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Comparative Study on the Collection of data to Measure the Extent and Impact of Discrimination in a selection of countries

Medis Project (Measurement of Discriminations)

Final Report on Australia

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Summary

INTRODUCTION

In Australia, the fight against discrimination practices relies for the most part on a judicial approach towards discrimination. This approach is based on a broad judicial foundation which covers a group of prohibited discriminatory criteria (at the federal level, race, disability and sex, and other grounds depending on the State in question). All of the Australian States and Territories have enacted anti-discrimination laws in the areas of employment, education, access to goods and services (even though the areas covered may vary[1]) and generally follow a similar complaint handling process which allows them to address all breaches of the law.

Even though these laws are based on identifying certain groups facing a disadvantage because of their membership in a specific community (Aboriginal, women, handicapped people), the legal structure requires the individual to act in his/her own behalf in order to address their individual situation. Hence, the concept of "discrimination" itself is often limited to the judicial area and to individual cases. In referring to groups, public policy, as well as Australian statistics, refer to "disadvantage" which includes discrimination while being broader in meaning (and including social and economic elements). The monitoring conducted by Australian statistics and revealed in its publications (or by Ministries through their administrative data) on these groups also focuses on disadvantages more than on discrimination *per se*. These disadvantages are recognized for certain groups and are the subject of equal opportunity programs (mainly).

For historic reasons, however, Australian lends particular attention to its Aboriginal community and has (belatedly) recognized a historic and systemic discrimination in its regard. Australia is a multicultural society and considers itself as such and therefore is committed to promoting cultural diversity.
These two specific characteristics are fundamental to the subject matter of this report and explain the weaknesses in the research material collected relating to discrimination on religious and sexual orientation grounds.

Beyond its quite remarkable judicial structure with regard to discrimination, Australia remains exemplary for many reasons. The standardization of Australian statistics regarding ethnicity and the Aboriginal, as well as its administrative statistical information, underline the importance of using such tools in assessing public policies and equity programs.

[1] See Annex A.

I - LEGISLATION AND POLICY

This part of the report on Australia's anti-discrimination regime addresses legislation and policy. Consistently with the approach taken in relation to the report as a whole, the primary focus is on legislation and policy at the federal or 'Commonwealth' level. However, given Australia's politico-legal structure in which responsibility for combating discrimination is shared by the federal and regional governments, this part of the report also looks at a regional case-study, namely New South Wales. New South Wales was chosen because it is the most populous Australian State[2], it has the largest single economy and constitutes the most developed of the regional polities.

Australian governments at the federal and regional levels have developed detailed and relatively wide-ranging anti-discrimination legislation and policy. Discrimination on the grounds of race and disability is addressed thoroughly by statute at all levels of government. The grounds of religion and sexual orientation are also addressed by the relevant legislation but not in such a comprehensive manner. Each government at the federal and regional level has established its own statutory body the primary role of which is to oversee that jurisdiction's anti-discrimination legislation and to deal with complaints.

The monitoring of discrimination in Australia, as established by law, is largely *ad hoc*: there are few legislative requirements to collect or publish particular categories of discrimination data, and such monitoring restrictions as exist are largely targeted at protecting the privacy of discrimination complainants. The statutory anti-discrimination bodies at the federal and regional levels constitute central repositories for the collection and dissemination of data on discrimination. There are also other, specialised statutory bodies and some non-government organisations which collect and publish data relevant to discrimination. Almost all rely, at least in part, on government funding. However, there is no *direct mechanism* which triggers the development of legislation or policy following the publication of results from demographic surveys suggesting particularly problematic phenomena in the field of discrimination.

[2] New South Wales has a population of 6,411,700 out of a total population in Australia of 18,966,800 (estimates for 1999, Australian Bureau of Statistics).

A/ Background to the Australian System

1) Historical Background

The territory now known as Australia was, until 1788, inhabited exclusively by indigenous peoples. On 26 January 1788, sovereignty over this territory was assumed by the British and from this time until 1 January 1901, the territory was divided into semi-autonomous colonies under the ultimate control of the Imperial Parliament in London. On 1 January 1901, Australia became an independent nation, adopting the structure of a federation. As a result, the Australian colonies were converted into the States of the newly federated nation.

On arrival in Australia, the British settled the territory on the assumption that the territory was *terra nullius*. Under this doctrine, the territory was perceived as being, if not uninhabited, then inhabited by a class of people so low in the scale of social organisation as not to possess the capacity to enter into an agreement over the land which they previously inhabited exclusively of other human beings.[3] The effect of this assumption was that, unlike in other countries with a similar history of British colonisation such as Canada[4] and New Zealand[5], no treaty or other such agreement was reached between the settlers and the indigenous inhabitants of Australia; instead, sovereignty was acquired as if there had not been any previous inhabitants.[6] While the doctrine of *terra nullius* was repudiated by the High Court of Australia in 1992 leading to the development of a system of 'native' (or indigenous) title to land,[7] the acquisition of sovereignty by the British settlers (and their legal successors) has, as a matter of law, been found to be beyond question.[8]

2) The Australian Politico-Legal System

The Australian polity has three tiers of government: the Federal (also known as "the Commonwealth"); the Regional (Australia consists principally of six States and two Territories); and, the Local (with limited power to enact by-laws). Under the federal system, these tiers of government have overlapping jurisdiction, with the Commonwealth given a finite, enumerated list of powers and the States exercising plenary power. Anti-discrimination regimes have, in essence, only been developed at the Federal and Regional levels.

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[3] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 39-40.
[4] See, for example, the *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada*.
[5] See, for example, the *Treaty of Waitangi* 1840.
[6] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40.
[7] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
[8] *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Coe v Commonwealth of Australia (The Wiradjuri Claim)* (1993) 68 ALJR 110 at 114 per Mason CJ; and, *Walker v New South Wales* (1994) 182 CLR 45 at 48 per Mason CJ.

Government at the Commonwealth level, and to a lesser extent in the States and Territories, embodies a strict separation of powers as between the legislature, the executive and the judiciary. The application of this in the field of anti-discrimination is that at the federal and regional levels:

- *the legislature* enacts legislation which aims to address individualised and/or systemic discrimination;

- *the executive* administers anti-discrimination policy, identifying, monitoring and counteracting discrimination by facilitating conciliation between the person claiming to have suffered discrimination and the alleged discriminator; and

- *the judiciary* acts as the arbiter, providing definitive determinations on questions of fact and law to establish whether a claim of discrimination has been made out.

With respect to the judicial arm of government, separate jurisdictions exist for the Commonwealth and for each of the States. Thus, the Commonwealth and each of the States possesses its own judicial system. However, the various judicial systems are in a sense unified by the High Court of Australia which is the ultimate court of appeal for almost any legal controversy in Australia. All Australian jurisdictions are common law jurisdictions. Consequently, the sources of law to which the judiciary pays regard are: the Commonwealth *Constitution*; ordinary statutes enacted by Commonwealth, State and Territory parliaments; the common law (i.e. 'judge-made law'); and, international law. Of these sources of law, the common law is of marginal relevance in the field of discrimination as there has developed no common law in respect of discrimination.[9]

A function of the overlapping jurisdiction in the anti-discrimination area is that a concept of 'dual citizenship' has developed: that is, Australians can access separate governmental structures developed at the federal and the regional level but covering the same or similar area.[10] Applying this to the issue at hand, this means that an individual is entitled to make a complaint of discrimination using *either* the Commonwealth anti-discrimination regime *or* that of the State or Territory in which they were located at the relevant time. Hence, if discriminatory conduct the subject of a complaint is not covered by Commonwealth legislation but is covered by the law of the relevant State or Territory, the complainant can bring their complaint under the State or Territory law – or vice versa if the Commonwealth law does provide coverage but the State or Territory law does not.

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[9] Ronalds, C and Pepper, R, *Discrimination Law and Practice* (2nd ed, 2003) at 3. See also, for example, the former Commonwealth Attorney-General, Keppel Enderby, who, prior to the enactment of Australia's first anti-discrimination legislation, noted that "[t]he common law provides few effective remedies against discrimination … whether it is based on race or colour or on any other grounds": Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 1975 at 285.

[10] See generally, for example, Galligan, B and Walsh, C, "Australian Federalism Yes or No?" in Craven, G (ed), *Australian Federation* (1992) 193 at 196.

Outside of the direct processes of government, non-governmental organizations also have a role in the Australian politico-legal system with respect to discrimination: such groups lobby government on particular issues; collect, collate and disseminate data on discrimination; and, consult with government to develop new and monitor existing anti-discrimination law and policy.

3) The Means of Countering Anti-Discrimination

It has long been recognised by government in Australia, at the federal and regional levels, that an effective anti-discrimination regime must address the problem of discrimination at several levels. Hence, governments at the federal and regional levels have established anti-discrimination regimes which function as follows:

- Each legislature has enacted legislation proscribing certain conduct deemed to be unlawful discrimination. These constitute judicially enforceable standards. Furthermore, each legislature has, to varying degrees, established statutory programs which are directed at achieving *substantive* justice through equal opportunity or 'affirmative action' methods.

- Each legislature has established, as part of that jurisdiction's executive, a statutory body,[11] the role of which is principally to oversee that jurisdiction's anti-discrimination legislation, providing regular advice and assistance to Parliament on the development of laws, programs and policies relating to discrimination; and, to collect and collate data on certain forms of discrimination.

- Government Departments and instrumentalities have been instructed to develop policies consistent with anti-discrimination principles.

[11] These bodies are:
New South Wales's Anti-Discrimination Board (www.lawlink.nsw.gov.au/adb); Queensland's Anti-Discrimination Commission (www.adcq.qld.gov.au); South Australia's Equal Opportunity Commission (www.eoc.sa.gov.au); Tasmania's Anti-Discrimination Commission (www.justice.tas.gov.au/adcadcfrontpage.htm); Victoria's Equal Opportunity Commission (www.eoc.vic.gov.au); Western Australia's Equal Opportunity Commission (www.equalopportunity.wa.gov.au); the Australian Capital Territory's Human Rights Office (www.hro.act.gov.au); and, the Northern Territory's Anti-Discrimination Commission (www.adc.nt.gov.au).

B/ Principal Legislative and Institutional Mechanisms: the Federal Level

1) Legislation

a) The Constitution

Unlike countries such as the United States of America and Canada, Australia does not have a constitutionally enshrined 'bill' or 'charter' of rights. As a result, there is no broad, constitutional prohibition against discrimination. Such constitutionally enshrined rights as exist in Australia are either expressed *explicitly* in the Commonwealth *Constitution* 1901 ("the Constitution") or must be divined as *implications* from the text or structure of the Constitution.

Relevant to the field of discrimination, the explicit protections in the Constitution are limited:

- Section 116 states that "[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".

- Sections 51(ii), 117 and 118 prohibit discrimination on the ground of State residence. As there can be no logical connection between the State in which one resides and one's race or ethnic origin, these provisions of the Constitution do not cover discrimination on those grounds.

A more difficult question is that of implicit constitutional protections. The High Court has in the past implied a freedom of political communication in the Constitution,[12] and it is possible that the Court may in the future imply further protections against discrimination. It should be noted, however, that recent attempts to extend implied constitutional protections of human rights have been largely unsuccessful. One provision deserves further mention: s 51(xxvi) of the Constitution originally gave the Commonwealth power to make laws "for the peace, order, and good government of the Commonwealth with respect to… the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws". The words "other than the aboriginal race in any State" were removed following a referendum in 1967.

[12] For the nature and scope of this freedom, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559 wherein the High Court said, "[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government which the Constitution creates".

It has been argued that, even if the original intention was otherwise[13], this provision should now be interpreted as meaning that the Commonwealth cannot pass laws intended to discriminate (detrimentally) against Australian indigenous peoples.[14] No Australian court has yet ruled definitively on this issue.

b) Other federal legislation

The Commonwealth has enacted legislation which touches to varying degrees on each of the grounds of discrimination relevant to this study.

c) Race

The *Racial Discrimination Act* 1975 (Cth) was the first anti-discrimination statute enacted by the Commonwealth. Its purpose was "to make racial discrimination unlawful … and to provide an effective means of combating racial prejudice in this country" on both an individual and a "systematic" basis.[15] It covers discrimination based on race, racial hatred, racial vilification, incitement, aiding and permitting and establishes vicarious liability.

d) Disability

The *Disability Discrimination Act* 1992 (Cth) was intended to "assist all people with disabilities to exercise their rights as Australian citizens".[16] The Act establishes a three-pronged approach in the field of disability discrimination, aiming to "eliminate, as far as possible, discrimination" in work, accommodation, education, access to premises, clubs and sport, in the provision of goods and services, under the law and in the administration of Commonwealth laws and programs; to "ensure, as far as practicable" equal opportunities; and, to "promote recognition and acceptance" that people with disabilities have "the same fundamental rights as the rest of the community".[17] The Act covers direct and indirect discrimination based on disability, disability harassment, victimization, incitement, aiding and permitting and establishes vicarious liability.

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[13] There is ample evidence which suggests that s 51(xxvi) was intended to provide the Commonwealth with clear permission to enact racially discriminatory laws. See, for example, Quick and Garran, *Official Record of the Debates of the Australasian Federal Convention* (1891-1898, reprinted Legal Books 1986), vol 4, Melbourne 1898 at 623.

[14] See, for example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 367-368 per Gaudron J and French, R, "The Race Power: A Constitutional Chimera", *Australian Constitutional Landmarks* (2003) at 201 and 205.

[15] Commonwealth Attorney-General, Keppel Enderby, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 13 February 1975 at 285-286.

[16] Commonwealth Minister for Health, Housing and Community Services, Brian Howe, Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 May 1992 at 2750.

