially those of the Northern Territory – to perceive that it is acceptable and appropriate to discriminate against them and that they are less worthy of legislative protections afforded to other Australians. Worryingly, an escalation of racist incidents has been widely reported since the commencement of the Intervention. The evidence demonstrates that the Intervention has profoundly undermined the relationship between the Aboriginal people of the Northern Territory and the Australian Government, having resulted in distrust, hostility and suspicion.
52. Importantly, Jumbunna notes CERD's observation that the degree to which acts of racial discrimination and racial insults damage the injured party's perception of his/her own worth and reputation is often underestimated, which it considers to be exemplified by the Intervention. The affront to Aboriginal peoples' right to freedom and dignity is epitomised by a perception of a regression to a protectionist and paternalistic era with humiliation, incomprehension, confusion, anxiety and a sense of betrayal and disbelief reported by the independent review of the Intervention. The Review Board commented that experiences of racial discrimination and humiliation were told with such passion and such regularity that it felt compelled to advise the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs during the course of the review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.
53. Under the amending legislation, the RDA and other anti-discrimination laws were purportedly reinstated at the end of 31 December 2010, although many lawyers and legal commentators, including the AHRC, are concerned that in the absence of a 'notwithstanding clause', discriminatory measures will not be altered by the reinstatement of the RDA.
54. Further, the Baseline should acknowledge that CERD has also repeatedly expressed concern that Australia has not withdrawn its reservation to article 4(a) of the CERD, which requires State parties to make dissemination of ideas based on racial superiority or hatred; incitement to racial discrimination; violence or incitement to violence; or assistance to racist activities an offence.

Issues the NAP could consider:

55. The adoption in the Baseline and NAP of the definition of "Special Measures" as contained in CERD's general recommendation No. 32 (2009).
56. The full re-instatement of the *Racial Discrimination Act 1975* (Cth), without reservation and the amendment of the act to include a "notwithstanding" clause;
57. The implementation of the recommendations made by CERD to:
 - i. enshrine the norm of non-discrimination in the Australian Constitution;
 - ii. make dissemination of ideas based on racial superiority or hatred; incitement to racial discrimination; violence or incitement to violence; or assistance to racist activities an offence; and
 - iii. reverse the onus, so that a respondent is required to provide evidence of an objective and reasonable justification for differential treatment.

58. The establishment of a national compensation scheme for the Stolen Generation;
and

59. The implementation of a national scheme for the compensation for Stolen Wages.

Access to Justice

60. Access to Justice issues are paramount for Indigenous Australians. Aboriginal Legal Services are severely under-funded, effectively preventing them from providing sufficient civil and family law services in Indigenous people. The Law Council has called for a funding injection to ensure that the legal system does not continue to fail Indigenous peoples.⁷ Access to Justice is presented as a fundamental aspect of the rule of law and a key human right in any modern democratic system, however at best current approaches to justice are 'ad hoc' and generally consistent with policy of the moment e.g. currently this means aligned with existing 'close the gap' policy frameworks.⁸

61. Despite these ongoing concerns ALS's and Legal Aid have battled against the odds to alleviate some of the immediate impacts of this flawed system. Notably, the ALS services have done so whilst being funded at a small percentage of Legal Aid services. Progress in this area has been significantly undermined during the 'Howard' years through targeted interventions, such as the Intervention.⁹ This has further led to the undermining of considerations for customary law and cultural practices,¹⁰ as well as poor resourcing for ALS's despite overwhelming demand for legal assistance through these services.¹¹ Indigenous communities are feeling deeply the impacts of these interventionist tactics, with research showing increased incarceration rates,

⁷ Legal And Constitutional Affairs References Committee, Access to Justice, December 2009, p.147. ('Access to Justice Report')

⁸ See Attorney General's Department, Commonwealth of Australia (2009) 'A Strategic Framework for Access to Justice in the Federal Civil Justice System', Report by the Access to Justice Taskforce, 61, 155. ('Strategic Framework for Access to Justice')

⁹ See Cox, E. (2011) Accessed on May 10th 2011, <http://www.evacox.com.au/crikey/nt-ithe-NTERvention-the-divide-between-opinion-and-evidence>, Gibson, P. (2010), Working for the Basics Card in the Northern Territory, The impact of the Northern Territory Emergency Response and associated policies on employment conditions in NT Aboriginal communities, Discussion Paper, Jumbunna Indigenous House of Learning, accessed from Jumbunna Pilot Portal on May 1st 2011, 10 and Gibson, P. (2010), Return to the Ration Days, The NT Intervention: grass-roots experience and resistance, Discussion Paper, Jumbunna Indigenous House of Learning, accessed from Jumbunna Pilot Portal on May 1st 2011 <http://www.jumbunnanewmedia.com.au/articles>. Recent criticism has also come from international bodies and representatives such as the United Nations Human Rights Commissioner, Navi Pillay see 'UN rights chief slams 'racist, inhumane' elements in Australia', The Age, May 26th 2011, accessed on May 27th 2011 UN rights chief slams 'racist, inhumane' elements in Australia <http://www.theage.com.au/world/un-rights-chief-slams-racist-inhumane-elements-in-australia-20110526-1f4zs.html#ixzz1Nn5zoia3>. For further material please refer to Amnesty International <http://www.amnesty.org.au/indigenous-rights/comments/22025/>, 'Stop the NTER Collective', <http://stoptheittheNTERvention.org/> and 'Roll Back the NTER' <http://rollbacktheittheNTERvention.wordpress.com/.gyjgyjk>

