

## Introduction

This is my third *Social Justice Report* as Aboriginal and Torres Strait Islander Social Justice Commissioner and covers the period 1 July 2005 to 30 June 2006.

The Report covers a broad range of issues extending from the local level (with Indigenous perspectives on Shared Responsibility Agreements), regional and national levels (considering the capacity for Indigenous participation and engagement in federal policy making processes), through to the international level (with a review of developments on Indigenous human rights over the past four years).

It is the fourth successive *Social Justice Report* to substantially focus on the federal governments' policy settings for Indigenous affairs. The 2003 report had provided a preliminary overview of the operation of the Council of Australian Government's (COAG) eight trial sites for whole of government activity and identified some concerns about their operation and their transferability into policy more generally. The COAG trials formed the genesis of the *new arrangements for the administration of Indigenous affairs* that were introduced in 2004, and which were given preliminary consideration in the 2004 report. That report also noted a series of preliminary concerns that, if not addressed, could compromise the overall effectiveness of the new arrangements.

The 2005 Report then considered progress in bedding down these new arrangements after twelve months of operation. It considered whether the preliminary concerns and warnings identified in the previous two reports had eventuated. It expressed serious concerns about lack of Indigenous engagement and participation in the new arrangements, and the overall lack of transparency and government accountability that has accompanied these arrangements.

This Report considers progress two years into the new arrangements. It builds on the analysis of the previous three reports.

This continuity of focus over a four year period provides a vital record of the policy making process for Indigenous affairs at the federal level. It documents the commitments of the Australian Government and its major announcements over this period. And it has identified significant concerns about the government's policy settings and the potential implications of these concerns if left unaddressed.

We can reasonably expect that over a four year period we would begin to see the impact of the substantial changes to policy that have occurred.



For example, it has been five years now since the Government committed to principles for service delivery to Indigenous peoples as a consequence of the findings of the landmark inquiry into Indigenous funding by the Commonwealth Grants Commission. A major focus of that report and of the consequent principles that guide Indigenous policy was on the need to improve accessibility of mainstream services to Indigenous peoples. One of the slogans of the new arrangements has been that government is committed to 'harnessing the mainstream'.

Similarly, the basic structure of the new arrangements for service delivery and policy development has now been in place for long enough to assess whether they are capable of meeting the extensive commitments made by all Australian governments to address the social and economic disadvantage experienced by Indigenous Australians.

## What makes good Indigenous policy?

My role as Aboriginal and Torres Strait Islander Social Justice Commissioner is to monitor and report to the federal Parliament on the ability of Indigenous peoples in Australia to enjoy their human rights, and to identify where legal or policy changes could be made to improve such enjoyment.

Given the urgent need for sound policy in Indigenous affairs, it is timely to consider what some of the key elements of good Indigenous policy making are.

This is a question that is continuously being grappled with by the government and the Australian Public Service (APS).

In the context of Indigenous affairs, the most senior officers of the APS have recognised their part in contributing to dysfunction and disadvantage in Indigenous communities as a result of the 'failure of a generation of public policies to translate into the sustained economic betterment of indigenous Australians.'<sup>1</sup> As the Secretary of the Department of Prime Minister and Cabinet stated:

I am aware that, for some 15 years as a public administrator, too much of what I have done on behalf of government for the very best of motives and had the very worst of outcomes. I (and hundreds of my well-intentioned colleagues, both black and white) have contributed to the current unacceptable state of affairs, at first unwittingly and then, too often, silently and despairingly.<sup>2</sup>

In an effort to standardise approaches to policy implementation in the APS, and ultimately improve policy outcomes, the Australian National Audit Office and the Department of Prime Minister and Cabinet have recently produced the *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter* (or the Better Practice Guide).<sup>3</sup> Although this publication is a general guide for policy makers across all portfolios – not just in the areas of

1 Shergold, P. (Secretary, Department of Prime Minister and Cabinet), *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, Sydney, 19 July 2006, p2.

2 Shergold, P. (Secretary, Department of Prime Minister and Cabinet), *Indigenous Economic Opportunity: the Role of the Community and the Individual*, Speech delivered at the First Nations Economic Opportunities Conference, Sydney, 19 July 2006, p2.

3 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet and Australian National Audit Office, Canberra, October 2006.



Indigenous affairs – it represents the collective wisdom and experience of senior managers and executives across the APS.

Some of the lessons learned within the APS that are reflected in the Better Practice Guide are particularly relevant in the context of Indigenous policy formulation. The Guide has the potential to assist the APS in overcoming the significant policy challenges that exist in relation to Indigenous issues.

In this section of the introduction I consider some of the key elements of good Indigenous policy. I then relate these to current developments in Indigenous policy making processes at the federal level.

- **A commitment to human rights**

Fundamental to good policy development is that all legislation, policies and programs developed and implemented by governments should be consistent with international human rights standards.

As past *Social Justice Reports* have noted, human rights transcend politics and provide objective standards to which governments worldwide are accountable. Human rights are universal and indivisible.

In simple terms universality means that they apply to everyone, everywhere, equally and regardless of circumstance – they are intended to reflect the essence of humanity. They are the standards of treatment that all individuals and groups, irrespective of their racial or ethnic origins, should receive for the simple reason that we are all members of the human family. They are not contingent upon any factor or characteristic being met – you do not have to ‘earn’ rights or have to be ‘deserving’ for them to be protected.