[17] *Disability Discrimination Act* 1992 (Cth), s 3.

e) Religion

Other than s 116 of the Constitution (see above), there is no specific, dedicated piece of Commonwealth legislation which covers discrimination based on religion. However, there are certain Commonwealth statutes which provide some limited protection against discrimination based on one's religion. First, the *Racial Discrimination Act* has, by judicial extension, been applied to protect adherents of certain religions from discrimination. Thus, the definition of 'race' or 'ethnic origin' in that Act has been found to include Jewish people in Australia.[18] It is unclear, however, whether other religious groups would be covered by the *Racial Discrimination Act*.[19] Secondly, s 170CK(2)(f) of the *Workplace Relations Act* 1996 (Cth) provides a prohibition (with certain exceptions) on terminating a person's employment because of their religion. Thirdly, the *International Covenant on Civil and Political Rights* (the "ICCPR") is annexed as a Schedule to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).[20] This provides some further limited protection against discrimination based on religion: one can complain to the Human Rights and Equal Opportunity Commission that the Commonwealth, or one of its instrumentalities, has contravened Article 26 of the ICCPR which prohibits discrimination on grounds including religion.

f) Sexual Orientation

There is no dedicated Commonwealth statute prohibiting discrimination based on sexual orientation. This is notwithstanding that there have been numerous calls for such legislation both from outside government[21] and from within the Parliament itself[22]. There are three Commonwealth statutes which provide some limited protection against discrimination based on sexual orientation. First, s 170CK(2)(f) of the *Workplace Relations Act* 1996 (Cth) provides a prohibition (with certain exceptions) on terminating a person's employment because of their "sexual preference". Secondly, one can complain to the Human Rights and Equal Opportunity Commission that the Commonwealth, or one of its instrumentalities, has contravened Article 26 of the ICCPR which prohibits discrimination on "any ground".

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[18] *Miller v Wertheim* [2002] FCAFC 156 at [14] and *Jones v Scully* (2002) 120 FCR 243 at 272.

[19] See: Human Rights and Equal Opportunity Commission, *Federal Discrimination Law 2004* (2004) at 7-8. In relation to racial hatred, it seems that the Commonwealth did intend that a broad definition of 'race' should be adopted, but in relation to other forms of racial discrimination, it has been questioned whether Muslim people for instance would be covered. HREOC (at 8) notes that "other jurisdictions have found that Muslims do not come within the meaning of ethnic group because while Muslims professed a common belief system, the Muslim faith was widespread covering many nations, colours and languages."

[20] It should be noted, however, that while the ICCPR has been signed and ratified by Australia and included as a Schedule to the *Human Rights and Equal Opportunity Commission Act*, the High Court has made clear that these actions alone are not enough to incorporate the ICCPR into Australian law: *Dietrich v The Queen* (1992) 177 CLR 292 at 305 per Mason CJ and McHugh J.

[21] See, for example, Mason, G, "Harm, Harassment and Sexuality" (2002) 26(3) *Melbourne University Law Review* 596.

[22] Legal and Constitutional Affairs Committee, Senate, *Report on Inquiry into Sexuality Discrimination*, 1997 (see recommendations of majority).

Thirdly, s 4 of the *Human Rights (Sexual Conduct) Act* 1994 (Cth) provides that "sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights".

Principal Mechanism to Address Discrimination

The Human Rights and Equal Opportunity Commission

The Human Rights and Equal Opportunity Commission ("HREOC") is the principal statutory body charged with supervising the Commonwealth anti-discrimination regime. Its responsibilities are, relevantly:

- to inquire into, and where appropriate to assist in conciliation, in relation to alleged discrimination under the *Racial Discrimination Act*, the *Sex Discrimination Act*, and the *Disability Discrimination Act*, and in relation to alleged infringements of human rights under the *Human Rights and Equal Opportunity Commission Act*;
- to assist in appropriate court proceedings, either through intervention or as *amicus curiae*;
- to educate and enhance awareness among the public, the government and the business sector on discrimination issues; and
- to assist in policy and legislative development.

As part of this process, HREOC also collects and publishes statistics relevant to discrimination (see below).

Individual Complaint Handling

HREOC is the official complaint-handling body for allegations of unlawful discrimination. In the first instance, HREOC assists the parties to the dispute by facilitating conciliation[23] and, only if conciliation fails, can the matter subsequently be transferred to the federal judiciary. Part IIB of the *Human Rights and Equal Opportunity Commission Act* establishes the process by which complaints of unlawful discrimination are to be conciliated:

- A written complaint is lodged by or on behalf of a person ("the complainant") which alleges unlawful discrimination by another person or agency ("the respondent"). The complaint must set out the grounds of discrimination and the details of the act in question.

[23] Previously, HREOC had a tribunal function with the power to issue binding determinations. This function was removed by the *Human Rights Legislation Amendment Act (No 1)* 1999 (Cth).

- An officer from HREOC determines whether the complaint is covered by the relevant legislation. The President of HREOC will then decide whether to reject the complaint on procedural grounds (e.g. failed to lodge complaint in time; no allegation of breach of law etc).
- If accepted, the complaint will be investigated by an officer from HREOC.
- The officer will attempt to conciliate the dispute by arranging a meeting between the complainant and the respondent, and suggesting ways of reaching an agreement. This process is confidential: what is said here cannot be used in subsequent judicial proceedings.
- If conciliation fails to resolve the dispute, the President will terminate the complaint. Thereafter, the matter can, within 28 days, be transferred to the federal judiciary (at first instance to the Federal Magistrates Court or the Federal Court of Australia, with limited appeal rights to the Full Court of the Federal Court of Australia and the High Court of Australia).

Principal Legislative and Institutional Mechanisms: a Regional Case-Study (New South Wales)

New South Wales Legislation

There is no constitutional protection against discrimination under the New South Wales *Constitution Act*, nor in the Constitution of any other State or Territory.[24] New South Wales has only one principal piece of legislation covering discrimination: the *Anti-Discrimination Act* 1977 (NSW) ("the NSW Act"). This is indicative of the situation at the State level where anti-discrimination law is largely consolidated into one or possibly two statutes.[25] New South Wales anti-discrimination law operates in the following manner.

- *Race*. The NSW Act covers discrimination based on race, racial hatred and racial vilification.
- *Disability*. The NSW Act covers direct and indirect discrimination based on a person's disability (physical and mental impairment). There is another statute, the *Disability Services Act* 1993 (NSW), the objects of which include the promotion of equal opportunities for disabled people in New South Wales.

[24] It is noted, however, that the Australian Capital Territory has recently enacted a statutory bill of rights, the *Human Rights Act* 2004 (ACT), which will come into force on 1 July 2004. This new law will cover discrimination and, in s 8, provides a non-exhaustive list of grounds of unlawful discrimination: "race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status".

[25] The principal statutes in the other States and Territories are: Queensland's *Anti-Discrimination Act* 1991 (Qld); South Australia's *Equal Opportunity Act* 1984 (SA) and *Racial Vilification Act* 1996 (SA); Tasmania's *Anti-Discrimination Act* 1998 (Tas); Victoria's *Equal Opportunity Act* 1995 (Vic) and *Racial and Religious Tolerance Act* 2001 (Vic); Western Australia's *Equal Opportunity Act* 1984 (WA) and Chapter XI of the *Criminal Code* (racist harassment and incitement to racial hatred); the Australian Capital Territory's *Discrimination Act* 1991 (ACT); and, the Northern Territory's *Anti-Discrimination Act* 1992 (NT).

- *Religion*. The NSW Act does not cover discrimination based on a person's religious belief or activity. This is in contrast with every other State and Territory except for South Australia, which have all enacted legislation in respect of discrimination based on one's religion.[26] Indeed, under s 56 of the NSW Act religious organisations (of all denominations) are explicitly exempted from being obliged to comply with state anti-discrimination law in relation to the ordination of priests and other religious practices.
- *Sexual orientation*. The NSW Act covers homosexual vilification and discrimination based on a person's sexuality or transsexuality.

2) Principal Mechanisms to Address Discrimination

a) The New South Wales Anti-Discrimination Board

The New South Wales Anti-Discrimination Board ("the ADB") is the principal statutory body charged with supervising New South Wales' anti-discrimination regime. Its responsibilities, relevantly, are:

- to act impartially in investigating and conciliating complaints of discrimination, harassment and vilification;
- to inform and educate the people of New South Wales, employers and service providers about their rights and responsibilities under anti-discrimination law; and
- to make recommendations to the government about amendments to anti-discrimination law.

As part of this process, the ADB also collects and publishes statistics relevant to discrimination (see below).

b) Individual Complaint Handling: New South Wales

The ADB is the official complaint-handling body for allegations of discrimination under New South Wales law. In the first instance, the ADB assists the parties to the dispute by facilitating conciliation and, only if conciliation fails, can the matter subsequently be transferred to the federal judiciary. Part 9 of the NSW Act establishes the process by which complaints of unlawful discrimination are to be conciliated:

- A written complaint is lodged by or on behalf of a person ("the complainant") which alleges unlawful discrimination by another person or agency ("the respondent"). The complaint must set out the grounds of discrimination and the details of the act in question.

[26] See: *Anti-Discrimination Act* 1991 (Qld); *Anti-Discrimination Act* 1998 (Tas); *Equal Opportunity Act* 1995 (Vic); *Racial and Religious Tolerance Act* 2001 (Vic); *Equal Opportunity Act* 1984 (WA); *Discrimination Act* 1991 (ACT); and *Anti-Discrimination Act* 1992 (NT).

- The President of the ADB (hereinafter, references to the President include to a delegate of the President) is obliged to investigate the complaint. If the President considers that a specified criminal offence has been committed, the President must refer the matter to the Attorney-General.
- The President will determine whether the complaint should be considered further. If not (because, for example, the complaint is deemed to be "frivolous, vexatious, misconceived or lacking in substance"), the complainant will be informed and they will be entitled to refer the matter to the Administrative Decisions Tribunal (NSW).
- The President will determine whether the complaint is suitable for conciliation between the parties. If so, the parties are obliged to attend a conciliation organised by the ADB. This process is confidential: what is said here cannot be used in subsequent proceedings.
- If conciliation is deemed unsuitable or if conciliation has not resolved the dispute between the parties, the President will refer the matter to the Administrative Decisions Tribunal (NSW). Appeals from the Tribunal can be brought in the Tribunal's own Appeal Panel and, from there, to the Supreme Court of New South Wales, with limited further appeal rights to the High Court of Australia.

The extensive deployment of the anti-discrimination system with regard to compliance with the law is illustrated by this presentation of the main legislative and institutional means. Based on a remarkable complaint handling mechanism (for each of the grounds for discrimination studied in this report), the system is effective because of its ease of use (complaint registering over the Internet, information sheets in various languages, territorial distribution: relevant to both the federal and State levels, institutional relays) and the attention lent to the process. However, although the law covers direct, indirect and systemic discrimination, as well as harassment, it is limited by its structure to individuals and only has an indirect impact on the defining of tools to fight discrimination at the group or minority level (with the exception, to some degree, of the Aboriginal peoples). It will more likely be the accepting of Australia as a multicultural and diverse society, and this must first be at a political level, that will influence the design of anti-discrimination tools and focus on statistical data. Statistics are more often used to highlight diversity than as a logic for monitoring discrimination *per se.*

II - SUMMARY: THE USE OF STATISTICS AND THEIR SPECIFICATIONS

A/ Issues surrounding criteria and specific programs

At the forefront, Australian statistics play a fundamental role in legitimizing federal and State policies.

Firstly, statistics (on demographics) illustrate the significant breadth of ethnic diversity within the Australian population and thus justified the multiculturalism policies of the 70's. Secondly, the use of statistics in reports and surveys tabled with the Parliament often supports recommendations on anti-discrimination policies or substantiates submissions leading to the amendment of legislative provisions. These recommendations all include references underlining the importance of the quality (and sometimes standardization, to be more precise) of statistical data in ensuring effective monitoring. This demand for standardization and categorization aims at providing absolute comparisons (socio-economic progress of handicapped people between two intervals, for example, or at an international level), as well as relative comparisons (comparison of the status of indigenous Australians with non-indigenous Australians), when studying the progress or reduction of disadvantages facing target groups.

Further, Equal Employment Opportunity (mainly) which proactively sets out legislative obligations through specific programs requires the implementation of a monitoring structure. This structure includes indicators which relate to target objectives and is broadly based on the use of statistics.

In Australia, however, the use of statistics as a tool to fight discrimination (awareness, identification and evaluation) does not always lead to *monitoring* of *discrimination*, but rather monitoring of a *disadvantage*. Incorporating the discrimination concept into the meaning of 'disadvantage' (which is broader and includes the larger spectrum of socio-economic or cultural inequities) generally occurs when dealing with systemic or institutional discrimination or discrimination against a particular group. Furthermore, disadvantages, whether past or present, only apply to certain groups of the population: Aboriginal and Torres Strait Islander, disabled persons, persons from a background where English is not the main language, and women. They can thus be used as justification for the implementation of specific programs.

1) Ethnic or racial background

For historical reasons, the main tools used in Australia to fight discrimination on grounds of ethnic or racial background relate in particular to two target groups: the Aboriginal and Torres Strait Islander, and immigrant populations. We will look at these two categories separately, focusing on the bodies that represent them and the procedures that have led to establishing the legitimacy of the mechanisms in place for these groups.

a) The Aboriginal and the Torres Strait Islander[27]

Most statistics emphasize the extent of the disadvantages suffered by the indigenous peoples of Australia. They reveal significant health problems, a high rate of unemployment, a low level of studies, insufficient infrastructures and housing, as well as a high rate of arrests, incarceration and deaths while in custody. Alcohol addiction, domestic violence, suicide and other signs of social dysfunction also illustrate the *fragility* of the Aboriginal' specific situation. This is explained by factors which support taking this population into consideration in the implementation of the various governments' social and economic policies. They occupy *de facto* a particular place in Australia's history of anti-discrimination practices[28]. They are the only ethnic group for whom systemic and historical discrimination has been recognized. A detour to study the recognition of this discrimination appears crucial in order to understand the statistical attention focused on this group.

<u>The first objective recognition of the indigenous disadvantage: the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).</u>

The subject of the disadvantage of indigenous peoples was first identified by the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) in 1999. In 2000, it was recognized at an international level by the CESCR[29], in the final observations of the third periodic report on Australia with regard to its obligations under the International Convention for the Elimination of all Forms of Racial Discrimination.

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[27] The Aboriginal and the Detroit Strait Islander are ethnically and culturally distinct. From a historical perspective, the Aboriginal lived on mainland Australia, in Tasmania and on many islands off the coast. The Torres Strait Islander come from the Torres Strait Islands, between York Cape, in Queensland, to Papua New Guinea, and have many cultural similarities with the people of Papua New Guinea and the Pacific.