¹¹ Watson, N. (2005) 'Tendering of Indigenous Legal Services', Briefing Paper 4, Jumbunna Indigenous House of Learning, accessed http://www.jumbunna.uts.edu.au/pdfs/tendering_als_brief4.pdf on May 1st 2011, 10. Also see Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, Social Justice Report (2009), 14.

often for minor offences such as traffic infringements.¹² The current draft of the Baseline operates within this context, only identifying generalised access to justice issues for Indigenous communities. In our view, the Baseline and NAP must focus on the urgent need for sufficient and appropriate resourcing for ALS's, increased access to legal education and advice and the role of technological drivers, and greater understanding of civil law needs within a national context.

Access to Justice and Technology

62. Understanding Indigenous perspectives on technology is critical to maximizing legal innovations during an era of rapid social and technological transformation. A consultation process should importantly include scoping of innovation and technological considerations for improving legal education and services across rural, remote and urban contexts. With national network plans the Internet is firmly positioned as the main service delivery portal for interaction with government.¹³
63. In developing a NAP it is vitally important to explore Indigenous solutions and perspectives on sustainable and community-controlled design and enhancement of innovation in legal education and advice. Without this direct engagement there is genuine danger of creating a 'forced adoption' technology ethos that will only exasperate and mimic existing barriers to accessing justice. Within a multi-levelled jurisdictional environment¹⁴ local communities are subject to complex digital divide issues.¹⁵ It is not simply a question of passively identifying legal needs and the reasons for a seemingly careful uptake of new technologies within the legal system.¹⁶ For example video conferencing (in particular) has been identified as having potential to enhance legal services offered with recommendations that 'Legal Aid NSW develop the use of AVLs as part of their improvements in outreach services to Aboriginal communities' but only after consideration of identified concerns.¹⁷ There are drastic language and cultural concerns being experienced already through current phone link up practices.¹⁸

¹² Thalia Anthony, (2010) 'Governing Crime in the Intervention', *Law in Context*, vol. 27, no. 2, pp. 90-113.

¹³ Australian Government Information Management Office, Department of Finance and Deregulation, *Interacting with Government*, December 2009, p. 5.

¹⁴ See Recommendation 6.8, Attorney General's Department, *Strategic Framework for Access to Justice*, above, note 8, 84.

¹⁵ See Radoll, P. (2003) 'Protecting Copyrights on the Internet: A Cultural Perspective from Indigenous Australia'. CAEPR Seminar Series, Centre for Economic Policy Research, Australian National University, ACT and McMahon, M. (1997) 'Indigenous Cultures, Copyright and the Digital Age', *Aboriginal Law Bulletin* 23, (1997) 3 (90) 14, accessed on May 20th 2011 at <http://www.austlii.edu.au>.

¹⁶ This includes the scoping of how AVL is currently being used by key stakeholders such as Legal Aid and Aboriginal Legal Services. There have been issues raised by prisoners using AVL, such as perceptions of appearing in prison uniforms and cognitive impairment to follow proceedings on AVL see Grunseit, et al. (2008) 'Taking Justice into Custody', *Law and Justice Foundation of NSW*, 36-37. For insight into broader issues around technology and justice see for example Leeuwenburg, J and Wallace, (2001). *A. Technology for Justice 2000 Report*, Australian Institute of Judicial Administration.

¹⁷ Cunneen, C and Schwartz, M (2009) 'From Crisis to Crime: The escalation of civil and family law issues to criminal matters in Aboriginal communities in NSW', (2009) 7 (15), 18-21, 20.

¹⁸ This is a key objective as reflected within the endorsed national strategy: 'Provide Aboriginal and Torres Strait Islander peoples in urban, regional and remote settings with access to services that are effective, inclusive, responsive, equitable and efficient', Standing Committee of Attorneys-General Working group on Indigenous Justice, (2009) *National Indigenous Law Justice Framework*,

64. A NAP must engage with the means of communicating solutions to these unique legal needs as understood from distinct Indigenous cultural and social worldviews.¹⁹ A broader ARC study will soon begin the first comprehensive investigation seeking to understand and respond to the complex civil and family law needs of Indigenous peoples nationally.²⁰ Understanding and revealing the civil and family law needs of Aboriginal peoples is a urgent first step in transcending an imposed criminal justice regime because 'building positive futures *relies* on a foundation of well addressed non-criminal needs'.²¹ It is critical to draw on this expertise and evidence-based findings in order to move forward with long term strategies and solutions that contribute to improving access to justice for Indigenous peoples.

Standards the Baseline should include

65. The Baseline should incorporate the comments of UN Treaty Bodies and the Special Rapporteur²² on the need for increased funding to Aboriginal Legal Services;
49. The Baseline should acknowledge the human right of a person to an interpreter in legal proceedings;²³ and
50. The Baseline should incorporate the findings of the *Access to Justice* Report and the Government's response to the same.