And the indivisibility of human rights means that all rights - economic, social, cultural, civil and political rights – are of equal importance. There is no hierarchy or priority for the protection or enjoyment of rights. Similarly, this means that all rights are to be applied consistently – you cannot claim to be performing an action in exercise of your rights if it causes harm or breaches the rights of another person.

So what does this mean for policy making as it relates to Indigenous peoples in Australia?

Chapter 4 of this report discusses the existence of what is being referred to internationally as the ‘implementation gap’<sup>4</sup> between the human rights obligations accepted by government and their application in domestic policy frameworks for Indigenous issues.

We do not protect the rights of Indigenous peoples in Australia well, and we have not adopted a human rights based approach to policy or service delivery.

At present, domestic Indigenous policy making processes treat human rights as a prescriptive framework that is focused on *what you can’t do* and on a *compliance mentality*. The limited efforts to engage with human rights principles are at the most

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4 Stavenhagen, R. (Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples), *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, Commission on Human Rights, UN doc E/CN.4/2006/78, 16 February 2006.



crude and basic level, such as crafting measures so that they can avoid accusations of racial discriminatory treatment.

Clearly this is an essential component of the human rights system. But it is much more than this. It also encourages the adoption of proactive measures to create an enabling framework for active participation and engagement of all citizens, and particularly for those who are disadvantaged or powerless.

The human rights framework promotes a focus on ensuring that different segments of the population are able to participate fully. This requires a focus on gender equality; the rights of children and a focus on the best interests of the child; as well as providing recognition and protection for cultural diversity.

Human rights provide an enabling framework that promotes active engagement of Indigenous peoples through partnerships, shared decision making and ultimately shared responsibility for outcomes.

Importantly, human rights also provide a framework to assist in targeting government activity to areas of greatest need. One of the fundamental goals of human rights is the provision of equality before the law and non-discriminatory treatment for all. Where such discrimination exists, such as the entrenched discrimination against Indigenous peoples that is reflected in disproportionately high rates of disadvantage, there are obligations on the national government to ensure that actions by government to address these inequalities are sufficiently targeted, are progressively reducing the inequality gap and are doing so as quickly as possible and utilising the maximum of available resources.

One of the major problems with Indigenous policy making in Australia is that it is not sufficiently targeted to overcome the existing level of inequality and discrimination experienced by Indigenous peoples. Building this in to policy would require needs based funding so that programs are capable of overcoming existing inequalities and are also cognisant of the future needs of particular groups. For Indigenous peoples, this is going to be a major issue with a rapidly expanding youth population over the next decade creating a further pressure on what are already inadequate levels of funding and services.

The *Social Justice Report 2005* set a range of challenges for government to address Indigenous health inequality through adopting a rights based approach. The lack of needs based funding and longer term planning has also been identified as one of the shortcomings of the Shared Responsibility Agreement making process in the national survey of Indigenous communities contained in chapter 3 of this report.

A human rights based approach also emphasises the necessity for Indigenous participation at all stages of the policy development and implementation processes.

Effective participation in decision making processes that affect us has been confirmed as essential to ensuring non-discriminatory treatment and equality before the law. It is also central to the human rights based approach to development which is now widely accepted and operational across the United Nations and the international development cooperation system.



Chapters 2 and 3 of this report vividly demonstrate the problems that are now crystallising within the new arrangements for service delivery at the federal level as a result of the lack of effective participation of Indigenous peoples. I have described this as the fundamental flaw of the new arrangements.

All of these elements of a human rights based approach are required if the Australian Government is to effectively implement its human rights obligations and to ensure sound processes for Indigenous policy development.

Finally, good Indigenous policy making also requires a focus on compliance with human rights and action to redress known violations of human rights.

For example, Article 28 of the Convention on the Rights of the Child recognises the right of the child to education. Government undertake as a matter of legal obligation to make primary education compulsory and available free to all; and take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Non-attendance at school and low retention is a matter of human rights compliance and breaches the rights of the child. It necessitates action by governments to ensure that the right to education is available to all 'with a view to achieving this right progressively and on the basis of equal opportunity.' It should not simply be accepted that this is just the way it is for Indigenous children.

Similarly, the Convention on the Rights of the Child requires governments to ensure 'to the maximum extent possible the survival and development of the child.'<sup>5</sup> Article 19 of the Convention also requires that governments:

shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Freedom from violence is also recognised as fundamental to equality and non-discrimination for women, and is also recognised in the Declaration on the Rights of Indigenous Peoples as a particular concern for Indigenous women and children.

There is a clear need to work with Indigenous communities to ensure compliance with human rights. This requires a multi-pronged approach – on the one hand, there should not be tolerance for breaches of rights such as family violence and non-attendance at school, but on the other hand, governments need to work with communities to increase their capacity to address these issues. This is not an either / or choice – it requires both elements and a starting point for this is human rights education for all to increase awareness of human rights and related responsibilities.

Overall, Australia's human rights obligations provide a framework for ensuring human rights are recognised and protected through a combination of measures ranging from:

- proactive measures to prevent violations from occurring in the first place and to address the underlying factors that can contribute to human rights violations;

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5 Article 6(2), International Convention on the Rights of the Child.



- an accountability framework to ensure that governments remain focussed on the ultimate outcomes of policy and are able to be held accountable for their rate of progress in addressing significant human rights breaches where they exist;
- processes for ensuring the effective participation and real engagement with stakeholders and affected peoples in designing policy and delivering services; and
- measures to respond and address violations of rights whenever they occur.