[28] To be brief, it is worth noting that the Aboriginal were granted the right to vote at the federal level in 1962 (thereafter at the State level). In 1965, the rule instituting equal pay for the Aboriginal workforce in industry and farming was enforced by an arbitration tribunal. In 1967, by referendum, they acquired to the right to citizenship and were counted in the Census for the first time. At the same time, discriminatory laws were repealed. (This year also marked the end of the assimilation policy.)

[29] "*despite the efforts and achievements of the State party, the indigenous populations of Australia continued to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education*", Committee on Economic, Social and Cultural Rights: Concluding Observations: Australia 01/09/2000, UN Doc: E/C.12/1/add.50, 1 September 2000, paragraph 15.

This commission was created on October 16, 1987 by the Commonwealth, six States and the Northern Territory to investigate the death while in custody of 99 Aboriginal and Torres Strait Islander between January 1, 1980 and May 31, 1989. The Commission was responsible for examining the circumstances surrounding the deaths, the measures taken by the authorities and the underlying causes of this phenomenon, including social, cultural and judicial factors. The investigation concluded that even though the rate of deaths in custody was the same for indigenous and non-indigenous people, the proportion of indigenous people within the criminal justice system was disproportionately high. The Commission also concluded that this was essentially due to "the very unfavorable status of many indigenous people within society, on a social, economic and cultural level"[30]. The Commission report's recommendations to the Commonwealth, States and Territories related to a large range of questions, in particular, the measures to be taken to eliminate inequities facing the indigenous peoples and changes to the police and prison practices and infrastructures. All governments have since been obliged to compile yearly reports on the manner in which they have applied, in whole or in part, the Royal Commission's recommendations. A majority of these recommendations have led to the implementation of specific policies or awareness and information programs aimed at the indigenous peoples[31].

As part of its recommendations, the Report also identified the need for implementing a reconciliation process and, in so doing, confirmed that the success of the reconciliation process would be intimately linked with the resolution of the indigenous disadvantage problem.

b) The reconciliation process: the birth of a policy recognizing the Aboriginal and Torres Strait Island peoples

In 1991, an official reconciliation process between the Aboriginal and Torres Strait Islander with other Australians was implemented pursuant to the *Council for Aboriginal Reconciliation Act 1991* and lasted for a period of ten years (to January 1st, 2001, the Australian Federation's centennial). Approved unanimously by the Australian Parliament, this decision consecrated the recognition of the

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[30] "*The single significant contributing factor to incarceration is the disadvantaged and unequal position of Aboriginal people in Australian society in every way, whether socially, economically or culturally*" Royal Commission into Aboriginal Deaths in Custody, National Report, AGPS, Canberra, 1991. The five volumes and 339 recommendations which are included in Commissioner Johnston's report remains one of the most critical and objective studies of the impact of colonialism on the aboriginal people of this country.

[31] See, for example, Recommendation 211 of the Royal Commission into Aboriginal Deaths in Custody, which states: "La Commission des droits de l'homme et de l'égalité des chances et les Commissions de l'égalité des chances des divers États devraient être encouragées à poursuivre leurs programmes visant à informer les collectivités aborigènes de l'existence de la législation anti-discriminatoire, en particulier par le biais du personnel aborigène travaillant dans des communautés et organisations pour garantir une diffusion efficace de l'information sur la législation et les moyens d'en tirer parti." The National Program for Aboriginal and Torres Strait Islander Community Education is central to the implementation of Recommendation 211. Commonwealth funding was allocated to the Human Rights and Equal Opportunity Commission for the designing of a community education module aimed at informing the Aboriginal and Torres Strait Islander of the rights and protections to which they are entitled under anti-discrimination (and other) laws. This module provides information on legislation relating to human rights and the anti-discrimination measures provided by law which enable indigenous peoples throughout Australia to fight the discrimination they face daily. This program is a community education program aimed at encouraging the indigenous populations to clearly define the underlying causes of a problem or conflict and to seek positive solutions.

thousand year occupation of Australia by the Aboriginal and Torres Strait Islander before British colonization, the fact that a majority of these peoples were dispossessed and chased from the land they had always occupied, and that no official reconciliation process between these peoples and Australians had occurred.

The Council for Aboriginal Reconciliation was created by the Federal Parliament and first met in 1992 with the objective of achieving better mutual understanding between the Aboriginal and Torres Strait Islander and the rest of the Australian community. Its 25 members (including 12 Aboriginal representatives, two Torres Strait Islander representatives, and 11 representatives from the rest of the Australian community) had the following main objectives:

- "to promote a better understanding of the history, the culture, the dispossession suffered in the past and the continuously unfavourable situation of the Aboriginal and Torres Strait Islander, through management, education and discussion, and to make the population aware of the need to fight these inequities;
- to incite a national willingness to cooperate in order to correct the inequities facing the Aboriginal and Torres Strait Islander;
- to consult the Aboriginal and Torres Strait Islander, as well as the entire population, to ascertain whether an official reconciliation document would contribute to achieve the desired outcome, and on the contents of such a document".

The first mandate (1992-1994) mainly involved the implementation of awareness and consultation on the topic of reconciliation (educational activities, setting up of networks, information). The second mandate (1995-1997) focused on the public's participation in designing the Australian Reconciliation Convention 1997 through regional consultations. The last mandate (1998-2000) aimed at consolidating the commitment and activities of governments, major organizations and individuals in order to achieve social and economic equality for indigenous Australians, to reach an agreement on a national reconciliation document and to promote the recognition of indigenous Australians in the Constitution.

After 10 years of deliberation, a revised declaration entitled the *Australian Declaration Towards Reconciliation* was made public on May 10, 2000 by the Council for Aboriginal Reconciliation. It is worded as follows:

Australian Declaration Towards Reconciliation[32]

"We, the peoples of Australia, of many origins as we are, make a commitment to go on together in a spirit of reconciliation.

We value the unique status of Aboriginal and Torres Strait Islander peoples as the original owners and custodians of lands and waters.

We recognise this land and its waters were settled as colonies without treaty or consent.

Reaffirming the human rights of all Australians, we respect and recognise continuing customary laws, beliefs and traditions.

Through understanding the spiritual relationship between the land and its first peoples, we share our future and live in harmony.

Our nation must have the courage to own the truth, to heal the wounds of its past so that we can move on together at peace with ourselves.

Reconciliation must live in the hearts and minds of all Australians. Many steps have been taken, many steps remain as we learn our shared histories.

As we walk the journey of healing, one part of the nation apologises and expresses its sorrow and sincere regret for the injustices of the past, so the other part accepts the apologies and forgives.

We desire a future where all Australians enjoy their rights, accept their responsibilities, and have the opportunity to achieve their full potential.

And so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation.

Our hope is for a united Australia that respects this land of ours; values the Aboriginal and Torres Strait Islander heritage; and provides justice and equity for all".

The document raises an essential point, that of the right of the Aboriginal and Torres Strait Islander peoples to self-determination. In fact, this paragraph was one of the most controversial topics of the discussion on the reconciliation process[33].

For the indigenous people, self-determination is considered the starting point towards achieving all other human rights. The term "within the life of the nation" was even deemed restrictive as it did not adequately recognize the need to adapt social structures to the hopes and culture of the indigenous peoples.

For Howard's liberal government, and for many non-Indigenous people, reconciliation cannot imply the right to self-determination of the indigenous population. The text was reworded by the government on the occasion of a press release, and the expression "*and so, we pledge ourselves to stop injustice, overcome disadvantage, and respect that Aboriginal and Torres Strait Islander peoples have the right to self-determination within the life of the nation*" was replaced by *"and so, we pledge ourselves to stop injustice, overcome disadvantage and respect the right of Aboriginal and Torres Strait Islander peoples, along with all Australians, to determine their own destiny*[34] *".* This is significant. Self-

[32] http://www.austlii.edu.au/au/other/IndigLRes/car/2000/12/pg3.htm

[33] Self-determination and effective participation 'within the life of the nation'? An Australian perspective on self-determination. HREOC, February 2003

[34] Prime Minister of Australia, Reconciliation documents, Press release, 11 May 2000.

determination seems to be a threat to national unity which, if successful, could lead to the creation of "*separate rights*" or even, to take an extreme point of view, the secession of Australia's indigenous peoples. Today, the debate in Australia on the meaning of "self-identification" does not seem to be over.

The more vague and undefined concept of "self-empowerment"[35] is preferred as it implies a greater sense of responsibility and independence and therefore self-determination is perceived more as a means to achieve social and economic equality rather than an end in itself.
At the same time, the Council for Aboriginal Reconciliation gave priority to four areas deemed essential in achieving this reconciliation:

- **Education:** A new approach and new activities in education are necessary in schooling, professional training and awareness programs for the various communities.
- **The government's responsibility:** Since the federal, State and Territory governments supply most essential services and that serious disadvantages still exist, they must be held responsible for the progress achieved in eliminating the disadvantages facing the indigenous peoples by defining measurable objectives and producing public performance reports.
- **Legislation:** A process is needed to follow up on the results of the current process, including a legislative framework that would take into account negotiated results on topics such as rights, self-determination, traditional laws and constitutional reform.
- **Reconciliation leadership:** *Reconciliation Australia,* a national representative body established and supported by all the sectors of the Australian community, will help in furthering the reconciliation process.

These measures were supported by the Roadmap for Reconciliation which sets out four national strategies:

- **Sustain the Reconciliation Process,**
- **Promote Recognition of Aboriginal and Torres Strait Islander Rights** (promote the recognition, respect and understanding of the aboriginal status),
- **Overcome Disadvantage** (so that the Aboriginal and Torres Strait Islander enjoy the same standard of living as other Australians),
- **Economic Independence** (so that these peoples share the same level of economic independence as the rest of the Australian community).

[35] In November 1996, the Minister for Aboriginal and Torres Strait Islander Affairs announced that government policy on indigenous affairs would no longer be based on the principle of self-determination, but rather on the concept of 'self-empowerment', which has no standing in international law. See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social justice report*, 1999, HREOC, Sydney, 2000, pp. 19-20.

The third point, *Overcome Disadvantage*, is of particular interest to this study as it includes a reference to the measurement and assessment of its implementation. Indeed, it specifically states that the Council of Australian Governments (COAG) must evaluate and update its National Commitment[36] by:

- Implementing program performance indicators that are measurable, include timelines and are established in conjunction with the indigenous peoples and communities;
- Verifying that the required information systems are in place to monitor this performance; and,
- Reporting annually to the parliaments, councils and their constituents with regard to these indicators.

Every five years, the Commission for Human Rights and Equal Opportunity (HREOC), along with ATSIC[37], must prepare an independent report on the nation's progress in bringing remedy to disadvantages.

From recognizing disadvantages to the need for statistics.

The Council for Aboriginal Reconciliation's final report entitled *The Australian Challenge* was presented to Parliament in 2000. It includes in its recommendations those put forth by the *Declaration Toward Reconciliation* and the *Roadmap for Reconciliation*. While it thus confirms the Council of Australian Government's (COAG) leadership role, it also underlines the need for the Australian Statistics Bureau (ABS) to continue improving the quality of indigenous statistical data obtained through the censuses and other studies. It also proposes that other statistical institutions, such as the *Australian Institute of Health and Welfare*, the *Australian Institute of Criminology* or the *Steering Committee of the Review of the Commonwealth/State Service Provision* broaden their indigenous data collection and indigenous/non-indigenous comparative statistical analyses to include the regional and sub-regional levels.

Searching for the definition of "disadvantage": the Centre for Aboriginal Economic Policy Research's contribution:

The CAEPR is an ANU (*Australian National University*) multi-disciplinary research centre for social sciences which mainly focuses on questions relating to the Australian indigenous economic policy and economic development, as well as social justice and the social and economic status of indigenous Australians. The CAEPR was founded in 1990 and is financed by the *Aboriginal and Torres Strait Islander Commission* (ATSIC), the *Department of Family and Community Services* (DFACS), and ANU.

[36] The *National Commitment to Improve Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islander,* approved by the Council of Australian Governments in 1992, is the general policy framework defining the collaboration between the Governments of the Commonwealth, States and Territories, with the local authorities aiming at remedying the disadvantages facing the Indigenous people and the promotion social justice.

CAEPR's participation in discussions conducted by the Council for Aboriginal Reconciliation (CAR) to determine a framework for benchmarking led to the publication of a joint document which summarizes the historical causes for the indigenous disadvantage as follows[38]

- "*Dispossession*: Before the British occupation, the Aboriginal and Torres Strait Islander population created a "mosaic of communities and groups whose rich and lasting cultures were based on an intimate relationship with land and sea …"[39] Dispossession and dispersion destroyed many Aboriginal and Torres Strait Islander societies … [and] most of these communities' individuals have little or no participation in the economic life of the nation other than that provided by the government.
- *Exclusion from principal services:* Until the end of the 60's, many indigenous Australians were excluded from principal services, creating a "heritage of significant inequities in areas such as education, health, infrastructures and housing"[40].
- *Recent inclusion:* Combined with the exclusion from services such as education, access to certain services of the Welfare State "intentionally and paradoxically created poverty traps from which escaping is difficult".
- *Inter-generational poverty:* Low income has limited the accumulation of capital and investment, leading to inter-generational poverty.
- *Located in rural and distant regions:* A higher proportion of the indigenous population lives in rural and distant regions where there are few economic opportunities and where access to goods and services is disproportionately more costly.
- *Demography:* The multi-generational nature of indigenous families creates relationships based on dependency and a heavier economic burden than in non-indigenous families. Likewise, the structure of the indigenous population is more similar to that of a developing country and its population growth exceeds that of the general Australian population, with a pyramid of younger age groups".

Each of these factors has implications for the development of policies and programs seeking to remedy the indigenous disadvantage, but also for the determination of indicators and targeted objectives. In this document, the CAR and the CAEPR also recognize that the failure in first identifying the structural reasons for the poor social and economic status of indigenous Australians and in defining objectives based on accurate demographic data makes the search for statistical equity difficult. In their opinion, the principle of equality and the adjustment of statistical targets must be established along geographic and cultural considerations.