Issues the NAP could consider

51. Contain a commitment to appropriate resourcing for ALS's that meets long-term projected demand realities with 'real funding' at least on par with what mainstream legal services are receiving. This should include additional funding for a genuine consultation process seeking community-controlled solutions to unique community demands for service and language translation issues.
52. Commit in the short term to an immediate increase in funds to ALS.
53. Respond to the submissions of NATSILS in relation to the funding needs of Aboriginal Legal Services.
54. Adopt and implement the recommendations of the Access to Justice Report;
55. Commit to the provision of interpreter services for all Indigenous people involved in legal proceedings.

¹⁹ See Janke, T. (1998) 'Our Culture Our Future: Report on Australian Indigenous Cultural & Intellectual Property Rights', Aboriginal Studies Press, Prepared for Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 18. There are specific issues for each nation, tribe, clan and community, for example Yolgu consultants discuss intellectual properties when teaching and using new technologies. Accessed May 29th 2011, <http://learnline.cdu.edu.au/inc/tfc/writings.html>.

²⁰ Indigenous Legal Needs Project, ARC Linkage, Chief Investigators: Cunneen, Swartz, Behrendt 2011. Cunneen and Swartz in 2008, see Cunneen, C. and Schwartz, M. (2008) *The Family and Civil Law Needs of Aboriginal People in New South Wales, Final Report*, Legal Aid NSW.

²¹ See Cunneen and Schwartz, above, note 17, 18-21, 20.

²² *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum: The Situation of Indigenous Peoples in Australia*, James Anaya, Human Rights Council, 15th sess, Agenda Item, UN Doc A/HRC/15 (4 March 2010), ("Special Rapporteur's Report on Australia") at paragraph 104.

²³ Universal Declaration on Human Rights, Art 7 & 10; International Covenant on Civil and Political Rights articles 9(2), 14(3) & 26 and Convention on the Elimination of All Forms of Racial Discrimination Art 5(a).

The Intervention

56. The Intervention has now been in place for 5 years, half of the anticipated duration of the NAP. The imposition of the Intervention constituted the single greatest suspension of Human Rights principles in recent times. As outlined in a complaint to CERD by a number of senior Aboriginal people subject to the measures of the Intervention, the Intervention has been described as being a scheme that is "punitive and racist"²⁴ and that "contravenes a number of international Human Rights conventions and the Racial Discrimination Act."²⁵ The Intervention was passed without consultation with Indigenous people and was imposed in only 10 legislative days. It has been condemned by a range of International and Domestic organisations and was raised as an issue of concern throughout the National Consultation on Human Rights.

Consultations

57. As noted above, the Intervention was initially instituted without consultation with Indigenous communities. However, since 2009 the Rudd Government has conducted two rounds of belated consultations with communities that live under the Intervention. The first round began with the release of a discussion paper, in which it was claimed that the Intervention was delivering substantial improvements, especially in the nature of increased household expenditure on essential items.²⁶ The consultations attracted the criticism that they were a disingenuous attempt to sell the pre-determined position of the Rudd Government.

58. Such criticism found reflection in the independent report, *Will they be heard?*²⁷ The report referred to statements of government representatives at community meetings, to the effect that the Commonwealth had already decided to maintain the Intervention.²⁸ The report also identified numerous deficiencies in the manner in which consultations were conducted. Participants who spoke no English at all or spoke English only as a second language were denied access to interpreters.²⁹ Complex legal concepts also appeared to have been deliberately simplified in order to garner support for the Government's position.³⁰

59. A further round of consultations took place between June and August this year. Once again, the consultations revolved around a discussion paper, *Stronger Futures*. In common with its predecessor, *Stronger Futures* portrays the Intervention measures as beneficial. At the time of writing this submission the consultations were yet to be subject to independent scrutiny. Anecdotal evidence suggests that whilst the consultations have improved in some measures (for example the use of interpreters), they continue to lack in other areas (for example it appears that the consultations are again not being taped by Government officials, and minuting of opinions and outcomes appears to be relying on the facilitator's summary of key points rather than on primary evidence).

²⁴ Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination: Submission in relation to the Commonwealth Government, 27 January 2009 at

²⁵ Ibid, paragraph 17.

²⁶ Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion Paper* (2009).

²⁷ Alistair Nicholson et al, *Will they be heard?* (2009).

²⁸ Ibid 24.

²⁹ Ibid 23.

³⁰ Ibid 27.

60. Again, the consultation process was devised without the input of those being consulted and no agreement obtained on issues such as recording of issues arising, decision making or reporting back to communities. We have also been informed that in many cases communities are informed of the consultations occurring in communities on extremely short notice, making it difficult for community members to attend. Again, there is insufficient information or explanation provided that would result in a clear understanding of the Government's proposals. Crucially, the process cannot be described as facilitating free, prior and informed consent.

Standards to be included in the Baseline

61. The Baseline should incorporate and engage with the numerous criticisms made of the Intervention by International bodies, including CERD, HRC, CESCR and the Special Rapporteur and domestically by the Aboriginal and Torres Strait Islander Social Justice Commissioner.
62. The Baseline should incorporate the findings of the *When Will They Be Heard* report.

