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Australia's National Institute for Aboriginal and Torres Strait Islander Health Research

POLICY BRIEF: MARCH 2012

Building a Legal Framework

for Aboriginal and Torres Strait Islander Health

Australia is one nation, but its federal structure and Constitution mean that health services are governed by a bewildering array of laws and policies that differ across its States and Territories. In particular, apart from a few notable exceptions, these legislative arrangements do little to support the provision of appropriate health services to Aboriginal and Torres Strait Islander people.

A recently published paper, *Legally Invisible–How Australian Laws Impede Stewardship and Governance for Aboriginal and Torres Strait Islander Health*, argues that the lack of an Australian law or set of laws to create responsibility for stewardship and governance for policies and programs to benefit the health of Aboriginal and Torres Strait Islander people in fact has **negative** health consequences.

With a national conversation now taking place about recognising Aboriginal and Torres Strait Islander people in the Constitution as Australia's First Peoples, the time has come to consider consistent and comprehensive legislative approaches to ensure that Aboriginal and Torres Strait Islander people receive appropriate health services. Policy and program commitments, as well as enabling arrangements, should fit clearly into an overarching responsibility in Commonwealth and/or State legislation, rather than depending on a complex and ever-changing administrative landscape.

The 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.

Key Recommendations

- A Commonwealth law that establishes Federal Government responsibility for important functions, and principles to guide interpretation and administration of all Commonwealth health legislation OR
- Nationally consistent laws at State and Territory level (on the model of the national health practitioner registration laws) OR
- The development of model legal provisions for adoption, as required, into State and Territory law.

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. The review showed that:

- 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 in support of Aboriginal health and health care.
- 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.

How do other countries compare?

- **CANADA:** there is a lack of constitutional clarity on allocating responsibility for health care, resulting in a shifting mix of federal, provincial and territorial programs and services as well as services provided directly by some Aboriginal communities. The federal Government limits its responsibility to being 'payer of last resort'.
- **UNITED STATES:** courts have determined that, under the US Constitution, Congress has clear responsibility for regulating the affairs of Indian tribes, and that the Indian Health Service (a separate entity within the federal Department of Health and Human Services) is recognised as the principal federal health care provider and health advocate for Indian people.
- **NEW ZEALAND:** both the original Constitution and the Treaty of Waitangi recognise Maori law and customs, and the Treaty of Waitangi is a key reference point for health laws that include specific provisions for Maori involvement in health policy making and service delivery.

As a general conclusion, it appears that constitutional/legal recognition of an Indigenous people's existence and particular needs provides a basis for the creation of other laws to ensure that their specific health needs are catered for.

Different 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:

- **HUMAN RIGHTS** – this approach gives weight to advocacy for health system reform using Australia's official participation in international treaties as the lever.
- **THERAPEUTIC JURISPRUDENCE** – the idea that laws can be chosen or designed on the basis of their potential to provide positive (therapeutic) impact for people (see Box).
- **LEGAL PLURALISM** – this approach acknowledges that customary as well as common law may be relevant to stewardship and governance for Aboriginal and Torres Strait Islander health.

Where to from here?

A number of elements are necessary to achieve stewardship and good governance, including:

- Constitutional recognition of Aboriginal and Torres Strait Islander people 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.

Therapeutic Jurisprudence

This is a relatively recent legal concept that sees the law as having both positive and negative effects on individuals and groups of people. Seen through this lens, the purpose of lawmakers should be to bring about legal change that increases the positive (therapeutic) effect of laws and decreases the negative effect.

So, for example, the concept of *terra nullius* that gave legal cover to European colonisation of Australia is one example of a construct that clearly had negative effects. The denial of citizenship rights to Aboriginal and Torres Strait Islander people is another.

The paper argues that the current agglomeration of laws and policies that establish the health system have health consequences for Australia's First Peoples, and that without reform these consequences will continue to be largely negative and hamper efforts to close the gap in health outcomes.

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A full copy of the *Legally Invisible* report is available in PDF format for download from the Lowitja Institute website (**www.lowitja.org.au**).

PUBLICATIONS

Howse, G. 2011, *Legally Invisible—How Australian Laws Impede Stewardship and Governance for Aboriginal and Torres Strait Islander Health,* The Lowitja Institute, Melbourne.

REFERENCE

Department of Health and Ageing (DoHA) 2009, *Legislation Administered by the Minister for Health and Ageing*. Available at: www.health.gov.au/internet/main/publishing.nsf/Content/health-eta2.htm.

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