Another difficulty, as demonstrated by CAEPR's research, relates to the interpretation of statistics concerning the achievement of a program's objectives. Recognizing and taking into account the effect on these results of indigenous choices leads to difficulties in measuring of the success of a policy or program, the choices not necessarily meeting the initial equity objectives.

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[37] See Appendix D
[38] Council for Aboriginal Reconciliation and Centre for Aboriginal Economic Policy Research, *Towards a benchmarking framework for service delivery to Indigenous Australians*, Commonwealth of Australia, Canberra, 1998, p4.
[39] Ibid, paragraph 1.8
[40] Ibid

For example, indigenous people may make certain choices leading to very weak results in terms of employment and the impact on their level of income. It can therefore be difficult to interpret the program results in terms of their efficiency in the fight against the disadvantage, whether the cause be historical, due to structural constraints or the effect of continuous discrimination.

The potential conflict between self-enumerated choices and the study on the equality of the results, notwithstanding the difficulty in interpreting the data, has clear implications for the process involved in designing policies and defining objectives.

Nevertheless, the CAEPR also set out a series of recommendations regarding the monitoring and assessment of disadvantages.

According to the CAEPR, in a number of cases, national statistical data do not provide sufficient information, as the averages and rates calculated on a national basis can be misleading. "The success or failure of the policy should be measured by taking into account… regional priorities, the variability of participation in formal and informal economic activities, and the low availability of action plans in the most removed regions".[41] In assessing this type of policy, special attention must be given to regional specificities and the study results on employment should distinguish between the various geographic regions. Furthermore, they specify that issues relating to employment and unemployment rates, and in general, the employment sector, should take the size of the population base into account. For example, if demographic forecasts concerning the rapid growth of the indigenous population of working age are not taken into account, achieving employment objectives for the indigenous population is not realistic.[42].

Finally, unless the indigenous population is defined, it is impossible to assess the impact over time of the government programs aiming to eliminate the indigenous disadvantage. Yet the question regarding the defining and enumeration of the indigenous population is problematic (see ABS).

[41] Taylor, J, Regional Change in the Economic Status of Indigenous Australians, 1986-9, CAEPR Research Monograph 5, CAEPR, Canberra, 1993

[42] "to move beyond this, and attempt to close the gap between Indigenous and other Australians, will require an absolute and relative expansion in Indigenous employment that is without precedent" Taylor, J and Hunter, B, *The Job Still Ahead*, ATSIC, Canberra, 1998 in Social Justice Report 2002, HREOC.

2) Other ethnic minorities and grounds

In order to understand the reasons the politicians have taken into account the various ethnic minorities of the Australian population, it is worthwhile to briefly overview the evolution of multicultural policies. Under the Howard government, the policy is now more clearly aimed at the promotion of cultural diversity and less towards reparation or social justice objectives.

History of Multicultural Policies in Australia

Three main periods can be identified in the evolution of public policies concerning immigration and the management of cultural diversity:

Assimilation policies: from 1901 to the mid-60's.

Assimilation is a concept directly attributable to the "*White Australian Policy*[43] ". While the immigration policy preferred British migrants, the integration of other populations was conditional upon their abandoning their cultural and linguistic heritage so as to rapidly blend into the host population, and become indistinguishable. This policy effectively eliminated non-European immigration, in particular immigration from Asia[44], however it did not resist the change in attitudes after the Second World War and the increasing recognition of Australia's responsibilities as a member of the international community. In 1966, the liberal government began the dismantling of the White Australia Policy by allowing 'distinguished' non-Europeans to immigrate.

Integration policies: from the mid-60's to 1973.

Integration refers to policies that do not consider it necessary for migrants to abandon their mother tongue or customs[45]. The benefits inherent in this type of immigration were only considered to be achievable through full participation in an integrated Australian culture. These policies therefore recognized that migrants, particularly those whose mother tongue was not English, experienced difficulties when establishing themselves in Australia and needed direct assistance. They also recognized that ethnic organizations could significantly assist in their integration. In order to fulfill these needs, assistance and welfare funds for migrants increased in the beginning of the 70's.

[43] One of the most lasting and official expressions of Australian racism is illustrated by the White Policy, an immigration policy implemented in 1901 and officially repealed only in 1973. By virtue of this law, it was virtually impossible for non-Europeans to enter the country.
[44] See dictation test.
[45] The Assimilation Branch of the Immigration Ministry becomes the Citizenship Branch.

From 1973 onwards: multiculturalism

The Australian White Policy was definitively repealed in 1973 and the term "multiculturalism" emerged. Unlike other societies, under this policy Australia sees itself as capable of welcoming and encouraging the co-existence of a large range of cultural groups, while respecting their specificities. The meaning of this concept has considerably broadened, however, starting for example with a theory of equal opportunity based on statistical equality (labour government) to the promotion of diversity management. This progress is understood through the study of various reports. In 1977, the Australian Ethnic Affairs Council[46], set out three principles regarding multiculturalism: social cohesion, equal opportunity and cultural identity, and provides policy directives flowing from these principles. In 1978, the Galbally Report[47] identified multiculturalism as a key factor in devising programs and services for migrants. In its recommendations[48], it set out four basic principles: equal opportunity and equal access to programs and services for all, the right of all Australians to preserve their culture "without prejudice or disadvantage", the need to create specific programs and services for migrants in order to achieve equal access and availability, and that these programs be conceived and implemented in consultation with the migrants (*self-help*).

In 1982, the Australian Institute of Multicultural Affairs (AIMA) study report concluded that the implementation of the Galbally Report recommendations provided a significant advantage to newly arrived migrants as well as to those having arrived in the past, and gave Australia "perhaps the most comprehensive system of migrant and multicultural services in the world". Despite this praise, the AIMA review, which was put in place to monitor the progress of policies concerning ethnic affairs, pointed out a certain number of weaknesses in the programs and services provided to migrants, particularly those concerning English language training, aid to children, security and professional health measures, as well as employment.

In 1986, four years later, Hawke's labour government launched a new multiculturalism study. The study committee was presided by James Jupp, a scientist and politician, who intervened during a difficult social and economic time when criticisms over multiculturalism were on the rise.

In this report, which nevertheless confirms that multiculturalism is an appropriate philosophy on which national policy could be developed over the next decade, multiculturalism is redefined as being "equitable participation". This Report pleads for an examination of structural inequities, reiterating the persistence of disadvantages facing migrants despite more than a decade of multicultural policies. In

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[46] *Australia as a Multicultural Society*. A report by the Australian Ethnic Affairs Council (chairman, J. Zubrzycki).
[47] 1978. *Review of Post-arrival Programs and Services to Migrants* (chairman, F. Galbally).
[48] An additional expenditure amounting to $50 million over three years was required for the 57 specific recommendations. These recommendations covered a broad range of sectors, including assistance on arrival ($12 million), improving English training for adults and children ($10 million), translation services as well as improving information and communication services ($4 million), the creation of multicultural resource centres ($1.34 million) and subsidy programs for ethnic communities and unions ($1.65 million). The Report also recommended the creation of an ethnic radio station ($3.23 million), as well as a work group for an ethnic television station project ($7.14 million).

contrast to the Galbally and AIMA Reports, the Jupp Report insists on the disadvantages facing migrants in the employment area, this becoming "the major determinant of whether certain persons or groups will be disadvantaged". Four key principles were also defined. They recognize that migrants should have:

- Equal opportunity to participate in the economic, social, cultural and political fields
- Equal access and sharing of government resources
- The ability to participate in or influence governmental policies, programs and services.
- The right to preserve their religion, culture and language

One of the Report's 23 recommendations is the creation of an Ethnic Affairs Bureau which not only has a coordination role, but also monitors the progress in achieving equitable participation. At the end of the same year, the Australian Multicultural Affairs Institute issued a report entitled Future Directions for Multiculturalism which suggests broadening the national access and equity strategy to include people from non-English language backgrounds, as well as women, disabled and indigenous peoples.

In 1989, the *National Agenda for a Multicultural Australia* was adopted by the government pursuant to the recommendation of the Multicultural Affairs Consultative Committee. It defines the fundamental principles underlying multiculturalism, namely the following rights: the right to a cultural identity (including language and religion), social justice (equality in treatment and opportunity, and the elimination of barriers for reasons of race, ethnic background, culture, religion, language, gender, birthplace); and economic effectiveness (the need to maintain, develop and efficiently use the qualifications and talents of all Australians) and obligations: to commit to the unification of Australia, its interests and future; to accept Australia's structure and founding principles; and to accept the right of expression and the right to retain one's own culture and beliefs implies a reciprocal responsibility for the acceptance of others' rights to express their opinions and values.

In 1999, a report published by National Multicultural Advisory Council and entitled: *Australian Multiculturalism for the Next Century: Toward Inclusiveness,* outlines the evolution of Australian multicultural policy, from the 'White Australia' policy of the early 20th century to assimilation, integration, and finally multiculturalism. The report focuses on several distinct areas: population, citizenship, religious affiliation, language spoken at home, age and gender and geographic population distribution. As cited in the report, multiculturalism was introduced into the social framework in 1973 after it was declared by the 1971 Trudeau government in Canada to be a social maintenance policy. In 1977, the Australian Ethnic Affairs Council introduced the first formal multicultural policy in a report entitled *Australia as a Multicultural Society*. Since that time the Australian government has sought 'to ensure that diversity is a positive force in our society'.[49]

[49] *Australian Multicultural Society for the Next Century: Toward Inclusiveness.* 1999. National Multicultural Advisory Council, The Department of Immigration and Multiculturalism and Indigenous Affairs.

Today's definition could be as follows[50]:

"Australian multiculturalism is the philosophy, underlying Government policy and programs, that recognises, accepts, respects and celebrates our cultural diversity. It embraces the heritage of Indigenous Australians, early European settlement, our Australian-grown customs and those of the diverse range of migrants now coming to this country.

The freedom of all Australians to express and share their cultural values is dependent on their abiding by mutual civic obligations. All Australians are expected to have an overriding loyalty to Australia and its people, and to respect the basic structures and principles underwriting our democratic society. These are the Constitution, Parliamentary democracy, freedom of speech and religion, English as the national language, the rule of law, acceptance and equality.

The Government's aim is to build on our success as a culturally diverse, accepting and open society, united through a shared future, and a commitment to our nation, its democratic institutions and values, and the rule of law. This vision is reflected in the four principles that underpin multicultural policy:

- ***Responsibilities of all** - all Australians have a civic duty to support those basic structures and principles of Australian society which guarantee us our freedom and equality and enable diversity in our society to flourish;*

- ***Respect for each person** - subject to the law, all Australians have the right to express their own culture and beliefs and have a reciprocal obligation to respect the right of others to do the same;*

- ***Fairness for each person** - all Australians are entitled to equality of treatment and opportunity. Social equity allows us all to contribute to the social, political and economic life of Australia, free from discrimination, including on the grounds of race, culture, religion, language, location, gender or place of birth; and*

- ***Benefits for all** - all Australians benefit from productive diversity, that is, the significant cultural, social and economic dividends arising from the diversity of our population. Diversity works for all Australians".*

As tedious as it may seem, this detour to study the history of the evolution of multicultural policies in Australia provides the basis for understanding some of the links between the search for the creation of a national identity and the production and categorization of statistics. It describes an Australia that vacillated between two concepts, between a European heritage and an Asian vocation, between white and aboriginal populations. As we have seen, the evolution from the "unity" paradigm to the "difference" paradigm broadens the initial focus on ethnicity to include other diversity issues: women, disability, religion, etc. The indigenous category remains, while the recognition of immigrant populations will form the basis of a new statistical category: individuals from a non-English language background. This classification links the disadvantage to a contextual handicap: that of not speaking the language of the host country, as opposed to an ethnic background problem *per se*. From this time forward, the study of the progress of equal opportunity programs will rely on this categorization more than on the identification of an individual's background.

[50] http://www.immi.gov.au/multicultural/australian/index.htm#def

B/ The use of statistics for policy and equity programs

1) Equity programs or taking diversity into consideration

In examining the question of the consideration of minorities, and more precisely the groups identified within this study by government and private sector services, one comes up against a variety of concepts (diversity, cultural diversity, equity, equal employment opportunity) which relate to mechanisms and legal obligations that are often quite different.
This terminology, as with the concept of multiculturalism itself, has been subject to semantic modifications resulting in the creation of statistical categories used in assessing programs. We will limit our comments to the currently accepted meaning.

Diversity includes the following terms: age, aspirations, social class, country of birth and first citizenship, gender, intellectual aptitudes, personality, physical capacity, mother tongue, professional experience, race, religion, sexual orientation, socio-economic group and work style. Thus, diversity includes almost every element of differentiation between people, not only the obvious ones such as gender, ethnic affiliation or disability[51]. Diversity is a broad concept, which includes the concept of cultural diversity. The difference between the two is that cultural diversity recognizes the existence of large cultural groupings. It generally relates to differences resulting from or attributed to members of these cultural groups. Cultural diversity is a part of Australia's history, and through this diversity, Australian culture is in constant evolution. Cultural diversity includes (but is not limited to): language, race, ethnic origin, clothing, values, religion and religious practices, social and community responsibilities, perceptions on family life, family responsibilities and political opinions.

Valuing diversity is a process for the recognition of differences through actions. This expression, as well as *managing diversity*, refers to a process through which a society or a company can recognise, use and profit from its members' varied backgrounds.

Equity : the equity principle supports the position that each individual has a fundamental right to work within the limits of his/her abilities. This right can only be enforced within a system where hiring and promotion procedures based on the stereotyping of certain groups are illegal. The equal opportunity principle is fundamentally breached if an employer requires a female or minority job seeker to have an additional competence over other job seekers.

All of this terminology is used in the equity or diversity awareness programs implemented at the federal and State levels.

[51] R Kandola and J Fullerton, 1995, *'Managing Diversity: Succeeding Where Equal Opportunities has Failed',* Equal Opportunities Review, No 59, January/February, p 31.

Equal Employment Opportunity and *Affirmative Action* (see also the legal exemptions to anti-discrimination laws):

The application of equal opportunity and affirmative action programs requires the prior identification of the barriers or disadvantages preventing a particular group from moving forward in an organization in the same fashion as another group. The majority of these programs relate to access to employment and are designed to eliminate or remove employment barriers and to provide for access equity to all employees (or potential employees) in terms of promotion, training and transfers. Besides the human resource management question, other programs relating to education involve university admission requirements for students.