Issues the NAP could consider

63. The immediate revocation of the Intervention (including the income management scheme);
64. A commitment not to implement or replicate any of the current aspects of the Intervention within Indigenous Communities until a consultation process has been conducted that is in accordance with the Guidelines of the Human Rights Commission on consultation, and has been evaluated to be so by independent organisations;
65. A commitment to not implementing any further legislative schemes that have the affect of restricting the Human Rights of Indigenous people until the Special Rapporteur has had an opportunity to evaluate and comment upon such scheme.

Native Title and Land Rights

Right to property

66. It is commonplace to observe that property is an international human right identified in international instruments including the Universal Declaration of Human Rights and Convention on the Elimination of All Forms of Racial Discrimination, among others. Inasmuch as property is a human right, the fundamental norm of non-discrimination requires recognition of the forms of property that arise from traditional or customary land tenure of Indigenous peoples, in addition to the property regimes created by the dominant society.³¹ International law has acknowledged the importance of lands and resources to the survival of Indigenous cultures and Indigenous self-determination.³²
67. Thus, Australia has specific obligations to protect Aboriginal and Torres Strait Islander peoples' rights to own, develop, control and use communal lands, territories and resources outlined in international instruments including General Recommendation 23: Rights of Indigenous Peoples.

³¹ S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004) 142.

³² *Ibid* 141.

68. Aboriginal and Torres Strait Islander culture and way of life is intrinsically connected to land.³³ Thus, any assessment of impact on Indigenous land rights – whether recognised by mainstream law through statute or as inherent rights – must acknowledge the undermining of culture and way of life that is necessarily incurred. The Baseline should include benchmarks that incorporate international standards and obligations and require an explanation if legislative or executive action seeks to diminish Indigenous tenure.

Native title

69. Notwithstanding the complexity involved in substantiating a native title claim and limited protection afforded to native title rights and interests, native title is a sovereign right worthy of robust protection.
70. From its beginnings, the native title system in Australia has been exceedingly complex, excessively technical and incapable of acknowledging the complicated realities of contemporary Aboriginal and Torres Strait Islander Traditional Owners and communities. The drafting of the NTA was undertaken against a background of an orchestrated response to the High Court's decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*') that was bitter and divisive, and was intended to be so, which considerable forced compromise in the drafting of the Act.
71. Currently, native title claims take an inordinate time to resolve, cost millions of dollars and, despite rhetoric from Australian governments suggesting support for negotiated outcomes, have been characterised by hard fought litigation. Outcomes differ for different claim areas depending on the value of the area to non-Indigenous interests, respondents' attitudes and the technicality of connection guidelines. In addition, the native title system has been responsible for creating and exacerbating deep divisions within and between Aboriginal and Torres Strait Islander communities and between Indigenous and non-Indigenous people.
72. A profound injustice of the native title system is that the Aboriginal and Torres Strait Islander peoples who have experienced the greatest degree of harm and interference are those least likely to be recognised as owners of their country. Another is that the system has been incapable of making reparation for dispossession, to the extent that monetary compensation *could* be capable of making such reparation.
73. Previous amendments to the system, rather than simplifying claims and facilitating land justice, have failed to benefit native title claimants and have brought international condemnation by CERD. In short, the native title system has failed the aspirations of Aboriginal and Torres Strait Islander peoples and has privileged the interests of non-Indigenous stakeholders.
74. The failure of the native title system is especially profound when it is understood that native title is no mere property right but is one aspect of Aboriginal and Torres Strait Islander sovereignty which has never been ceded. Native title rights and interests arise from continuing Indigenous normative systems, through which Indigenous peoples continue to exercise jurisdiction over land. Indeed, the interpretation that native title rights and interests are more fragile than mainstream property rights reverses the more robust protection and recognition that should be afforded to inherent, sovereign native title rights emerging from a different legal regime.
75. It is uncontroversial to observe that the native title system requires elemental reform. Jumbunna considers that native title should be conceived within a comprehensive

³³ Turner and Watson have identified that, for Indigenous people, land is the source of their "identity, economy and spirituality;" in essence, their "life force." See Pat Turner and Nicole Watson, "The Trojan Horse" in Jon Altman & Melinda Hinkson (eds), *Coercive Reconciliation. Stabilise, Normalise, Exit Aboriginal Australia* (Australia, Arena Publications Association: 2007), 206.

land justice framework with restitution at its centre. Such a comprehensive settlement process would deal with traditional and historic land claims, reparation for dispossession, resource management, Indigenous jurisdiction over land and resources, economic development, would deal with the realities and consequences of dispossession and should promote and embody Indigenous peoples' exercise of sovereignty.

76. Where parties are unable to resolve claims or where litigation has a role in resolving complex questions, Jumbunna considers that the proper characterisation of native title is that it is a 'right to the land' itself and recommends the formulation proposed by Strelein and Pearson that native title is best understood as full ownership, less the extinguishment of particular incidents of title by valid Crown or legislative act.
77. In determining whether valid extinguishment has taken place, Jumbunna considers that the appropriate test for extinguishment is that of factual inconsistency rather than legal inconsistency. While potentially onerous on its face, it is likely that agreement could readily be reached on acts that by their effect, rather than legal potential, have extinguished native title.