The compliance mentality that currently permeates Indigenous policy making processes does not address this full sweep of issues. It is an increasingly punitive framework that cherry picks issues and neglects important essential characteristics for good policy.

A number of the recommendations contained in this report are aimed at addressing this imbalance in policy processes.

### • **Engagement and participation of Indigenous peoples in policy making**

This report outlines in detail the importance of ensuring engagement and participation of Indigenous peoples in policy making and decision making processes that directly relate to our interests. This is central to the human rights based approach to development.

There is increasing awareness within the leadership of the APS that greater and more effective engagement with 'stakeholders' is required. For example, the Secretary of the Department of PM&C recently commented that:

There needs to be greater recognition that success depends not just on the effectiveness of our [APS] own organisations but our ability to work in partnership with a variety of others.<sup>6</sup>

As with any stakeholder group, Indigenous peoples need to be involved at the earliest possible stage in the policy design process, so that they can contribute their perspectives and ideas on the objectives and content of the policy as well as *how* the policy should be implemented. This is particularly important to ensure that:

- Indigenous cultural differences are respected and accommodated;
- the appropriate Indigenous peoples are involved;
- sufficient time is allocated to developing community support for the implementation process; and
- ultimately, Indigenous peoples feel a sense of *ownership* of both the process and the outcome.

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6 Shergold, P. (Secretary, Department of Prime Minister and Cabinet), *Implementation Matters*, Speech delivered at the launch of 'Implementation matters: the better practice guide to the implementation of programme and policy initiatives', Old Parliament House, Canberra, 16 October 2006, p.3. Available at [http://www.pmc.gov.au/speeches/shergold/implementation\\_matters\\_2006-10-16.cfm](http://www.pmc.gov.au/speeches/shergold/implementation_matters_2006-10-16.cfm) accessed 13 March 2007.



As the Better Practice Guide acknowledges:

Where this [consideration of how policy implementation will occur] does not receive sufficient and early attention, problems may arise during subsequent implementation. These problems may include: sub-optimal delivery methods; overambitious timeframes; resources not being available when required; inappropriate skills or capability for the initiative; and insufficient contingency planning.<sup>7</sup>

Successful change management strategies require structured planning, design, communication and administration, as well as *early and continuous stakeholder involvement* [emphasis added].<sup>8</sup>

The Better Practice Guide also recognises that different stakeholder groups will have 'unique characteristics' that need to be 'considered' before the implementation process gets underway. It anticipates that these can include providing 'adequate time and resources' to facilitate engagement with the most appropriate community representatives; considering whether stakeholders might be resistant to the proposed changes and how such resistance will be 'overcome'; and how expectations will be managed so they are not raised unrealistically high.<sup>9</sup>

A human rights based approach to engaging with Indigenous peoples is consistent with these aspects of the Better Practice Guide, however it requires that policy makers go further. For example, a human rights based approach requires:

- transparent and accountable frameworks for engagement, consultation and negotiation with indigenous peoples and communities, which could include specific, time-bound and verifiable benchmarks and indicators to ensure that progress can be tracked and measured over time;
- frameworks for engagement that allow for the full and effective participation of indigenous peoples in the design, negotiation, implementation, monitoring, evaluation and assessment of outcomes; and
- participation based on the principle of free, prior and informed consent, which includes governments and the private sector providing information that is accurate, accessible, and in a language the indigenous peoples can understand.<sup>10</sup>

As Chapters 2 and 3 of this report demonstrate, there is currently a disconnect between policy making at the national level and its implementation at the local and regional level, with a consequence that there are insufficient provisions that enable Indigenous participation in the policy process.

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7 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p5.

8 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p43.

9 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p67.

10 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, HREOC, Sydney, 2005, pp107-109.



## • A capacity building and community development approach

A human rights based approach regards capacity building in Indigenous communities as essential to facilitate their equal and meaningful participation in the planning, design, negotiation, implementation, monitoring and evaluation of policies, programs and projects that affect them.<sup>11</sup> Furthermore, it recognises that governments and the private sector have a role in assisting Indigenous peoples in this regard. Some Indigenous communities require capacity building in a range of areas including financial management, business development, and corporate governance, and sometimes this assistance may be best delivered by the private sector.

Where the policy implementation process is intended to build capacity in Indigenous communities, a human rights based approach also recognises that initiatives need to respect and reaffirm the legitimacy of Indigenous decision-making processes, authority structures and collective identity. Research suggests that this approach is critical if capacity building initiatives are to be sustainable.<sup>12</sup> Such an approach can also facilitate greater cultural awareness and understanding on the part of non-Indigenous policy implementers, thereby assisting in the broader reconciliation process.

As previous *Social Justice Reports* have also pointed out, capacity building is not a one-sided process that focuses entirely on the needs of Indigenous communities. There is also a need for building the capacity of government to engage appropriately with Indigenous peoples and communities.

This is amply demonstrated by the difficulties in implementing a whole of government approach through the COAG trials, as well as through the new arrangements to date. The APS' Better Practice Guide emphasises the importance of the APS having 'adequately skilled and experienced people available for implementation', and that it may be necessary to train and support them to fulfil their implementation role.<sup>13</sup> Previous *Social Justice Reports* have expressed concerns at the recruitment and retention policies of government, particularly, but not exclusively, as they relate to Indigenous staff. This remains an ongoing challenge to support good policy development.

