



*Incorporating the Cooperative Research Centre  
for Aboriginal and Torres Strait Islander Health*

# **Legally Invisible—How Australian Laws Impede Stewardship and Governance for Aboriginal and Torres Strait Islander Health**

Genevieve Howse

November 2011

© The Lowitja Institute, 2011

ISBN 978-1-921889-17-2

## **Executive Summary**

This paper explains the options available for Australian governments to articulate and allocate responsibilities for the health and health care of Aboriginal and Torres Strait Islander people in an enduring, reliable form. It was commissioned by the Lowitja Institute – Australia’s National Institute for Aboriginal and Torres Strait Islander Health Research in response to widespread recognition of problems in the policy and administrative arrangements for health and health care for Australia’s First Peoples, including lack of clarity about the responsibilities of governments at various levels.

### **Rationale and method**

The need to consider this question arises in the context of the universally acknowledged seriousness of ‘the health gap’—the relatively poor health status of Aboriginal and Torres Strait Islander people—and concerns about the effectiveness of current governance and stewardship arrangements, both nationally and in the Australian jurisdictions (States and Territories).

National stewardship for health has been defined as ‘the careful and responsible management of the wellbeing of the population’ (WHO 2000:viii) and is the responsibility of government, usually through a ministry of health. In broad terms, governance can be defined as ‘the actions and means adopted by a society to promote collective action and deliver collective solutions in pursuit of common goals’ (Dodgson, Lee & Drager 2002:6). Governance for health is founded in both legislative and administrative arrangements. Currently, administrative arrangements for Aboriginal and Torres Strait Islander health and health care are characterised by diffused responsibilities among national and jurisdictional governments and multiple portfolios, together with high administrative costs in the negotiation, coordination and implementation of tightly specified, time-limited programs and ‘strategies’.

On the other hand, recognition in law is powerful. Legislative duties and functions are the focus of public service departments and agencies. Ministers and secretaries must report compliance and progress against them. Agencies receive recurrent funding in budgets for legislated functions, and policy making and planning activities concentrate on them. International obligations, and the human rights-based approach to health, also favour legislation and national policy (Aboriginal and Torres Strait Islander Social Justice Commissioner 2005:54).

This paper focuses on the question of options for legislative approaches to stewardship and governance for Aboriginal and Torres Strait Islander health, as an alternative to the existing complex and changing administrative approaches.

### **The current legal and policy framework**

A comprehensive review of existing health legislation in Australia found very little specific recognition of the needs of Aboriginal and Torres Strait Islander people in any of Australia’s nine jurisdictions. Where it was found, it generally failed to provide for a mechanism of input to decision making or implementation. This almost total lack of recognition in national and sub-national laws for the health needs of Aboriginal and Torres Strait Islander people leaves

a weak or non-existent legislative structure on which to found stewardship and governance for Aboriginal and Torres Strait Islander health.

Of 69 principal Acts administered by the Commonwealth Department of Health and Ageing (DoHA 2009), three specifically refer to Aboriginal and Torres Strait Islander people and none create responsibility for stewardship or governance. Of the approximately 200 Acts administered by State and Territory health authorities, only South Australia has included specific provisions in its public health law or health service delivery law that could be used to justify policy making, programming and financing decisions. Thus, among the approximately 250 principal Acts administered by the Commonwealth, State and Territory health portfolios, there is no Australian law or series of laws which, taken together, create a legislative structure to secure stewardship and governance for the health of Aboriginal and Torres Strait Islander people.

### **Three approaches to law and policy**

There are three relevant ways of conceptualising laws and legal policy for Aboriginal and Torres Strait Islander health and health care:

- a human rights approach
- therapeutic jurisprudence
- legal pluralism.

The human rights approach (based on international covenants) gives weight to advocacy for a broad-based and holistic approach to stewardship and governance for Aboriginal and Torres Strait Islander health.

Therapeutic jurisprudence is the idea of the law itself having positive or negative therapeutic consequences. Legal pluralism gives weight to an acknowledgment that more than one source of law in Australia may be relevant to stewardship and governance for Aboriginal and Torres Strait Islander health. Both of these latter two approaches, as well as supporting constitutional recognition, also provide a basis for recognition of customary and community-based approaches to health promotion, health education and the prevention of diseases.

### **Experiences of other countries**

Other countries with Indigenous populations and an introduced legal system have grappled with similar issues. No country is exactly like Australia, but examination of the experience of New Zealand, the United States (US) and Canada supports the value for health governance and stewardship of legal recognition, and the need for greater coherence in policy and program responsibility.

### **Options for law reform**

This paper identifies a number of elements necessary to achieve stewardship and good governance, including:

- constitutional recognition as a basis;
- governance arrangements that bring together the levers for policy-making
- clarity of responsibility
- an active role for Aboriginal and Torres Strait Islander people.

Three options for law reform are derived from the analysis in this paper. The first is a Commonwealth law that establishes government responsibility for important functions and principles to guide interpretation and administration of all Commonwealth health legislation. The second would be nationally consistent laws at State and Territory level (on the model of the national health practitioner registration laws). The third is the development of model provisions for adoption, as required, into State and Territory law.

### **Conclusions**

This review shows that the configuration of Australian laws allocating responsibility for the health of Aboriginal and Torres Strait Islander people fails to set up a structure in which system-wide stewardship and good governance may be undertaken. Instead, the current configuration of laws creates a need to negotiate through a bewildering array of jurisdictions, laws, policies, criteria for funding, and funding streams through, and within which, accountability for health outcomes is diffused and muddled.

Laws and legal systems are capable of change. Recent shifts, and the continuing national conversation about recognition of Aboriginal and Torres Strait Islander people in our Constitution, encourage optimism that the national consciousness may be more open to reform.