These specific programs are generally referred to as "affirmative action or "equal opportunity" programs and are implemented differently by the private and public sectors whether at the federal or State level. In Australia, affirmative action refers only to gender and is perceived as a means to remove the barriers faced by women in employment and in the workplace both in the private and public sector. The private sector legislation is the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth[52])*. This law applies to all non governmental organizations with more than a hundred employees (companies, higher education institutions, employees in the community sector, non-governmental schools and training institutions). Every year on May 31st, each employer covered by this law must present an anti-discrimination and equal opportunity for women program to the Equal Opportunity for Women in the Workplace (EOWA). These organizations must inform the director of the corrective measures taken and the results achieved with regard to equal opportunity in the workplace. Every corrective measure program must clearly state the objectives and anticipated estimates within its mechanism and must undertake to proceed yearly with the monitoring and assessment of results achieved. However, it is not necessary to set quotas and employers are not obliged to take measures which are incompatible with the merit principle. The obligation to submit this report may vary over a period of one to three years, provided that the organization makes such a request. The Agency has a standard reporting form which is available electronically. If the employer does not submit the report and/or does not reply to requests for information, the Agency Director can inform the Parliament of such after 28 days formal notice. Since January 1, 1993, an employer named in Parliament is ineligible for any governmental contract or industrial subsidy of any kind.

In the public sector, EEO is a legal condition designed to eliminate and ensure that no discrimination exists in the workplace on the basis of race, sex, civil status or disability.

[52] The Law's objectives are to: promote the principle that women's work should be treated based on merit; with employers, promote the elimination of discrimination against women and the implementation of equal opportunities for women in employment; encourage consultations between employers and employees with regard to questions relating to equal opportunities for women at work and in the workplace.

The program is administered by the Director of the Office for Equal Opportunity in Public Employment and encourages equal opportunities for women, racial, ethnic and ethno-religious minority group members, Aboriginal and Torres Strait Islander.

The *National Charter on Public Service in a Culturally Diverse Society* is an example illustrating the effort undertaken by the Commonwealth to provide a framework for benchmarking the implementation and the assessment of principles underlying a multicultural society.

2) The Example of the Charter on Public Service in a Culturally Diverse Society

In 1999, the DIMIA[53] created the *New Agenda for Multicultural Australia* to further the evolution of Australian multicultural policy. The main goals of the *Agenda* include 'a united and harmonious Australia, built on the foundations of our democracy and developing our continually evolving nationhood by recognizing, embracing, valuing and investing in our heritage and cultural diversity'[54]. The projected goals were designed to be realized through commitments to 'Civic duty, which obliges all Australians to support those basic structures and principles of Australian society which guarantee us our freedom and equality and enable diversity in our society to flourish; Cultural Respect, which, subject to the law gives all Australians the right to express their own culture and beliefs and obliges them to accept the right of others to do the same; Social Equity, which entitles all Australians to equal treatment and opportunity so that they are able to contribute to the social, political, and economic life of Australia, free from discrimination, including on the grounds of race, religion, language, location, gender or place of birth; Productive Diversity, which maximizes for all Australians the significant cultural, social and economic dividends arising from the diversity of our population'.[55]

The *National Charter on Public Service in a Culturally Diverse Society* is included in the *New Agenda* as a tool to help the Australian government programs meet the needs of the increasingly culturally and linguistically diverse society. The Minister created the Charter for Immigration and Multicultural Affairs in an effort to implement a Federal access and equity strategy in consultation with other levels of government. It was endorsed by Commonwealth, State and Territory Governments and by the Australian Local Government association. It integrates a set of delivery principles concerning cultural diversity into the strategic planning, policy development, budget, and reporting processes of government service delivery. The Charter applies irrespective of whether these services are supplied by government agencies, community organizations or commercial enterprises that are contracted by the government to supply these services. Some of the agencies that participated in the 2002 Access and Equity Annual report, a report analyzing the progress made by certain agencies in implementing

[53] This department is responsible for orchestrating and overseeing Australia's multicultural policy.
[54] *Progress in Implementing the National Charter for Public Service in a Culturally Diverse Australia.* Access and Equality Annual Report. Department of Immigration and Multicultural and Indigenous Affairs. Australia, 2003.
[55] *Progress in Implementing the Charter of Public Service in a Culturally Diverse Society:* Access and Equity Annual Report. 2002. Commonwealth of Australia. 2003.

the Charter included: Aboriginal and Torres Strait Islander Commission, Immigration and Multicultural and Indigenous Affairs; Australian Broadcasting Authority; Australian Taxation Office; Agriculture, Fisheries and Forestry of Australia; Education Science and Training; Australian Federal Police; Australian Sports Drug Authority and many others.[56] The Charter is organized around seven principles: Access, Equality, Communication, Responsiveness, Effectiveness, Efficiency, and Accountability. However, in the introduction to the Charter, it is clear that the approach to implementing these principles is through customer service, and therefore, it does not apply to government services such as Telstra and Australia Post, which, because their 'strong customer service orientation…should ensure they service the needs of their diverse clientele'.[57]

To help various government agencies succeed in upholding the principle of accountability, the Charter outlines how to report on multiculturalism in a more meaningful way. Though this reporting represents monitoring of the treatment of various groups in the Australian population, it, like the rest of the Charter is in no way required or legally enforceable. However, a performance management framework was implemented in 2000 to provide a standard in reporting on the success of agencies in implementing the Charter. The framework is built around five identified roles of government: Policy Advisor, Regulator, Purchaser, Provider and Employer. 16 performance indicators have been developed across these five roles in accordance with the seven principles of the Charter. See table below.

Overview of the Performance Management Framework table[58]

Policy Adviser

Role Summary

The **Policy Adviser** is responsible for initiating and developing government policy. The policy adviser considers the needs of different groups and advises on what the government should achieve for the community as a whole.

Performance Indicators

- **PI 1:** New or revised policy/programs that impact in different ways on the lives of people from different cultural and linguistic backgrounds, are developed in consultation with people from those backgrounds.
- **PI 2:** New or revised policy/program proposals assess the direct impact on the lives of people from a range of cultural and linguistic backgrounds prior to decision.
- **PI 3:** New or revised policy/program initiatives have a communication strategy developed and sufficiently resourced to inform people from relevant cultural and linguistic backgrounds.

[56] Ibid p.71.
[57] Charter of Public Service in a Culturally Diverse Society. 1998. The Minister of Immigration and Multiculturalism and Indigenous Affairs. Commonwealth of Australia.
[58] Progress in Implementing the Charter of Public Service in a Culturally Diverse Society: Access and Equity Annual Report. 2002. Commonwealth of Australia. 2003.

Regulator

Role Summary
The **Regulator** is responsible for enforcing legislation or other government 'rules'. The Regulator is responsible for all forms of regulations, including 'quasi regulations' such as codes of conduct and advisory instruments or notes.

Performance Indicator
- **PI 1:** Resources are provided so that publicly available and accessible information on regulations is communicated appropriately to people from a range of cultural and linguistic backgrounds, and especially to those identified as having a high level of non-compliance.

Purchaser

Role Summary
The **Purchaser** is responsible for determining what is to be purchased and from whom it is to be purchased. Relevant purchased items are primarily outsourced government services, grants and cultural items for public display.

Performance Indicators
- **PI 1:** Purchasing processes that impact in different ways on the lives of people from different cultural and linguistic backgrounds are developed in consultation with people from those backgrounds.
- **PI 2:** Tendering specifications and contract requirements for the purchase of goods or services are consistent with the requirements of the *Charter*.
- **PI 3:** Complaints mechanisms enable people (regardless of cultural and linguistic backgrounds) to address issues and raise concerns about the performance of service providers (contracted or other), and the purchasing agency.

Provider

Role Summary
The **Provider** is responsible for delivering services, often under contract by government. Providers can be government, private or not-for-profit organisations.

Performance Indicators
- **PI 1:** Providers have established mechanisms for planning for implementation, implementation, and for monitoring and review that incorporate the principles underpinning the *Charter*.
- **PI 2:** Provider data collection systems incorporate the requirements of the Standards for *Statistics on Cultural and Language Diversity* (the *Standards*) for statistics on cultural and language diversity.
- **PI 3:** Providers have established service standards that utilise the cultural and linguistic diversity of their staff, or their staff's cross-cultural awareness to facilitate and enhance service delivery.
- **PI 4:** Complaints mechanisms enable people (regardless of cultural and linguistic background) to address issues and raise concerns about the performance of Providers.

Employer

Role Summary
The **Employer** is responsible for involving the provision of a range of work conditions, including wages, in exchange for the provision of labour to produce goods and services. All portfolio agencies undertake this role.

No Performance Indicators
Agencies are not required to report directly on the Employer role. Information on the Employer role is extracted from the *Workplace Diversity Report* produced annually by the Australian Public Service Commission.

The Charter outlines practical strategies for achieving success on the seven principles, including suggested monitoring and reporting approaches that attempt to identify possible means to help government service providers determine whether their practical strategies are proving to be effective.

Practical strategies for achieving the first principle, ‘access’, include a commitment to quality client services, specific training on cultural diversity issues, and active training designed to prevent discrimination. It is recommended that achievement of equal access to government services be monitored by regular collection, maintenance, analysis and use of data on potentially disadvantaged groups on the basis of their cultural and linguistic background, and using other data sources when appropriate, as well as specific reporting on the proportion of clients categorized by their country of birth, or cultural and linguistic background compared with their percentage composition of the total population in the service target group.

Practical strategies for achieving ‘equity’ include recognizing and valuing difference even to the extent of hiring employees of specific ethnic or indigenous background to deal with sensitive issues, and removing barriers by helping clients overcome possible disadvantage caused by country of birth, language, culture, race, and religion so that government services are developed and delivered on the basis of fair treatment of clients who are eligible to receive them. It is proposed the Charter proposes that the achievement of equity could be monitored by qualitative information through consultations with client groups in addition to program outcome reports and evaluation case studies. The Charter recognizes the difficulty in quantifying certain processes and outcomes, however, it does cite some measurable indicators of equity such as a reduction in the level of complaints received about unfair treatment.

Practical strategies for achieving ‘communication’ include informing eligible clients about services in languages other than English, consulting with clients of diverse linguistic and cultural backgrounds about all stages of program planning, and participation of people of diverse linguistic and cultural backgrounds in decision making and advisory bodies. The evidence of the use of information strategies that aim to inform all clients, regardless of cultural or linguistic background is one example of type of monitoring for these measures. Monitoring might also be implemented by reporting on the numbers of clients from diverse cultural and linguistic backgrounds that are involved in consultative arrangements.

Practical strategies for achieving ‘responsiveness’ pinpoint flexible services as a means of optimizing the reach and impact of mainstream government programs through adapting the service delivery to the particular needs of different clients. In regard to monitoring ‘responsiveness’, the Charter suggests there should be evidence of client needs assessment undertaken and taken into account, evidence of staff undertaking cultural diversity training, measurement of the level of client satisfaction with services through structured feedback, evidence of the marketing services to all sections of the community.

Practical strategies for achieving 'effectiveness' include collecting data specifically to identify the possible causes of disadvantage associated with a client's cultural and linguistic background and which could effect their access to and benefit from government services. Key characteristics recommended for such data are: birthplace, whether a person's first spoken language is English, whether they have an Aboriginal or Torres Strait Islander background, whether they have an Australian South Sea Islander background, date of birth, year of arrival in Australia, birthplace of parents, sex, and religion. The collected data may not always include these items, as the relevance of these data items will vary depending on the service delivery context. The Charter acknowledges the sensitivity and privacy issues involved in collecting these types of data. It recommends that consideration be given to collecting data essential to the particular service delivery or evaluation or purpose, guaranteeing anonymity, and ensuring that all data collection proposals are non-intrusive. To monitor the achievement of effectiveness, it is proposed that agencies develop appropriate performance indicators for assessing if program outcomes have been realized.

Practical strategies for achieving 'efficiency' include planning to meet the needs of all clients, regardless of cultural or linguistic background, especially strategic planning in vision statements or corporate goals, policy development, program design, service delivery and evaluation and reporting, and managing resources to meet these goals with cultural diversity in mind. Monitoring achievement is possible through evidence of government agencies allowing for the costs associated with developing culturally responsive and accessible services in their budgets, and where services are delivered by a non-government contractor, these considerations would need to be factored into agencies' tendering bid and contracts. All external agencies that wish to do business with Government public services must comply with the same standards as the government agencies, regardless of whether they are public or private.

Practical strategies for achieving 'accountability' include the production of departmental/agency annual reports that focus on outputs/results, as well as inputs/processes. When a program or service is delivered via an intermediary, the funding conditions in the contract must specify relevant access and equity accountabilities, such as collection and reporting on client characteristics. Accountable and transparent government service is based on the production of these relevant and complete annual reports[59].

It is important to note, that, like the rest of the Charter, the monitoring is based on self-evaluation. Each government agency is required to present a report on their success in following the performance indicators and thus implementing the Charter, but there is no official sanction if an agency has a less than perfect score on the performance indicators or refuses to produce a self-evaluation. Rather, an annual Access and Equity Report highlights how different agencies are doing, but offers no official recourse for agencies that do not comply.

The 2002 Access and Equity annual report: Progress in Implementing the *Charter for Public Service in a Culturally Diverse Society*[60] presents an example of an analysis that was presented on how different public agencies are succeeding in implementing and reporting on their commitment to the *Charter.* In 2002, the report noted that of the 46 agencies whose roles intersected with Policy Advisor, Regulator, Purchaser and Provider roles, 19 received a perfect score against the performance indicators. The report noted that government agencies which have a primarily commercial focus, or with programs that target businesses perform less well than others with a Provider role. One of the main criticisms cited in the report is that these particular agencies collect data incorporating the requirements of the *Standards for Statistics on Cultural and Linguistic Diversity*. However, even though this precise criticism represents a success of the Charter, there is no legal or official recourse for forcing these agencies to change their practices, either in the form of a penalty for their failure to comply or a reward for greater success.