There is also a challenge to build into policy a longer term vision for the well-being of Indigenous communities. Policy development and program implementation can benefit from understanding community development principles. Creating change in communities is a long term process that will ultimately only be achieved by empowering and supporting communities, often small step at a time, so that they are capable of taking control of their circumstances. This takes time and consistency of effort.

Chapter 3 of this report includes the results of a national survey of communities that had entered into a Shared Responsibility Agreement. The survey results

11 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, HREOC, Sydney, 2005, pp107-109.

12 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p20.

13 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p69.





demonstrate the willingness of communities to engage in such processes, but with the expectation that the commitments of government will be ongoing. The key weakness of the process was seen as raised expectations within the community that could not be supported by the scope of the SRA ultimately put into place and the lack of follow up and implementation with communities.

A community development approach also seeks to bring to the fore a positive vision for Indigenous communities. Nearly all coverage of Indigenous issues in national media is negative. Indigenous peoples continually confront negative stereotypes and defeatist attitudes about our abilities and capacity. Good policy involves a vision for a positive future to which we can strive and which can reinforce the inherent value and dignity of Indigenous peoples.

## • Supporting sound Indigenous governance

Supporting good Indigenous governance is paramount to good policy development. Emerging evidence in Australia suggests that Indigenous governance is a broad concept that can include:

how decisions are made, who has the authority to make those decisions, and how decision-makers gain legitimacy and are held accountable – both within the community and to external stakeholders such as government agencies and corporate partners.<sup>14</sup>

Research is also revealing that good governance is an important contributing factor in generating sustained economic development and social outcomes in Indigenous communities in Australia. As the preliminary research findings of the *Indigenous Community Governance Research Project* indicate:

Effective governance is a prerequisite for mobilising community capital and provides better conditions for that capital to be developed and sustained. Good governance also sets in place the conditions for creating further capital. It's important that governance capacity is developed hand in hand with addressing the significant backlogs in basic infrastructure and essential services that exist in many communities.<sup>15</sup>

A human rights based approach to development will also recognise that Indigenous cultures vary considerably across Australia, and as a result there are a diversity of governance frameworks. Communities need the scope to design structures and methods of governance to suit their needs and the size of their group, rather than these being externally imposed in a one size fits all approach.

Equally, research suggests that community aspirations need to be balanced with 'hard-headed practical considerations when designing legitimate and effective structures and processes' to ensure that the most appropriate representatives are selected, and that strategic outcomes can be achieved.<sup>16</sup> Given that Indigenous

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14 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p6.

15 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p14.

16 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p6.



cultures are evolving, governance structures and processes will also require the flexibility to evolve and change over time.

These observations have particular relevance for members of the APS who are working in portfolios with responsibility for the new arrangements in Indigenous affairs. As the preliminary research findings of the *Indigenous Community Governance Research Project* indicate:

government agencies need to be better informed about the importance of the different governance relationships and hierarchies that lend legitimacy to different aggregations and scales, for different purposes. Government agencies need to be clear about who makes decisions, how, when, and in what contexts, so that their interventions do not undermine legitimate governance structures.<sup>17</sup>

- **Fostering and recognising leadership**

From a government perspective there is a clear need for leadership from within government if complex whole of government arrangements are to succeed for Indigenous policy. As the Secretary of the Department of Prime Minister and Cabinet (PM&C) advised the APS when he launched the Best Practice Guide to policy implementation:

It [best practice] depends on those at the top of organisations providing a clear picture of the decisions that need to be taken, by whom, for what purpose and when – and identifying the associated critical paths, risks, and interdependencies. The responsibility doesn't rest with the technical guys ... – it rests with us.<sup>18</sup>

From a human rights perspective, leadership particularly on the part of governments and the private sector, is regarded as essential to drive the legal and policy changes that can facilitate the development of a human rights culture across society. In contrast to the speed with which political leaders can make legal and policy changes, the attitudinal and behavioural changes that need to occur across all sectors of the population to produce a human rights culture, can take generations.

However, it is equally important to cultivate and support leaders within Indigenous communities that will be affected by the implementation of the policy. Leadership within Indigenous communities is often a very complex phenomenon with different people taking lead roles depending on the task at hand. Policy makers need to be mindful and accommodating of the considerable pressures borne by Indigenous leaders who have to juggle Indigenous and non Indigenous political and professional demands; and immediate and extended family and cultural demands and achieve consensus outcomes across all areas of their work and life.

Developing an understanding and appreciation of the overlapping networks of leadership and authority in Indigenous families and communities can be critical

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17 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p9.

18 Shergold, P. (Secretary, Department of Prime Minister and Cabinet), *Implementation Matters*, Speech delivered at the launch of 'Implementation matters: the better practice guide to the implementation of programme and policy initiatives', Old Parliament House, Canberra, 16 October 2006, p.3. Available at [http://www.pmc.gov.au/speeches/shergold/implementation\\_matters\\_2006-10-16.cfm](http://www.pmc.gov.au/speeches/shergold/implementation_matters_2006-10-16.cfm) accessed 13 March 2007.



to the successful implementation of policy. For example, the preliminary research findings of the *Indigenous Community Governance Research Project* indicate that:

Non-Indigenous stakeholders may not recognise legitimate Indigenous leadership, and hence may inadvertently undermine it. This risk is further magnified when interactions between government agencies and the community are rushed and/or impeded by cross-cultural or language challenges – particularly where the legitimate Indigenous leaders are not proficient in English and government officials do not speak the relevant Aboriginal language... It is critical that government agencies recognise the need to build their own capacity to interact with Indigenous communities.<sup>19</sup>

Furthermore, given the young demographic profile of Indigenous communities across Australia, there is a clear role for policy makers to play in providing coordinated program funding for leaderships development, mentoring and succession at the community level, to foster the next generation of leaders.<sup>20</sup>

### • **A learning framework / planning for implementation**

Sharing information and experience within and across government agencies is critical if policy makers are to learn from mistakes and ultimately adopt the most effective approaches. In the context of a whole of government policy approach, such as the government's new arrangements in Indigenous affairs, the free flow of information and ability to learn from past mistakes is critical.