Land rights and the Northern Territory Intervention

78. The Northern Territory Intervention is instructive of seemingly legitimate objectives that can result in overt racial discrimination and breach of Human Rights. In particular, compulsory leases over Aboriginal freehold land and the suspension of the future act regime under the Native Title Act represent impermissible violations of fundamental Human Rights.
79. The compulsory acquisition of Aboriginal land that has occurred under the Northern Territory Intervention must be assessed in its historical context of redress for dispossession. The NT Land Rights Act was enacted in 1976 to restore Aboriginal possession, control and ownership of land. Under the Land Rights Act, Aboriginal land is granted in fee simple to recognise complete ownership by Aboriginal communities in the Northern Territory.³⁴
80. The compulsory five-year lease regime under the Northern Territory Intervention apply to forms of Aboriginal freehold land, and restricts the incidents of ownership to such an extent that it violates the right to property.
81. First, it is inconceivable that freehold land would be acquired in Australia by reference to any other racial group that owns the land. Second, the terms of the lease are dictated by the Commonwealth Government without consultation or negotiation with the Aboriginal owners. Such terms are therefore atypical and favour the Commonwealth Government. Thus, Aboriginal Land Trusts or Land Councils enjoy substantially fewer legal rights in relation to freehold land than other freehold titleholders.
82. Crucially, the acquisition of Aboriginal land violates the State party's specific obligation to protect Aboriginal peoples' rights to own, develop, control and use

³⁴ Ironically, former minister Brough described the Land Rights Act as one of the two things that "did more to harm Indigenous culture and destroy it than any two other legislative instruments ever put into the Parliament. ... You can be land rich but be absolutely poor in every other way". See The Honorable Mal Brough, former Federal Minister for Families, Community Services and Indigenous Affairs, "Northern Territory Intervention" *2007 Alfred Deakin Lecture*, (Melbourne University, 2 October 2007) at http://www.facsia.gov.au/Internet/Minister3.nsf/content/alfred_deakin_02oct07.htm (accessed 21 September 2008)

communal lands, territories and resources. Indeed, on the introduction of the Northern Territory Intervention, the Australian Government described the undermining of communal ownership as an explicit aim of the lease regime, notwithstanding that communal ownership is fundamental to traditional Aboriginal title and to providing the foundation for social and cultural norms.

83. Jumbunna also notes CERD's support for the Native Title Act as providing a framework for continued recognition of Aboriginal land rights following the precedent established in the *Mabo* case.³⁵ The removal of the future act regime, which was specifically designed to protect native title rights and interests during the long process of resolution of a native title application, undermines that recognition in violation of the Convention.

84. Further, the removal of the traditional Aboriginal owners' ability to fulfil cultural obligations through the removal of the right to negotiate removes a fundamental incident of Aboriginal ownership of land.

Standards to be incorporated into the Baseline

85. The Baseline should acknowledge and incorporate each of the three Concluding Observations in relation to the State party's periodic reports since 1994 in which CERD has reminded the State party of its obligation to ensure effective participation of Aboriginal people in the conduct of public affairs and in decision making and policy making relating to their rights and interests.³⁶ In particular, the Committee has recommended that Aboriginal communities should participate in decisions affecting their land rights.³⁷ However, diminution of rights of Aboriginal landowners and removal of the future act regime provided by the Native Title Act were undertaken without any consultation.

86. The Baseline should explicitly acknowledge, and commit to protect, the right to property at international law and adopt processes that accord with contemporary international Human Rights norms, principles and standards that govern Aboriginal property rights, including the right to self-determination. In particular, the Baseline should adopt the standard provided in General Recommendation 23 that states:

The Committee especially calls upon States parties to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and

³⁵ CERD, Decision 2(54) on Australia, 18 March 1999, A/54/18

³⁶ See CERD, Concluding Observations to Australia's thirteenth and fourteenth periodic reports (2005), Australia's tenth, eleventh, twelfth periodic reports (2000) and Australia's ninth periodic report (1994).

³⁷ CERD, Concluding Observations to Australia's tenth, eleventh, twelfth periodic reports (2000).

prompt compensation. Such compensation should as far as possible take the form of lands and territories.

87. The Baseline should entrench the norm of non-discrimination so that Indigenous specific land rights receive the same protections and recognition as property rights granted by the State. This is best achieved through constitutional recognition.

Issues a NAP could address

88. The commitment by the Government to recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation and to ensure that they meet the following criteria in the development and implementation of policy:
- i. ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
 - ii. provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
 - iii. ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests, including rights and interests relating to land, are taken without their informed consent;
 - iv. ensure that indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages.
89. Require that all Commonwealth legislation impacting upon Indigenous Australians should adopt the Declaration on the Rights of Indigenous Peoples within its objects.
90. Set out a timeline for the implementation of a constitutional protection of the principle of equality before the law.
91. A comprehensive land rights system should be developed in genuine collaboration with Aboriginal and Torres Strait Islander peoples that would recognise and protect their inherent, sovereign rights and provide just reparation for dispossession.
92. Native title rights and interests should be conceived as inherent sovereign rights, best described as full sovereign rights minus those legitimately extinguished, where extinguishment is assessed against actual inconsistency, rather than legal inconsistency.