The Guide: *Standards for Statistics on Cultural and Linguistic Diversity*, is a guide written by the Statistics Working Group of the Commonwealth Interdepartmental Committee on Multicultural Affairs (IDC). It sets out the ways in which government agencies at the Commonwealth level should collect statistics on their diverse clientele. The *Standards* are part of the Australian Bureau of Statistics statistical concepts library, which provides authoritative information about the concepts, sources, methods and classifications used in Australian statistics. The core set of the *Standards* consists of: person's country of birth, main language other than English spoken at home, proficiency in English spoken at home and the person's indigenous status (if any). Other variables outside the core set are ancestry, country of birth of father, country of birth of mother, first language spoken, languages spoken at home, main language spoken at home, religious affiliation, and year of arrival in Australia. The Guide suggests that agencies might find it advantageous to implement the *Standards* in relation to an individual data set or system that is already widely used in the organization.

There are other programs that are run out of DIMIA besides the implementation of the Charter. Some of the key initiatives created to give effect to the governments' multicultural priorities are: the Council for Multicultural Australia (see Appendix), the Living in Harmony Program, Harmony Day, and Diversity Management.

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[59] The assessment logic: performance indicator, performance measure, measurement and reporting mechanisms all are found in the application of policies relating to handicapped people. *A guide : to the performance reporting framework*, Office of Disability, 2000, Canberra

[60] For the original text, see http://www.immi.gov.au/multicultural/_inc/publications/charter/charter_ps2.htm

Living in Harmony and Harmony[61] are two initiatives that represent a commitment by the government of certain funds to promote the acceptance, access and equity for all Australians in the form of Harmony Day, and public relations devoted to explaining multicultural policy and its importance to all Australians. Diversity Management, in partnership with Australian businesses helps to articulate a business rationale for diversity management. The main focuses include promoting Australia's cultural diversity as a productive and unifying force in the society with an emphasis on the benefits of community harmony and social cohesion. This represents a shift in DIMIA policy, away from a 'push' toward a more multicultural society to a 'lead' by good example approach[62].

Henceforth accepted in the broader definition of multiculturalism, the concepts of "diversity" and "difference" used herein were initially developed outside of the multiculturalism debate and still generally refer to a limited area: human resource management[63]. Introduced in Australia at the end of the 1990's, these concepts aim to promote certain departments within companies, particularly client service departments. In the private sector, the promotion of diversity to employees is directly seen as a means to improving client service through a "reflection" mechanism: it is in the company's interest that its personnel reflect its clientele's diversity. In this case, recruitment is not aimed at providing opportunities for disadvantaged groups to participate in the workplace.

In fact, the generally accepted definition of diversity management is as follows:

"Le management de la diversité se rapporte à l'engagement systématique et planifié d'une société ou d'une organisation à recruter et à former des employés issus de milieux divers. Le management de la diversité implique également une reconnaissance et une appréciation actives de la nature de plus en plus multiculturelle des sociétés."[64]

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[61] Designed by the Government to respond to positions taken by the One Nation Party (the birth and progress of Pauline Hanson's One Nation Party in 1990 led to fears that racism and xenophobia were gaining ground in Australian society). "Living in Harmony" includes three facets aiming at increasing Australian awareness of ethnic diversity issues and at uniting citizens of various origins. This program consists in bringing together local non-governmental organizations, companies, communities, the media, and Government representatives and involving them in a multiparty and multicultural dialogue to promote mutual understanding. Various sub-programs were designed to encourage the various participants to actively promote racial harmony. The "Working Together in Harmony" sub-program involves industrial or commercial companies. Its objective is to inform employers of the positive contribution of a diverse workforce. The "Working Together in Crisis" program aims at having Australians from various cultures involved in emergency action volunteer groups. The "Winning Together" sub-program focuses on diversity and racial harmony within sporting events. The "Learning to Live in Harmony" initiative focuses on the economic and social advantages of a multicultural society. Finally, the "Believing in Harmony" project seeks to involve members of different religious communities in the multicultural debate. The media are also encouraged to heighten public awareness of racial issues, particularly through debates on the topic.

[62] Interview: Dr Thu Nguyen Hoan, Assistant Secretary, Multicultural Affairs Branch; et al. 20 March 2004.

[63] "Diversity is a touchstone of the Australian nation, and its workforce in the 21st century. Australia's population, workforce, trade and investment profile have all changed significantly over the last 50 years presenting a myriad of opportunities and challenges to Australian business. Diversity management is an important tool in exploiting opportunities and meeting these challenges. Managed effectively, diversity can produce a dividend and improve the bottom line" (http://www.diversityaustralia.gov.au/index.htm).

[64] Managing diversity and Equal Opportunity, Allies or Antagonist? Speech address by Linda Matthews, South Australian Equal Opportunity Commissioner, at Australian Human Resources Institute's 1999 National Convention*, "Winning in the New Economy",* Adelaide Convention Centre, Monday 24 May 1999.

This definition infers the following logic: if diversity is maximized within the company and each employee can fully achieve his/her potential, the result will be beneficial both to the company's productivity and to the employees themselves. In other words, a workplace in which everyone can participate free from barriers contributes to the full use of employee capabilities and increased productivity.

While the concepts of equal opportunity and diversity management share a certain number of similarities: the promise of a benefit to the organization (improvement in employee morale, reduction of absenteeism, reduction of turnover, etc.), recognition of each person's potential contribution in the workplace because of his/her background and experience, acceptance of non-discrimination principles in recruiting and promotion practices, they also refer to radically different values and principles concerning their implementation.
Equal opportunity is applied by law, supports social justice concerns and is based on the principle of group affiliation. On the other hand, diversity management is based on voluntary actions aimed at profit and refers to distinguishing differences.

Diversity management theory wholly relies on voluntary actions, asking companies and other organizations to take the initiative in responding to demographic tendencies which are outside of their control. The responsibility for achieving diversity in the workplace thus lays on the shoulders of managers. Equal opportunity has emerged in response to systemic barriers facing the inclusion of certain groups in the workforce.

However, diversity management may continue to support changes if it is supported by the equal opportunity employment policies similar to those already in place in public services. As an initiative, this notion of diversity is often deemed to be dangerous as it is restricted to sectors lacking employees, on the one hand, and, on the other, it depends on (positive) reactions on the part of the market place and clientele. Diversity initiatives will only be effective in terms of equity and business if they are implemented at the same time as, or within, existing EEO programs. These programs focus on the identified disadvantaged groups whose qualifications and qualities have not been accepted for historical, structural or attitudinal reasons[65].

In 2001, a study was financed by the DIMIA (*Capturing The Diversity Dividend*[66]) and conducted by the Australian Centre for International Affairs with 227 company heads (80%) and human resource managers (20%) from Australia's largest companies on the diversity issue (intending to include ethnic origin, gender, language, age, hierarchical position, sexual orientation, religion, socio-economic status, marital status, and physical and mental abilities). It contains interesting conclusions:

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[65] Burton C, *Managing difference and diversity - The Changing Role of Human Resource Management in the 90s'*, paper presented at International Women's Day Lunchtime Seminar Series, Public Service Commission, 1992.
[66] *Capturing The Diversity Dividend, Views of CEOs on Diversity Management in the Workplace,* Australian Centre for International Business, 2001.

"Most firms had diverse workplace[67]
Diversity management was not given a high priority
Few firms had documented diversity policies[68]
Few firms undertook diversity training or employed diversity officers
Few firms had diversity management capabilities
Inadequate record-keeping denied CEOs (Chief Executive Officers) the data to employ their diverse workforces productively
Few CEOs implemented diversity management to reduce turnover, absenteeism and job satisfaction
Few CEOs recognise the role of diversity in facilitating firm growth domestically or internationally".

This study underlines the significant contrast between the private and public sectors (with the exception of EEO/AA as they apply to women) in their proactive implementation of equity and anti-discrimination programs. It also underlines the poor availability of statistics and/or available indicators within the commercial sector (with the exception of general surveys conducted in the workplace, Labour Force Surveys). Encouraging diversity management based on profit improvement does not seem very effective today.

As we have seen, the implementation of policies that relate directly to the fight against disadvantages facing certain groups requires the availability of statistics both to identify and recognize diversity and the reality of inequities, firstly, and, secondly, in order to evaluate the target groups designated by the categories. At this stage, it is important to remember that although reporting has been clearly organized at the public service level as well as for women in the private sector, it (a legal obligation) is based on the principle of self-declaration and therefore carries no penalties other than being named in Parliament should there be no reporting. The validity of the declaration is rarely checked or is the subjected to a separate audit conducted by an independent body (for example, KPMG for the public service). Not only the declarant's good faith, but also the validity of the statistical data could be challenged (generally by the *Equal Opportunity Unit* management). A certain number of statistical elements are available at the State and Territory levels, however they are limited mainly to employment in the public sector.

[67] "59% reported their shop floor workplaces as ethnically diverse, compared to only 27% for general management and 18% for senior management", ibid.
[68] "Only 27% of firms undertook diversity training and only 12% of the firms employed officers responsible for diversity or Aboriginal Employment", ibid.

In fact, following the example of the anti-discrimination legislative framework (see Part I), most of the Australian States have created by law (*Equal Opportunity Acts* or similar legislation) separate statutory bodies within their territory and with distinct functions[69]. Besides the Commissioner for Equal Opportunity[70], who is responsible for handling complaints and often the promotion of diversity[71], there are also usually an Equal Opportunity Tribunal[72] and a Director of Equal Opportunity in Public Employment. To facilitate the understanding of the organization of statistical data collection in relation to EEO on the State level, the case of New South Wales will be studied more particularly herein.

3) Statistical Data Relating to Equal Employment Opportunity: the Case of New South Wales' Office of the Director for Equal Opportunity in Public Employment[73]

The Office of the Director for Equal Opportunity in the Public Sector of the State of New South Wales[74] is representative of what can be found at the State level to promote equal opportunity and diversity.

The Office supports the Director in administering the EEO program for the NSW Public Sector[75]. The EEO Program aims to achieve fair outcomes for everyone in Public Sector employment and to enhance employment opportunities for the four identified EEO groups[76]:

- women
- Aboriginal people and Torres Strait Islander
- members of racial, ethnic and ethno-religious minority groups, and
- people with a disability.

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[69] At the State level, the following bodies have been created: Affirmative Action Agency (now called the Equal Opportunity for Women in the Workplace Agency)

- Anti-Discrimination Board (NSW)
- Anti-Discrimination Commission of Queensland
- Canberra Connect Community and Family (ACT)
- Council for Equal Opportunity in Employment (Private Sector Organisation)
- Equal Opportunity for Women in the Workplace Agency (formerly Affirmative Action Agency)
- Human Rights and Equal Opportunity Commission (Australia)
- Northern Territory Anti-Discrimination Commission
- South Australian Equal Opportunity Commission
- Tasmania Anti-Discrimination Commission
- Victorian Equal Opportunity Commission
- Western Australian Equal Opportunity Commission
- Western Australia Office of Equal Opportunity

[70] The Commissioner for Equal Opportunity investigates and tries to conciliate complaints lodged by people who believe they have been discriminated against.

[71] Most States provide guides to "Equity Planners and Practitioners", usually human resource managers.

[72] The Equal Opportunity Tribunal hears complaints that have been referred by the Commissioner for Equal Opportunity when the conciliation process has failed.

[73] ODEOPE: Office of the Director of Equal Opportunity in Public Employment

[74] The information provided herein is available at the following site: http://www.eeo.nsw.gov.au

[75] The Director of Equal Opportunity in Public Employment was established in 1980 to administer Part 9A of the NSW Anti-Discrimination Act 1977. Part 9A of the Act deals with EEO within the NSW Public Sector, which includes departments, declared authorities, State-owned corporations, health services and universities.

[76] EEO groups are "people affected by past or continuing disadvantage or discrimination in employment. As a result they may be more likely to be unemployed or working in lower paid jobs". Cf. ibid

The Office does this by:

- providing support, assistance, guidance and advice to Public Sector agencies on their EEO programs
- monitoring the EEO Program throughout the Public Sector
- advising the Government on employment policies and practices
- collecting EEO statistical data and maintaining a statistical database on EEO throughout the NSW Public Sector
- producing publications designed to assist managers and employees understand EEO and its application in the workplace, and
- carrying out particular programs and initiatives.

The Office collects comprehensive EEO statistics from individual NSW Public Sector agencies. These are added together to give an EEO profile of the Public Sector workforce. The statistics show if particular EEO groups are getting jobs and promotions in proportion to their numbers in the NSW working age population. Changes in this profile over time are used to evaluate the progress of the EEO Program and to work out where more effort is needed.

Data sources

NSW population benchmarks for women and people whose first language was not English are based on Australian Bureau of Statistics (ABS) data from the 2001 Census of Population and Housing. As the Census does not capture information about language first spoken as a child, the estimate for people whose first language was not English is based on the count of people born in countries in which English is not the main language. This population, while not identical, provides the best available approximation for the purposes of benchmarking.

The population benchmark for people with a disability is derived from the ABS Survey of Disability, Ageing and Carers (1998) and consists of persons who:

- live in households
- are aged between 15 and 64 years
- have a disability which is likely to last 6 months or more
- are not retired or attending school, and
- are not permanently unable to work.

The question on disability in the standard EEO data collection form used by NSW Public Sector agencies is closely modelled on the questions used in the ABS survey. However, while the ABS survey establishes a respondent's disability status based on their answers to a range of questions relating to different types of disability, the EEO form uses a single question containing a list of examples derived from the ABS questions. It is acknowledged that these different forms of questioning do not necessarily produce identical counts. However, the complexities of the ABS question modules,

and the privacy concerns relating to the provision of detailed information when respondents are identifiable, make them unsuitable for use within an administrative data collection

For example, at the University of Sydney[77], data relating to the administrative registration of the university personnel relies on volunteer participation for the EEO issues (the questionnaire for students is basically similar) and are collected via a standard form used in the State of New South Wales[78] :

EEO Data – while completion of this section of the form is voluntary, we ask for your co-operation

1. Are you an Aboriginal or Torres Strait Islander person ? An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent, who identifies as such and is accepted as such by the community in which they live.