The Better Practice Guide recognises that it is necessary to cultivate an environment where mistakes can be admitted and public servants feel confident that they can provide frank and fearless advice to their Minister and their superiors.<sup>21</sup> Learning from the policy implementation experience should occur on an ongoing basis – not just at the end of the process. For example, the Better Practice Guide advises that mechanisms be put in place to 'ensure that information obtained from stakeholders will be acted on to improve the quality of the implementation', and that protocols be developed to deal with 'sensitivities' or conflicts that might arise during implementation.<sup>22</sup>

According to the Secretaries Group on Indigenous Affairs, the new arrangements are to operate in 'a learning framework', 'sharing information and experience, learning from mistakes and progressively adopting approaches that work best.'<sup>23</sup>

As outlined in chapters 2 and 3 of this report, I have concerns about how this is operating in effect. My primary concerns relate to policy development that is

19 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p18.

20 Sixty percent of the Indigenous population is under the age of 25. See Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*; Reconciliation Australia, Canberra, June 2006, p18.

21 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p4.

22 Australian Government, *Better Practice Guide to the Implementation of Programme and Policy Initiatives – Making Implementation Matter*, Department of Prime Minister and Cabinet, Australian National Audit Office, Canberra, October 2006, p68.

23 Secretaries' Group on Indigenous Affairs, *Annual Report on Indigenous Affairs 2004-05*, Office of Indigenous Policy Coordination, Canberra, 2005, p27. Available at [http://oipc.gov.au/performance\\_reporting/sec\\_group/ar2005/OIPC\\_Sec\\_Report05.pdf](http://oipc.gov.au/performance_reporting/sec_group/ar2005/OIPC_Sec_Report05.pdf) accessed 15 February 2007.



not evidence based and lacking Indigenous input; and that where lessons are identified, they are not being addressed through the new arrangements (such as on the importance of regional engagement processes to facilitate Indigenous participation).

### • **Needs based funding and planning processes**

A key principle guiding the government's approach to the new arrangements in Indigenous affairs is that access to services and opportunities should be based on need.<sup>24</sup> This reflects the diversity in need amongst Indigenous Australians, particularly the needs of remote versus urban based communities and peoples.

Funding based on need is an integral component of a human rights based approach to development and is an essential feature of good policy development.

Some of the necessary components of a rights based approach include:

- the development of agreed targets and benchmarks with timeframes for completion so we have a clear picture of what it is exactly that is trying to be achieved;
- the allocation of funding so that programs are capable of meeting identified need, particularly so that programs are able to overcome existing inequalities in access to services;
- identification of barriers to accessibility of services, including in urban locations and through mainstream programs;
- an evaluative framework to assess whether the rights of Indigenous peoples are being 'progressively realised', so that we can be confident that government efforts are effective, well targeted and taking place at the maximum level possible; and
- the adoption of a people-centred approach which values the full participation of Indigenous peoples in the process, from the very beginning of policy development, through to service delivery and monitoring and evaluation.

Recent *Social Justice Reports* have outlined the 'progressive realisation' principle in some detail and identified, as a weakness of current policy approaches, the mismatch between program funding allocation and need. I have continually expressed concern that current programs are not funded to a level that can overcome Indigenous disadvantage, rather than simply address the ongoing and growing consequences of inequality.

This is a matter of great concern as the demographic profile of the Indigenous population means that there will be an increased demand for services in the coming decade. We should be building processes to plan for this eventuality, much as we have begun to plan for the consequences of an ageing Australia more generally.

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24 Brough, M. (Minister for Families, Community Services and Indigenous Affairs), *Blueprint for Action in Indigenous Affairs*, Speech delivered at National Institute of Governance – Indigenous Affairs Governance Series, Canberra, 5 December 2006, p.2. Available at [http://www.atsia.gov.au/media/speeches06/05\\_12\\_06.aspx](http://www.atsia.gov.au/media/speeches06/05_12_06.aspx) accessed 13 March 2007.



## • **Monitoring and evaluation**

Human rights based approaches to development assign clear responsibility to governments and the private sector to establish transparent and accountable frameworks. Key elements of such a framework include specific, time-bound and verifiable benchmarks and indicators to ensure that people's enjoyment of their rights can be measured and there is improvement over time.<sup>25</sup>

Regular performance review, evaluation and reporting allow problems to be identified and addressed in a timely manner. As recognised earlier, it is critical that Indigenous peoples are active participants in establishing the monitoring and review mechanisms, and in contributing information to them as policy implementation occurs.

As the APS Better Practice Guide acknowledges, and the government's commitment to a 'learning framework' requires, it is essential that 'bad news' gathered through the monitoring process is not filtered out. The Guide also recognises that quality of monitoring and review processes is largely determined by the quality of the data that is collected and the skills of those responsible for analysing it. Hence my ongoing concerns about the persistent and significant data quality issues in relation to progress under the government's new arrangements in Indigenous affairs.