Policing in Australia

93. It is unacceptable that the draft Baseline does not acknowledge broader considerations relating to Policing of the Australian community, and in particular, consistent concerns raised in relation to:

- i. The use of force by Police against Indigenous peoples, and the investigation of Police against whom such complaints are made; and
- ii. Policing discretions within Aboriginal and Torres Strait Islander communities.

Use of Force and Complaint Procedures Generally

94. The Baseline must acknowledge the broader issues raised as matters of concern. Whilst not limited to Indigenous communities, these considerations are particularly relevant to Indigenous communities, given the complicated history that exists in relation to Indigenous people and the Police, and the continuing deaths of Indigenous people whilst in Police custody in circumstances that legitimately arouse suspicion and distrust, such as that of the death of Mulrunji Doomdagee, and the deeply flawed Police investigation into its own officers that followed.
95. We do not agree with the implicit suggestion in the Baseline Report that complaints procedures are suitably regulated by resort to the Ombudsmen offices in Australia. Firstly, such a representation suggests that these procedures are effective, when evidence suggests they are not. More importantly however, the character and operation of the existing organisations, even if they were effective, are not in compliance with obligations for Police investigations under international law, and so should not be relied upon as purported compliance with the promotion and protection of Human Rights.

Standards for inclusion in the Baseline

96. The Baseline should incorporate the RCIADIC Recommendations.
97. The Baseline should incorporate the concluding observations of the Human Rights Committee in this regard.³⁸
98. The Baseline report should explicitly recognise the following international law principles³⁹:
- i. that the right to life includes an obligation upon the State to conduct an **effective** investigation in deaths caused by state agents (*McCann v United Kingdom* (1995) 21 EHRR 97);
 - ii. that the right to life and the right to freedom from torture, cruel, inhuman and degrading treatment and punishment (ill-treatment) impose both a negative obligation on the state – to refrain from engaging in such treatment – and a positive (procedural) obligation on the state – to conduct an **effective** investigation into an allegation of a violation.

³⁸ Concluding Observations of the Human Rights Committee, Australia, 95th Session, 7 May 2009, CCPR/C/AUS/CO/5, Paragraph 11.

³⁹ For a summary of the sources of these principles see Hopkins, Tamar *An Effective System for Investigating Complaints Against Police*, No. 3 of 'Additional Information Received' received by the Senate Legal and Constitutional Affairs Committee (Cth) in relation to its reference into Access to Justice, pages 20 - 23.

99. The Baseline should adopt as a benchmark of effectiveness of an investigation, the five key principles outlined by Graham Smith, Rapporteur to the European Commissioner for Human Rights being Independence, Adequacy, Promptness, Public Scrutiny and Victim involvement.
100. The Baseline Report should incorporate the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.
101. On 8 August 2011, a coalition of organisations wrote to both the Government and the Opposition outlining the lack of independence and effectiveness in the existing police investigation and oversight bodies at a Federal and State level (a copy of which is enclosed as Annexure A). The Baseline should acknowledge the concerns raised therein.
102. The Baseline does not currently identify the standards that are in place in Australia for the independent investigation of complaints against Police. The Baseline should detail the bodies that currently exist in Australia that are tasked with this role and evaluate their compliance with international legal norms.

Issues a NAP Should Address

103. The implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).
104. The NAP should include a commitment to the establishment on a Federal and State level of genuinely independent police investigation and oversight bodies completely separate from the Police force and compliant with the above principles.;

Policing discretion in Aboriginal Communities

105. The exercise of Police discretion is a particularly relevant causative factor in relation to Indigenous imprisonment, and yet there is no attempt in either the Baseline or the NILJ (see below) to engage with the process of evaluating the way in which Indigenous communities are policed. Consistently studies have shown that Indigenous communities are more heavily policed than non-indigenous communities. Police discretion is more likely to be exercised against Indigenous Australians in relation to the exercise of stop and search powers, charging discretions, diversionary options and police bail determinations. Moreover, there is a long history of police violence exercised against Indigenous people. It is imperative that these realities are acknowledged in the Baseline report, and that steps are outlined in the NAP to address the realities.
106. In addition to the establishment of an Independent Oversight police body, in order to evaluate the efficacy of the NAP, it is recommended that data be kept on the manner in which the exercise of Police discretion is exercised. Police should be required to record the race of all people stopped, searched and or questioned, even where such persons purportedly consent to the same, along with any action taken by Police in that regard. The obtaining of such statistics is an essential element in the

Government being able to determine the effectiveness of programs of diversion, education and training in the community and the police force.

Standards the Baseline Report should incorporate

107. RCIADIC Recommendations;
108. Recommendations of the *Doing Time – Time for Doing* Reports
109. Relevant statistical trend on the exercise of Police discretion from BOCSAR.

Issues the NAP could address

110. Immediate implementation of the RCIADIC and Doing Time recommendations.
111. The identification of mechanisms for the collection of quantitative data on the exercise of police discretion and the factors that contribute to that exercise.
112. The production on a state and federal level of cultural training programs for Police focusing on culturally appropriate exercise of discretions (for instance the imposition of culturally appropriate bail conditions) and mechanisms for the monitoring and evaluation of such programs.