Yes, an Aboriginal person ☐ Yes, a Torres Strait Islander ☐ No ☐

2. Are you from a racial, ethnic or ethno-religious group that is regarded as a minority group in Australian society, &/or is your first language non-English ? You should indicate that you are from a minority group if you regard yourself, & are regarded by others in the community, as being part of a minority group in Australian society due to your background, country of birth or descent, ethnic or racial appearance, religion and culture, language or accent.

Minority group & First language non-English ☐ Minority group ☐ First language non-English ☐ No ☐

3. Do you have a disability ? You should answer 'yes' to this question if you have : a long term medical condition, ailment or disease; speech difficulties in your first language; a disfigurement or deformity; a psychiatric condition; a head injury, stroke or other brain damage; a complete or partial loss of your sight (excluding conditions which are corrected by wearing glasses or contact lenses) or hearing; a complete or partial loss of the use of any part of your body; a disorder or condition that causes you to learn differently from a person without that condition or disorder.
Yes ☐ No ☐

If 'Yes', do you require reasonable adjustments to be made at work ? You should answer 'yes' to this question if, as a result of your disability and to perform your job, you require a reasonable adjustment to be made to the task that you perform, your workplace or work area, how others behave towards you, the equipment you use, your working hours.
Yes ☐ No ☐

[77] Interview with S. Heesom, Director of Staff and Student Opportunity Unit.
[78] The Office publishes several documents which present the technical specifications of the standard statistical tables used to report EEO data in the NSW Public Sector. They present a clear explanation of each statistical table, including detailed examples. Three documents are available, one for each of:

- Higher Education
- Public Health Services
- NSW Government Departments and Public Authorities.

An accompanying floppy disk in Excel is designed to simplify and streamline preparation of agency EEO statistics.

If 'yes', please detail the adjustment required (attach additional pages if necessary):

_____

_____

This questionnaire provides the following statistical classification[79]:

- Aboriginal People & Torres Strait Islander
- People from Racial, Ethnic, and Ethno-Religious Minority Groups
- People Whose Language First Spoken as a Child was not English
- People with a Disability
- People with a Disability Requiring Adjustment at Work

This classification is broken down into various tables (General Staff/Academic Staff):

- Level
- Employment Basis
- External Recruitment
- Internal Competitive Appointment
- Reclassification / Promotion
- Competitive Appointment - Starting Salary Rate
- Separations
- Average Base Salary
- Average Gross Salary
- Occupation

This allows the University of Sydney to obtain the information required in order to monitor the implementation of a number of university programs such as:

- Indigenous Employment Strategy[80]
- People with Disability (Disabilty Action Plan and EEO/AA Management Plan)
- Women in Leadership Program
- Career Development Support Program
- Staff Support and Development Unit
- Practical Assistance to People from Diverse Backgrounds

These data are the subject of an annual report referred to the Office of the Director for Equal Opportunity in Public Employment in the State of New South Wales. They are then assembled by

[79] *Annual Report to the Office of the Director of Equal Opportunity in Public Employment*, 2002-2003, University of Sydney.

[80] The major elements of the proposed Indigenous Australians Employment Strategy at the University of Sydney are : "General Recruitment, Assited Merits Based Recruitment, Targeted Entry Level Recruitment, Apprenticeships and Cadetships, Orientation ; and Retention" factors that will be monitored include : "Number of position created, type and grade of positions, number of people attending the cross-cultural training and their feedback, number of Indigenous people undertaking training, number of Indigenous people acting in higher graded positions, movement throughout the university of indigenous employees, how and where the strategy is being marketed to the Indigenous community". *Annual Report to the Office of the Director of Equal Opportunity in Public Employement*. 2002-2003, The University of Sydney.

sector[81] and by year (in this example, the New South Wales Department of Education and Training for 2002) and set out in two tables: Employment Basis and Salary Level. These data may be consulted via the Internet or simply on written request.

An analysis of these data is produced for the ODEOPE annual report. This report more closely resembles a report on activities than an analysis *per se*. More importantly, it is a reminder of the targets defined by target groups[82] and compares them to the data obtained for each agency. It also measures EEO achievements. With the exception of the above, no critical analysis is conducted with regard to any particular agency, although the agency is responsible for achieving a satisfactory status in relation to these objectives.

C/ The Use of Statistics within Judicial Proceedings

It is difficult to ascertain the use of statistics within judicial proceedings. However, when a complaint is submitted, the Federal Court of Justice has the power to require testimony as well as the production of documents clarifying issues which arise during the complaint process. The requests may occur five times. They can be requested of the complainant or the respondent. It may even been in the respondent's interest to produce documents which will allow him/her to refute the complainant's allegations and to suggest an alternative scenario. Upon request, an employer or other type of respondent may have to put into evidence his management of a certain sector or a human resource policy, as well as documents supporting the approach taken. Various types of documents may be requested: job descriptions, corporate structure, employment profile, information on production, company history, etc. These investigations may only be requested if appropriate and "*in the interest of justice*" (Federal Magistrates Court, Act s 45, FMC Rules Part 14.2[83]). However, nothing is available to confirm or deny the fact that statistics relating to ethnicity and employment, for example, can be used to justify a discriminatory practice.

The Role of the Law in the Production of Statistics

The role of the law in the production of statistical data is more easily identifiable. At both the federal and State level, most anti-discrimination laws provide the bodies responsible for their application with a legal mandate to collect and register data (see *Anti-Discrimination Board of New South Wales*). Data collection arising from the registration of complaints relating to discrimination on prohibited grounds and the publication of a report[84] are required by law. The registration of these data was the subject of

[81] For example: Film and Television Office, Fire Brigades NSW, Department of Mineral Resources, etc.
[82] The Office provides the Sector with comparative data to benchmark progress at the agency level for each EEO group. The outcomes identified for the Public Sector Equal Employment Opportunity Program are:

- a diverse and skilled workforce
- improved access and participation of EEO groups in the workforce
- a workplace culture displaying fair practices and behaviours.

[83] *Discrimination Law and Practice*, C. Ronald & R. Pepper, the Federation Press, 2004, p.204
[84] Complaints (Australian Federal Police) Act 1981-Sect 38 Annual report and additional reports to Parliament

a standardization attempt within the framework of the professionalisation of complaint handling[85]. Furthermore, as we have seen, the majority of the mechanisms and programs specifically aimed at target groups have a legal framework. There again, the publication of an annual report is mandatory. This is also the case for all anti-discrimination agencies (see the section on data production).

Finally, various submissions, such as the Department of Family and Community Services' submission to the *Productivity Commission Review of the Disability Discrimination Act*, specifically target the modification of publication conditions for statistical data (introduction of an international standard).

D/ Anti-Discrimination Agencies and Statistical Data Collection

The Human Rights and Equal Opportunity Commission Data Collection

The Commission is a collegiate body made up of a President and five Commissioners. The Commission is administered by the President, who is the Chief Executive Officer. He is assisted by the Human Rights, Race, Sex, Disability and Aboriginal and Torres Strait Islander Social Justice Commissioners.

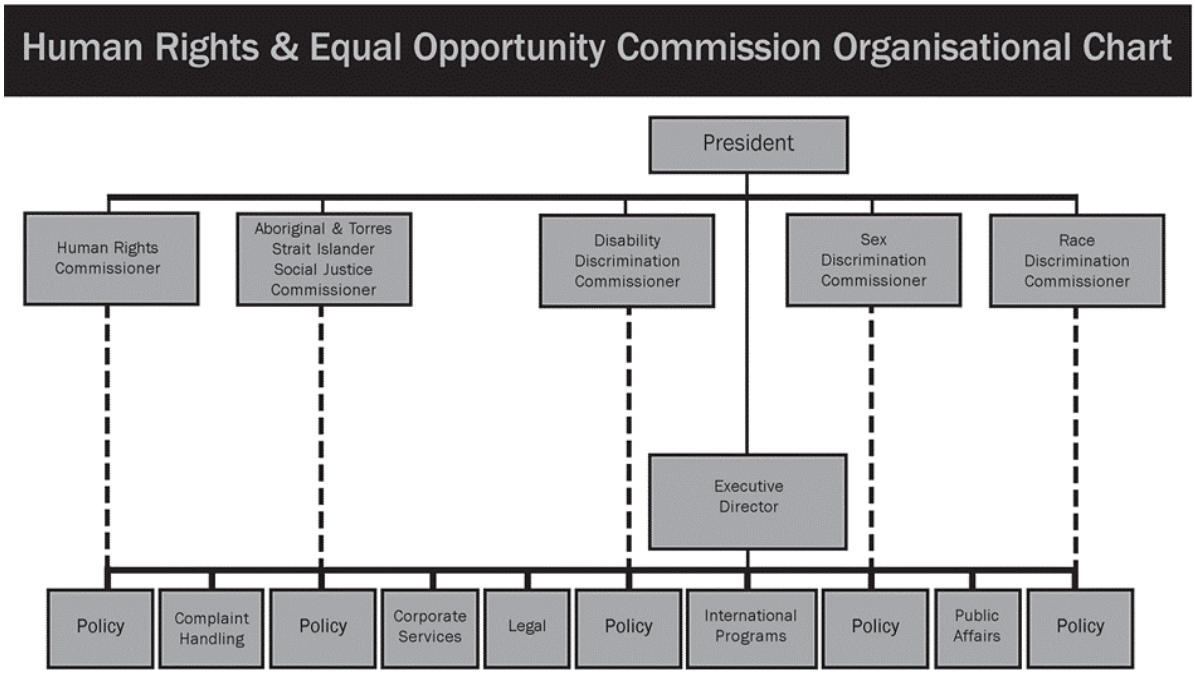
Under the legislation administered by the Commission, it has responsibilities for inquiring into alleged infringements under four anti-discrimination laws - the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* as well as inquiring into alleged infringements of human rights under the *Human Rights and Equal Opportunity Commission Act 1986*.

In addition, the Aboriginal and Torres Strait Islander Social Justice Commissioner has specific functions under the HREOC Act and under the *Native Title Act,1993*. These functions relate to the monitoring of the enjoyment or otherwise by Indigenous people of their rights under the law.

The Sex Discrimination Commissioner also has responsibilities in relation to federal awards and equal pay under the *Workplace Relations Act 1996*.

Matters which can be investigated by the Commission include discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment, marital status, pregnancy, or disability.

[85] *Australian Complaint Handling Standard AS 4269 (1995)*
www.dpc.wa.gov.au/psmd/pubs/psrd/complaintguide.pdf



http://www.hreoc.gov.au/annrep00_01/orgchart2.html

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner (created by the federal parliament in December 1992) was a response to the findings of the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into Racist Violence and also to the extreme social and economic disadvantage faced by Indigenous Australians.

The Social Justice Commissioner works to:

- advocate for the rights of Indigenous peoples
- promote an Indigenous perspective on different issues
- build support and understanding for an Indigenous perspective, and
- empower Indigenous peoples.

As part of its mission, the Commission considers particularly important the question of statistics collection within the Aboriginal populations. For example, on the Commission for Human Rights and Equal Opportunity's web site, the Commission displays a collection of statistics which illustrates the main characteristics of the indigenous population. These statistics focus on certain principal sectors, such as health, education, employment, housing and relations with the criminal justice and social welfare systems. The data is presented, wherever possible, in such a manner as to allow for the identification of modifications (in absolute or relative terms) of the indigenous peoples' situations over the past five and ten years, and to provide a few international comparisons.

The Commission recognizes and supports the usefulness of statistics as clear indicators of the disparities and inequities or the similarities between indigenous and non-indigenous Australians. While incomplete and lacking detail, the statistics it produces must illustrate the current state. The principal sources of information are still the Australian Bureau for Statistics (ABS) and the data obtained through the Census, but also include various studies that the Commission may undertake.

Because of the restrictions imposed on the use of current data (from the Census, as well as administrative data), the Commission points out that the compilation of a precise profile of indigenous peoples remains a difficult task. The Commission regularly emphasizes this point through its reports (a central function of the Commissioner is to report annually to federal Parliament on significant social justice and native title issues facing Indigenous Australians).

Reports on Social Justice

The majority of reports produced by the Commissioners for *Aboriginal and Torres Strait Islander Social Justice* devote a chapter to the question of benchmarking the indigenous populations' disadvantages. They repeatedly underline the need to have available and effective statistical tools and make recommendations to this end.

"Le principe fondamental à l'établissement d'un cadre d'égalité pour corriger les désavantages des indigènes en Australie est l'existence d'une base statistique suffisante au niveau national, d'un accord national sur un cadre de benchmarking et la présence de mécanismes de monitoring et d'évaluation."[86]

Amongst the conditions necessary to the success of reconciliation listed in the 2000 report are:

- Facilitating sufficient data collection to enable decision-making and report publication, and the development of appropriate mechanisms to independently monitor and assess the progress of the reparation process of the indigenous disadvantage;
- Adopting appropriate indicators to rectify the indigenous disadvantage through negotiations with the indigenous population, the State and Territory governments, as well as other service providers, and identifying clear timeframes to achieve short and long term objectives[87].

The 2002 Report, for example, relies on the United Nations development program recommendations[88] (*Using indicators for human rights accountability)* to underline the importance of developing indicators in the struggle for human rights.

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[86] 2000 Social Justice Report, By Dr William Jonas AM, Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, Report 2/2001
[87] Ibid, p. 100.

Although it is not recent[89], the Commission's constant insistence on the question of making statistics available in order to monitor the disadvantages faced by the indigenous population has finally been integrated in the *Steering Committee for the Review of Government Service Provision's* final report[90].

The Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP) was created in April 2002 by the Council of Australian Governments. Its mission was to produce a report on the key indicators relating to indigenous disadvantage[91]. The main objective of this report was to identify indicators illustrating the impact of intervention programs and policies favoring the Indigenous population[92].

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[88] United Nations Development Programme (UNDP), Human Development Report 2000 - Human rights and human development, UNDP, New York, 2000. www.undp.org/hdro/HDR2000.html.