Indigenous Australians expect that both government service providers and their own representative organisations will be accountable to them. If mismanagement, policy error or complete policy failure is occurring, Indigenous peoples want to know and expect the situation to be promptly rectified.

However research suggests that there are different approaches to accountability in Indigenous and non-Indigenous communities that need to be borne in mind by policy makers. For example,

Governments tend to emphasise 'upwards' accountability, risk avoidance, financial micro-management, and compliance reporting. Capacity in these areas promotes governments' assessment of an organisation's effectiveness.

By contrast, Indigenous communities emphasise internal accountability and communication. Indigenous people want their organisations to provide clear, culturally-informed and regular communication with the community members they serve. People want to be consulted, to know what their organisation is doing, know what decisions are being made and why, and they want to be confident that the organisation is operating fairly and well. This promotes a community assessment that the organisation and its leaders are effective and legitimate.<sup>26</sup>

## • **A culture of implementation and government accountability**

A consistent theme across this report is concern about the lack of implementation of the commitments of government and the lack of government accountability for policy failure.

25 United Nations Development Programme (UNDP), *Human Development Report 2000 – Human rights and human development*, UNDP, New York, 2000, available online at <http://hdr.undp.org/reports/global/2000/en/> accessed 14 February 2007.

26 Reconciliation Australia, *Indigenous Community Governance Research Project: Summary of Preliminary Research Findings*, Reconciliation Australia, Canberra, June 2006, p16.



There is a disturbing dynamic to public debates and media coverage of Indigenous issues which sheets home the responsibility for failed policy to Indigenous peoples. This is despite the absence of an outcomes focus to policy making, accompanied by a demonstrable lack of progress on key issues and slow progress on other issues.

There is currently not a culture among government that takes responsibility for a failure to implement commitments or to be held accountable for Government actions.

In 2004, the Secretary of the Department of Prime Minister and Cabinet had suggested that such a culture of implementation and accountability would be a central feature of the new arrangements. He stated that the new arrangements for Indigenous affairs constitute:

the biggest test of whether the rhetoric of connectivity can be marshalled into effective action... It is an approach on which my reputation, and many of my colleagues, will hang.

No new bureaucratic edifice is to be built to administer Aboriginal affairs separate from the responsibility of line agencies. 'Mainstreaming', as it is now envisaged, may involve a step backwards – but it equally represents a bold step forward. It is the antithesis of the old departmentalism. It is a different approach...

The vision is of a whole-of-government approach which can inspire innovative national approaches to the delivery of services to indigenous Australians, but which are responsive to the distinctive needs of particular communities. It requires committed implementation. The approach will not overcome the legacy of disadvantage overnight. Indigenous issues are far too complex for that. But it does have the potential to bring about generational change.<sup>27</sup>

These bold words do not accord with the situation that has emerged in the initial years of the new arrangements.

Two of the Aboriginal Directors of Reconciliation Australia correctly identify the main challenge that remains for public servants as follows:

Too often good policy becomes bad policy in its delivery. ... Good policy for us should reflect the aspirations of our people for a better future for our young people. It should be developed in a truly bipartisan partnership involving Indigenous people working alongside the best and brightest of the public service, civil society and corporate sectors.

It should be driven by a vision of success and what is possible. It should be driven by a shared imperative that it's in the national interest ie everyone's interest to close the 17 year gap in life expectancy. It should be driven by long-termism and consistency in policy that busts through commonwealth-state boundaries and electoral cycles.

Good policy should be implemented by people who truly respect and listen to us. ... And good policy should be determined equally by its evaluation and a strict regime of accountability for failure. There must be visible and direct consequences among those responsible for policy failure.<sup>28</sup>

27 Shergold, P. (Secretary, Department of the Prime Minister and Cabinet) *Connecting Government – Whole of government responses to Australia's priority challenges*, Launch Speech, Canberra, 20 April 2004, p4.

28 Marika, R. and Reys, S., *Social Policy in Action Session*, Making the Boom Pay Conference, University of Melbourne, 3 November 2006, p7. Unpublished paper provided by Reconciliation Australia.



## Reflections on the current policy framework for Indigenous affairs

After four years of tracking the new policy and service delivery processes through the *Social Justice Report*, it is clear that there are significant problems with the processes for establishing policy and delivering services for Indigenous affairs at the federal level.

Primarily, this is due to an 'implementation gap' between the rhetoric of government and its actual activities. Perhaps most concerning, is that the problems with the current policy settings are well known and documented. The government has largely acknowledged their existence and has made extensive commitments to address them. And yet, the problems continue and are exacerbated year by year.

This is no more apparent than in relation to processes for engagement with Indigenous peoples. The government has consistently emphasised that engagement with Indigenous peoples is a central requirement for the new arrangements to work. And yet, two years down the track, there has been little progress and no apparent priority attached to ensuring that appropriate mechanisms exist to facilitate this. Policy is being developed in a vacuum at the national level, with no connection to Indigenous experiences at the local and regional level and without applying the 'reality test' that comes with Indigenous participation and local engagement.

What this, and previous *Social Justice Reports*, also demonstrate is the lack of coherence between the different levels of service delivery and policy. Through its ambitious commitment to whole of government service delivery (or 'connected government'), the government is aiming for a seamless connection between service delivery and policy development from both the 'bottom up' and the 'top down'.