National Indigenous Law and Justice Framework

113. Indigenous people are 14 times more likely than non-Indigenous people to be incarcerated. Indigenous youth are 28 times more likely to be incarcerated than non-indigenous youth. The situation for Indigenous people in Australia is dire. The draft of the Baseline acknowledges these difficulties but, as noted in the NATSILS submission, “*does not go on to discuss any factors that contribute to such over-representation*”.⁴⁰ This is unacceptable, particularly considering the excellent domestic resources available for identifying the same, in particular the RCIADIC recommendations and the *Doing Time – Time for Doing* report. We endorse the list of relevant criteria contained in the NATSILS submissions, some of which are dealt with in greater detail throughout this submission.
114. The draft Baseline identifies the main Government initiative in this respect to be the *National Indigenous Law and Justice Framework (NILJ)*. There is however no recognition in the Baseline of the failings of the NILJ. In particular, the framework has no powers of compulsion, with no ability in the Commonwealth to require the States to comply with it. More significantly, the framework lacks detail. Similarly the Baseline contains no targets of any kind, such as targets for the reduction of imprisonment rates or employment of Police Liaison Officers for example. In addition, as noted in the NATSILS submission, the framework has no resources attached to it, and contains no specific steps. The reliance within the Baseline on the NILJ as the primary means of taking action on these issues means that the Government will be

⁴⁰ Paragraph 6.7(a), Page 15 of NATSILS' submission on the Draft Baseline Study Consultation Draft.

under no obligation to do anything specific, and, therefore, subject to no evaluation of the steps it has taken.

Issues the NAP could address:

115. The implementation of the RCIADIC Recommendations and the Recommendations of the *Doing Time - Time For Doing* Report;
116. The inclusion, in consultation and collaboration with Indigenous Communities, in accordance with the standards of the duty to consult and the right to self-determination of criminal justice targets within the Closing the Gap policy.
117. A commitment to Justice reinvestment with a focus upon culturally appropriate diversionary and sentencing schemes conceived and implemented in collaboration with Indigenous people
118. A commitment to the development of programs in collaboration with community to address the factors relating to Imprisonment rates, including, the establishment of bail accommodation for Indigenous juveniles and the introduction of culturally appropriate bail and sentencing conditions.

Closing the Gap Targets

119. Like the Howard Government's practical reconciliation that preceded it and the Hawke Government's earlier pursuit of statistical equality, the current Government's Closing the Gap initiatives centre government policy on the narrow aim of reducing socioeconomic disparity. Jumbunna has grave concerns that imposing targets on Aboriginal and Torres Strait Islander people and peoples without input is to impose contemporary means of assimilation. We note the complete absence of cultural considerations in the target setting. Moreover, the Baseline does not acknowledge that there has been widespread criticism of 'Closing the Gap' policy platforms.⁴¹ We note that Closing the Gap policies were a major concern for Maori in the mid to late 90's and the failed policy context has seen renewed calls for Indigenous driven health solutions in that context.
120. Given the strong association between the Closing the Gap Targets and the Baseline, the Baseline should acknowledge both the successes and failures in relation to those targets.

Standards the Baseline should incorporate

121. The Baseline should acknowledge the criticism that have been made of the Closing the Gap policy and, in particular, that the targets are focused upon socio-

⁴¹ Altman, John, *Beyond Closing the Gap: Valuing Diversity in Indigenous Australia*, Centre of Aboriginal Economic Policy Research, Working Paper No. 54/2009.

economic outcomes and therefore are not broad enough to include the social, cultural and political aspirations of Indigenous communities.

122. The Baseline should incorporate information provided through the current reporting mechanism by which the Steering Committee for the Review of Government Service Provision currently reports against the targets.

Actions a NAP could address

123. A commitment to a re-consideration of the content of the Closing the Gap Policy in consultation and collaboration with Indigenous Communities, in accordance with the standards of the duty to consult and the right to self-determination as discussed.

Right to Education

124. This section should include specific reference to a commitment to bi-lingual education, and a recognition of the importance of language to the maintenance and celebration of culture. We endorse the recommendations of the Special Rapporteur and these recommendations should be incorporated into the Baseline.⁴²

125. Language is a human right. Languages not only shape how we think, tell our stories, enable us to communicate and give names to our people and places, they form part of our identity and are a link to our culture. As put by Professor Ghil'ad Zuckermann,⁴³ language is part of the 'Intellectual Sovereignty' of Indigenous people.

126. Since 2008, Jumbunna researchers have conducted extensive research with Northern Territory Indigenous communities examining the impact of the Intervention. In the course of this research, Jumbunna recorded interviews and statements from a large number of Indigenous teachers and parents who are extremely distressed about the recent restrictions placed on bilingual education programs by the NT government. At the community level, the right to teach from curricula developed in Indigenous languages is expressed in ways inextricably linked to broader questions of rights to land, culture, employment and decision-making. Opposition to the restrictions on bilingual education was largely in the context of opposition to a raft of federal and NT government policies that have taken decision-making power and resources away from Indigenous communities. Since the Intervention, school attendance rates in Indigenous communities have declined by approximately 6 per cent⁴⁴ with some of the sharpest drops in school attendance taking place in schools where bilingual education programs were formerly operating, including a 23 per cent

⁴² Special Rapporteur's Report on Australia, above, note 22, [95] to [97].