In practice, the new arrangements are a top down imposition – with policy set centrally and unilaterally by government, confirmed in bilateral processes with state and territory governments (again without Indigenous input) and then applied to Indigenous peoples. The absence of regional mechanisms for engagement with Indigenous peoples is a critical problem that exacerbates this problem.

We only need to go back three years to remind ourselves of the likely outcome of such an absence of effective mechanisms to join the local and regional levels to the national level, and to join service delivery to policy development. The lack of effective connections between the regional and national level was identified as the central problem with the operation of the Aboriginal and Torres Strait Islander Commission (ATSIC), and a key reason cited by the Government for its abolition.

As I set out in chapter 3 of this report, I consider that the lack of effective participation in the new arrangements is the fundamental flaw of the new arrangements. It undermines the intent of the new arrangements, and is likely to undermine the achievement of outcomes into the longer term.

The Government knows this. As chapter 3 shows, the Government highlights the importance of addressing this issue continuously. And yet it does not act.

What the report also reveals is a system that is in a constant state of flux, with continual changes in rhetoric and ambition that is rarely matched by action to implement the stated policy objectives. Also revealed is the lack of involvement



of Indigenous peoples in the formulation of the policy, the token efforts to 'discuss new policy directions' and the paucity of information or systematic dissemination of information on new policy or programs to Indigenous peoples.

As chapter 2 demonstrates in relation to the focus on mainstream accessibility, there is a need to move away from a mindset that is concentrated on process towards one that is more focussed on outcomes. It is mystifying that after two years of the new arrangements there are not clear objectives for improving mainstream accessibility of services to Indigenous peoples, particularly in urban or regional settings.

One of the shortcomings of the new arrangements in Indigenous affairs has been the tendency to characterise all problems besetting Indigenous communities as the result of failed processes - whether it be during the ATSIC era, or more recently, as a lack of coordination on the part of governments in respect of service delivery. It can, however, be misleading to confuse process with outcomes, and it appears that this may be what the new arrangements have unwittingly tended to do.

This confusion can also be seen as a by-product of the failure of the new arrangements to adopt a human rights based approach to addressing Indigenous disadvantage. The necessary components of such a rights-based approach have been set out above and are discussed at length in Chapters 2 and 4.

Chapter 4 of the report provides an overview of international developments in the fields of human rights protection and development cooperation generally, as well as specifically in recognising the human rights of Indigenous peoples. Read in the context of the current federal Government policy development approach as outlined in chapters 2 and 3 of the report, this chapter vividly demonstrates the shortcomings of the current approach being adopted by the federal government and shows how out of step this approach is with international developments.

Again, the government knows this. It participates actively in United Nations processes and has made solid commitments to implement its obligations. And yet there exists a substantial 'implementation gap' between these commitments and the domestic policy framework for Indigenous affairs.

In launching the Best Practice Guide to policy implementation, the Secretary of the Department of Prime Minister and Cabinet (Dr Shergold) made the following comments about the importance of leadership within the public service that are of particular relevance for Indigenous affairs:

Good management practices consistently applied and a strong implementation culture persistently pursued are the foundations of effective project leadership...

...we need leaders who can sell the message and set the tone. We require people at the top who appreciate fully the increasing importance of dealing with problems from a whole of government perspective or, given the concurrent responsibilities of our federal system, across jurisdictions.

Those of us in positions of situational authority need to pay serious attention to how our agencies can generate greater policy innovation at the start of the policy cycle while, at the other end, pursuing administrative innovation to improve our delivery capabilities. There needs to be greater recognition that success depends not just on the effectiveness of our own organisations but our ability to work in





partnership with a variety of others. We require leaders who see the link between structures, processes, strategy and workplace culture.<sup>29</sup>

As this report demonstrates, there is a critical failing of leadership on Indigenous issues within the public service on these criteria. This is particularly so from the central coordinating agency for the new arrangements, the Office of Indigenous Policy Coordination (OIPC).

The rhetoric of the new arrangements – as set out in COAG principles and commitments, the government's blueprint and other documents endorsed through the myriad of structures to support whole of government activity – is rarely matched by implementation. It cannot be said that there exists a 'strong implementation culture' when the phraseology of the new arrangements is seen as an end in itself.

The obsession with process that is the hallmark of the OIPC's activities mistakenly confuses administrative change with policy innovation. It lacks an evidence base (how else do we explain policies on issues such as the viability of outstations and homelands and the obsession with opening up communal land for individual leasehold arrangements that contradict all available evidence?), occurs without stakeholder engagement, is conducted outside of a learning framework and lacks transparency. It is also an increasingly punitive framework that scapegoats Indigenous peoples for the failures of government service delivery and thereby neatly sidesteps accountability for the historic and ongoing under-performance of government on Indigenous issues.

Ultimately, the 'new broom' that has been introduced through the new arrangements to date has been a process broom. This has both exaggerated the role of process as a cause of Indigenous disadvantage, and resulted in other key issues not receiving the priority attention they deserve. In particular, it does not pay sufficient attention to:

- the urgent need to improve access to mainstream services;
- the need to give Indigenous peoples a real and substantive voice at the negotiating table – it is a simple fact that without full Indigenous participation we cannot move from a passive welfare model, no matter how punitive an approach is adopted;
- the significant under investment in infrastructure for Indigenous communities, a problem which is being exacerbated by the young and highly mobile demographic profile of the Indigenous population; and
- the need to support Indigenous communities in capacity building to assist them in developing autonomy and self-reliance.

The final words of Dr Shergold quoted above are of particular importance: 'We require leaders (within the public service) who see the link between structures, processes, strategy and workplace culture.'

An essential link between structures, processes etc is effective participation of Indigenous peoples. The centralised, 'top down' approach that predominates

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29 Shergold, P, *Implementation Matters*, Speech given at the launch of 'Implementation matters: the better practice guide to the implementation of programme and policy initiatives', Canberra, 16 October 2006, p2, available online at: [www.pmc.gov.au/speeches/shergold/implementation\\_matters\\_2006-10-16.cfm](http://www.pmc.gov.au/speeches/shergold/implementation_matters_2006-10-16.cfm).



from the OIPC does not promote the type of workplace culture that can lead to sustainable changes for the improvement of the lives of Indigenous peoples. At various stages of this report, I have identified specific concerns about the leadership on Indigenous affairs that is currently provided by the OIPC.

It is a culture of control that perhaps unintentionally disempowers Indigenous communities, and it is a culture that is not based on respect and partnership. Indigenous peoples are treated as problems to be solved, not as partners and active participants in creating a positive life vision for the generations of Indigenous peoples still to come.

The greatest irony of this is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services!

There needs to be a re-engagement with Indigenous Australians on the basis of mutual respect and equality, with clear processes and certainty of structures for Indigenous representation and advocacy. Without this, it remains uncertain whether the new arrangements can produce tangible, significant and lasting benefits rather than amounting to little more than an administratively complex repackaging of existing programs.

There are now four years of *Social Justice Reports* that outline in detail concerns that must be addressed. There can be no excuse for ongoing policy failure. And there can be no doubt at whose feet such failure lies.

## **Contents of the *Social Justice Report 2006***

**Chapter 2** of this report identifies the ongoing obstacles and challenges that need to be overcome if mainstream services are to meet the needs of Indigenous Australians. One of the catchcries of the new service delivery arrangements is that they are aimed at 'harnessing the mainstream.' This is to be achieved by removing or reducing the barriers that prevent Indigenous peoples from accessing existing mainstream services on an equitable basis. The chapter focuses predominately on the role of the new whole of government machinery in achieving better synergies between mainstream programs and Indigenous specific services.

The chapter also demonstrates that a degree of instability appears to characterise the new arrangements in Indigenous affairs with a seemingly endless raft of complex changes to the government's administrative processes and policies. The rhetoric of the arrangements is strong, but the outcomes remain elusive. The chapter analyses the processes of the new arrangements in some depth and offers suggestions about how existing commitments and processes could be turned into action to achieve this critical goal of improving mainstream accessibility of programs and services.

**Chapter 3** of the report then considers developments through the new arrangements at the federal level to ensure the effective participation of Indigenous peoples in decision making that affects our lives. This includes the development of policy, program delivery and monitoring by governments at the national, as well as state, regional and local levels.



The chapter provides an update on developments at the national and regional level. It is clear that the mechanisms for Indigenous participation in the new arrangements remain inadequate. Indeed this ongoing failure to ensure Indigenous participation in decision making is the fundamental flaw in the implementation of the new arrangements. I also provide a brief overview of developments by some Indigenous peoples in relation to a national representative body and share briefly my thoughts on the matter.

It then looks to developments at the local level through Shared Responsibility Agreements (SRAs) to see how this program of activities is unfolding. The chapter contains a series of interviews with three SRA communities, and the results of a national survey of two thirds of those Indigenous communities or organisations that had entered into an SRA by the end of 2005.

The chapter then looks to ways forward which address the significant concerns that have been raised. It makes clear that it is *not* a flaw in design or of government policy. Government commitments exist to ensure the maximum participation of Indigenous peoples in decision-making and these commitments have been consistently re-affirmed by the government. The concerns reflect a problem of implementation.

**Chapter 4** then considers developments at the international level that impact upon the recognition and protection of the human rights of indigenous peoples. Much of the focus at the international level has now begun to address the need for implementation. There exists concern at the existence of a 'protection gap' between the rhetoric and commitments of governments relating to the human rights of Indigenous peoples and the activities of governments on the ground. This 'protection gap' exists due to limited consideration of the Government's human rights obligations in the settling of policy and delivery of programs as they affect Indigenous Australians.

Recent developments emphasise the importance of adopting a partnership approach that secures the effective participation of indigenous peoples. Accordingly, this chapter also considers what actions ought to be taken within Australia, by governments and by our Indigenous communities and organisations, to facilitate improved partnerships with Indigenous peoples and ultimately to address the 'protection gap' between international standards and commitments, and domestic processes.

**Appendix 1** of the report contains a chronology of events relating to the new arrangements for Indigenous affairs at the federal level from 1 July 2005 to 30 June 2006. This is the third year such a chronology has been included in the *Social Justice Report*.

**Appendix 2** then reproduces the summary guide to a recent publication by the Human Rights and Equal Opportunity Commission that provides an overview of findings of research on family violence in Indigenous communities.

**Appendix 3** reproduces the Survey form used for the national survey of Shared Responsibility Agreements. The outcomes of the survey are reproduced in chapter 3.

**Appendix 4** then reproduces extracts from the *resolution* and Program of Action for the Second International Decade of the World's Indigenous Peoples. This provides a vital tool for bridging the implementation gap between the international and domestic systems.