⁴³ Chair of Endangered Languages, School of Humanities, University of Adelaide, *Life Matters*, ABC Radio 19 July 2011.

⁴⁴ *Closing the Gap in the Northern Territory Monitoring Report (July – December 2010) Part 2* at http://www.fahcsia.gov.au/sa/indigenous/pubs/the_NTER_reports/closing_gap_NT_jul_dec_2010/Documents/part2/Closing_the_Gap_Part2.htm#t2_1

drop at Lajamanu.⁴⁵ As a consequence of this jobs for local people have disappeared as bilingual education programs are cut.

Standards that the Baseline should incorporate

127. Recommendations 95 to 97 of the Special Rapporteur⁴⁶;
128. Clauses 4 (a) to (e) of General Recommendation 23: Rights of Indigenous People.

Issues a NAP should address

129. Reinstatement of bilingual education programs in the Northern Territory; and, Aboriginal languages as part of a National Curriculum program, including early education.
130. A commitment to the provision of equal opportunities for education to be available in all remote areas.

The Right to Work and CDEP

131. The most enduring employment program for Indigenous people is the Community Development Employment Projects Program ('CDEP'). CDEP was first piloted in the Northern Territory community of Bamyili, in 1977.⁴⁷ Later that year, the Commonwealth announced the creation of the CDEP program. Aboriginal Councils were to be funded to provide work on community development projects for willing individuals. In determining the monies made available to Councils, individuals' entitlements to unemployment benefits were to be taken into account. Over three decades CDEP enabled communities some flexibility in determining their priorities for development. Consequently, CDEP funded a range of projects, from the delivery of essential services to community enterprises. CDEP remains the largest employer in some remote communities and for many it is their only source of employment.
132. As part of its the Intervention reforms, many CDEP workers are now participants in work for the dole schemes, with much of their benefits quarantied. Little research has been undertaken in relation to the impacts of those changes on the working lives of Aboriginal people in the Northern Territory. However, an unpublished paper by Paddy Gibson of the Jumbunna Indigenous House of Learning, UTS, revealed some deeply troubling allegations.⁴⁸ Of particular concern are claims

⁴⁵ Dan Harrison, "NT schools to stick to English despite attendance falls", *Sydney Morning Herald*, January 11 2011 at <http://www.smh.com.au/national/education/northern-territory-schools-stick-to-english-despite-attendance-falls-20110117-19u5d.html>

⁴⁶ Special Rapporteur's Report on Australia, above, note 22, Recommendations 95 to 97.

⁴⁷ Race Discrimination Commissioner, 'The CDEP Scheme and Racial Discrimination' (1997) 7.

⁴⁸ Paddy Gibson, 'Working for the Basics Card in the Northern Territory' (Discussion Paper, Jumbunna Indigenous House of Learning, University of Technology, Sydney, 2010).

that workers are being denied fundamental labour rights, such as the payment of award wages.

133. Similarly troubling are the concerns raised by participants in an ARC Linkage research project conducted by Jumbunna investigating factors that may impact on rates of crime in Aboriginal communities in NSW that increasing rates of crime may be linked to the abolition of CDEP in NSW.

Issues the NAP could address:

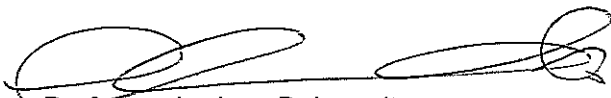
134. That a genuine consultation process adopting best practice be undertaken to investigate the impacts of the Intervention and CDEP reforms on the labour rights of Aboriginal workers in the Northern Territory.
135. The development, in collaboration with affected communities, of a dedicated Aboriginal and Torres Strait Islander work program similar to the CDEP.

Constitutional Reform

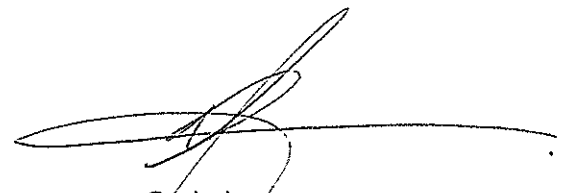
136. We acknowledge that the issue of Constitutional Reform is of importance to many Indigenous Australians and concur with the Prime Minister's sentiments that constitutional recognition is an 'important step to building trust and respect'. However, we also believe that it is disingenuous to engage in such a nation-building exercise while the Intervention remains in place. That the Gillard Government has begun a dialogue on constitutional recognition, while maintaining this matrix of coercive and racially discriminatory laws, is instructive of its lack of respect for Aboriginal people.

These submissions were prepared by Craig Longman, Jason De Santolo, Nicole Watson, Terry Priest and Alison Vivian on behalf of Jumbunna Indigenous House of Learning, Research Unit. The authors would be happy to provide the committee with further information on any of the matters raised above.

Yours Sincerely,



Professor Larissa Behrendt.



Craig Longman