[89] In 1999, the Commonwealth Grants Commission (CGC) had already been commissioned to determine calculation methods relating to the needs of indigenous Australians at the regional level, with regard to health, housing, infrastructures, education, professional training and employment. It was also to produce an index of needs in order to enable the comparison of these results to real expenditure distribution in the various sectors.
In light of the high level of disadvantages facing the indigenous populations in most of these sectors, the use of the main governmental services by this population was expected to be higher than that of non-indigenous Australians. However, the report revealed that these rates were significantly inferior. The lack of access by this population to common services provided by law pointed once more to the importance of specific programs in order to re-establish equal access.
Furthermore, the report revealed that a good portion of the data required for an analysis of the services provided was either non-existent, partial, uncertain, or not comparable between regions or different trends. These various problems included:

- The use of Census data,
- The difficulty in obtaining administrative data,
- Where they existed, no comparative analysis was possible,
- Confidentiality constraints from time to time,
- and the fact that there are almost no data regarding the breakdown of expenditures by region or specific groups of persons.

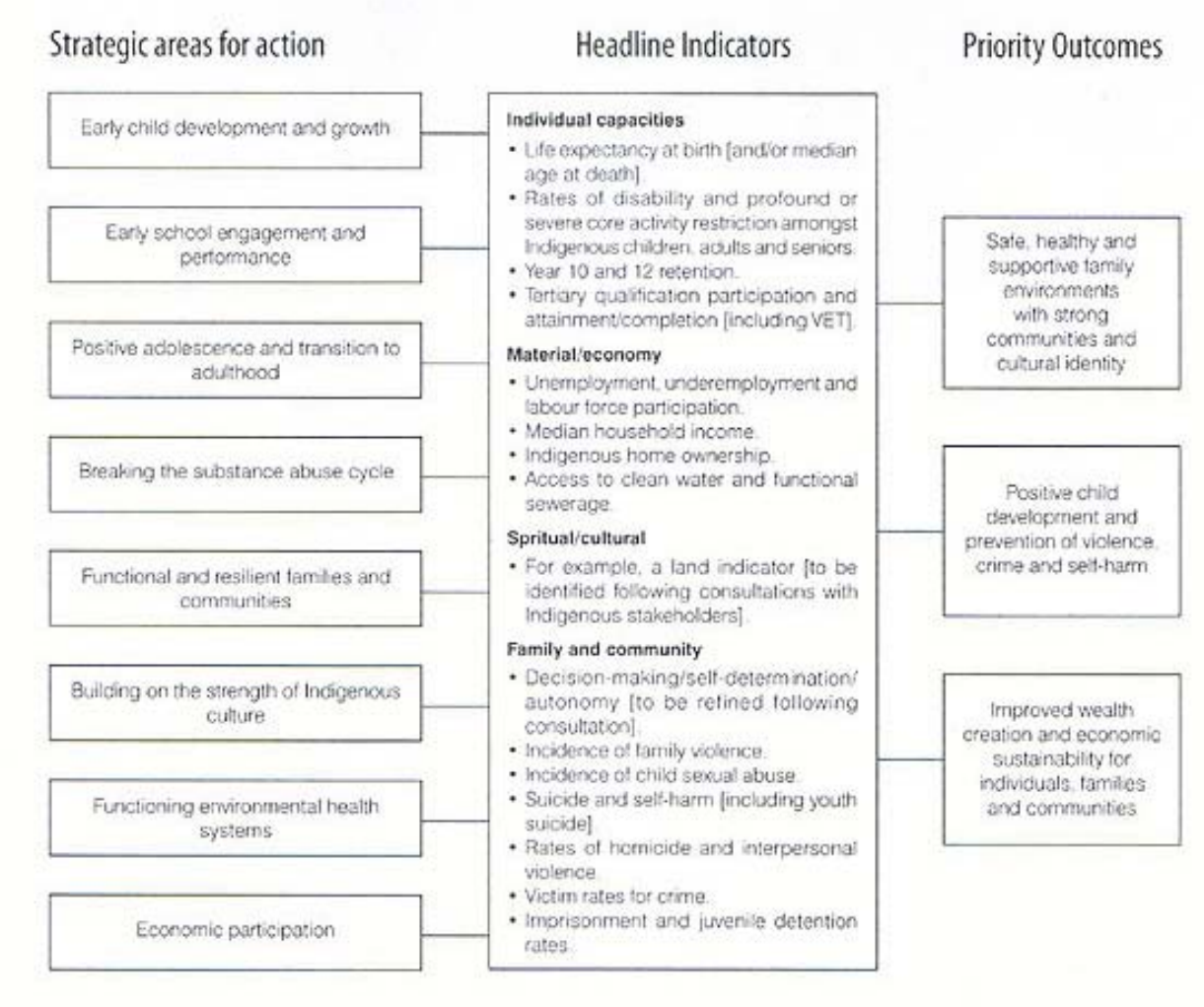
The Report's priority recommendations, therefore, focused on regional data collection that could be compared with a large number of variables (Commonwealth Grants Commission, *Report on Indigenous Funding 2001*, Canberra, 2001).

[90] Steering Committee for the Review of Government Service Provision, Overcoming Indigenous Disadvantage: Key indicators 2003: Report, Productivity Commission, Canberra, 2003.

[91] Steering Committee for the Review of Commonwealth/State Service Provision, Draft framework for reporting on Indigenous disadvantage, 2003.

[92] "The commissioning of this Report by the Council of Australian Governments demonstrates a new resolve, at the highest political level, not only to tackle the root causes of Indigenous disadvantage, but also to monitor the outcomes in a systematic way that crosses jurisdictional and portfolio boundaries. In so doing, the Report also raises the transparency of governments' performance… This Report, therefore, is more than just another collection of data. It documents outcomes for Indigenous people within a framework that has both a vision of what should be for Indigenous people and a strategic focus on key areas that need to be targeted if that longer term vision is to be realised." Ibid.

The Committee provided a framework which included three expected outcomes (right-hand column) arising from the priority areas as defined by the Council of Australian Governments[93] :



Excerpt from the Social Justice Report 2002; HREOC

The 'strategic change indicators' were developed in relation to different political orientations and over eight strategic areas which were identified as requiring action.

Because of the lack of statistical data or the impossibility in collecting data, certain relevant indicators are not included. However, in the case where data are not (or are only partially) available, the indicator is considered as inciting the improvement of data quality.

The particular attention placed on the indigenous question underlines the unique position this minority occupies within concerns relating to the struggle against discrimination and the promotion of human rights. In fact, the HREOC only publishes statistics relating to the complaint handling process for the other grounds for discrimination.

[93] safe, healthy and supportive family environments with strong communities and cultural identity; positive child development and prevention of violence, crime and self harm; and improved wealth creation and economic sustainability for individuals, families and communities, Ibid.

Complaint Handling Statistics

As part of its policy and Education work, and pursuant to statute[94], HREOC's Complaint Handling Section collects data in relation to discrimination. Much of these data are collated and de-identified (i.e. anonymised) and then published in HREOC's *Annual Report*. This report is made publicly available and the government is obliged to table it in Parliament within 15 parliamentary sitting days. Under law, HREOC has an unfettered discretion to decide what data on discrimination should be collected for the *Annual Report*. The statistics published in the *Annual Report* in relation to discrimination are categorised, largely, as follows (from the 2002-2003 Report):

- the background of the complainant (the complainant's gender; the nature of their disability, if any; their geographical origin; whether the complainant is an individual, group, or organisation; whether the complainant is indigenous; and whether the complainant is not from an English-speaking background);
- the nature of the complaint;
- the outcome of the complaint;
- the processing time of the complaint;
- the specific ground(s) of the complaint; and
- the originator of the allegedly discriminatory behaviour (e.g. the media, the government, inter-personal conflict, employment, propaganda).

Some effort is made to maintain, where possible, the integrity of the categories of data collected and published by HREOC to facilitate comparisons of discrimination data over time.[95]

An important statutory function of HREOC is its power to inquire into acts, practices, enactments and proposed enactments to ascertain whether the matter in question is inconsistent with or contrary to any human right.[96] However, unlike in some jurisdictions overseas, there is *no* formalised process whereby the anti-discrimination legislation is reviewed at regular intervals against the relevant statistics (or otherwise) to determine how successfully the regime is meeting its objectives. Under the *Human Rights and Equal Opportunity Act*, HREOC does, however, independently institute its own inquiries (see s 11(1)(f)), reporting its findings to the Attorney-General with the government obliged to table HREOC's report in Parliament (see s 46).

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[94] *Human Rights and Equal Opportunity Act* 1986 (Cth), ss 45 and 46.
[95] Interview with Rocky Clifford (Director, Complaint Handling Section, HREOC), Sydney, 3 March 2004.
[96] *Human Rights and Equal Opportunity Act* 1986 (Cth), s 10(1).

In exercising this function, HREOC has published a number of reports relevant to discrimination on the grounds covered by the MEDIS study.[97]

E/ A Regional Case-Study: New South Wales

1) The Anti-Discrimination Board

The ADB has a statutory obligation (see especially s 122 of the NSW Act) to collect, collate and publish de-identified data on discrimination in its *Annual Report* which is publicly available. As with HREOC, these data are based on complaints received and processed by the ADB. The five main types of statistics published by the ADB are:

(i) Total number of enquiries by ground of discrimination – in 2002-2003, the grounds were:

- sex,
- disability,
- race,
- carers' responsibility,
- age,
- homosexuality,
- racial vilification,

[97] Relevant reports tabled since 1996 include:

- No. 6 - Discrimination on the ground of sexual preference (1998);
- No. 7 - Superannuation entitlements of same-sex couples (1999);
- No. 10 - Report of an inquiry into a complaint of acts or practices inconsistent with or contrary to human rights in an Immigration Detention Centre (2000);
- No. 12 - Report of an inquiry into a complaint of acts or practices inconsistent with or contrary to human rights in an immigration detention centre (2000);
- No. 13 - Report of an Inquiry into a Complaint of Acts or Practices inconsistent with or contrary to human rights (2001);
- No. 15 - Report of an inquiry into a complaint by Ms Elizabeth Ching concerning the cancellating of her visa on arrival in Australia and subsequent mandatory detention (2002);
- No. 16 - Report of an inquiry into a complaint by Mr Hocine Kaci of acts or practices inconsistent with or contrary to human rights arising from immigration detention (2002);
- No. 17 - Report of an inquiry into a complaint by the Asylum Seekers Centre concerning changes to the Asylum Seekers Assistance Scheme (2002);
- No. 18 - Report of an inquiry into a complaint by Mr Duc Anh Ha of acts or practices inconsistent with or contrary to human rights arising from immigration detention (2002);
- No. 23 - Report of an inquiry into a complaint by Mr Hassan Ghomwari concerning his immigration detention and the adequacy of the medical treatment he received while detained (2002) ;
- No. 24 - Report of an inquiry into complaints by five asylum seekers concerning their detention in the separation and management block at the Port Hedland Immigration Reception and Processing Centre (2002);
- No. 25 - Report of an inquiry into a complaint by Mr Mohammed Badraie on behalf of his son Shayan regarding acts or practices of the Commonwealth of Australia (the Department of Immigration, Multicultural and Indigenous Affairs) (2002); and
- No. 27 - Report of an inquiry into a complaint by Ms KJ concerning events at Woomera Immigration Reception and Processing Centre between 29-30 March 2002 (2004).

- marital status,
- victimisation,
- transgender;
- HIV/AIDS
- vilification (broken down to sub-categories of HIV/AIDS vilification, homosexual vilification and transgender vilification),
- all grounds,
- not covered by the Anti-Discrimination Act (other problems), and
- not covered by the Anti-Discrimination Act (work not harassment).

(ii) Total number of enquiries by area – in 2002-2003, the areas were:

- employment,
- goods and services,
- education,
- vilification
- registered clubs,
- all areas, and
- other.

(iii) Complaints received by ground and area which link the statistics collected in (i) and (ii) above.

(iv) Type of employment complaints – in 2002-2003, the categories were:

- Private enterprise,
- State Government (broken down to sub-categories of government departments, statutory bodies and government business enterprises),
- individual (broken down to sub-categories of male and female),
- State.
- education (broken down to sub-categories of public and private),
- hospital,
- Local government,
- non-profit association,
- registered clubs,
- media organisation,
- Commonwealth Government (broken down to sub-categories of statutory bodies and government departments),
- trade unions,
- other, and
- not known.

(v) Outcome of complaints finalised – in 2002/2003 the categories were:

- not proceeded with,
- settled (broken down to sub-categories of 'before conciliation', 'after conciliation' and 'outside' the ADB')
- outside jurisdiction,
- referred to Administrative Decisions Tribunal,
- not accepted,
- formally declined,
- referred to HREOC, and
- formally declined and referred to Administrative Decisions Tribunal.

The use of the statistics collected by the ADB itself is limited. The statistics are examined annually by the ADB's management team to assist in determining appropriate funding priorities and there is also some *ad hoc* analysis of the statistics by the ADB to discern the relative effectiveness of anti-discrimination measures in New South Wales and the ADB in turn liaises with the New South Wales Department of the Attorney-General, reporting on the implementation of the legislation.[98] Under s 120 of the NSW Act, the Attorney-General may refer a law, a proposed law or a practice which conflicts or potentially conflicts with the NSW Act to the ADB which then conducts an examination and reports back to the Attorney-General. This is of particular significance because in Australia there are strict restraints on a court giving an advisory opinion to government (i.e. on a question which does not form the basis of a justiciable dispute between parties with standing before the relevant court).[99] However, as with HREOC, there is no formalised process for the regular review of existing anti-discrimination legislation. To the extent that New South Wales anti-discrimination legislation is reviewed, this has occurred once by statutory mandate within 12 months of the commencement of the NSW Act[100] and, since that time, on an *ad hoc* basis.

[98] Interview with Felicity Huntington, Nathan Tyson and Narelle Hennessy (Indigenous Services, ADB), Sydney, 5 April 2004.
[99] *In re Judiciary Act and Navigation Acts* (1921) 29 CLR 257.
[100] This was mandated by s 121 of the NSW Act.

2) Other Regional Mechanisms for Monitoring Discrimination: New South Wales

The NSW Act has also been reviewed externally by the New South Wales Law Reform Commission.[101] As part of the Law Reform Commission's reporting process, it engaged in community consultation, receiving submissions from interested community groups. It also commissioned a survey report, *Discrimination Complaints-Handling: A Study*, which surveyed the perceptions of people with direct experience of the processes of the ADB and the Equal Opportunity Tribunal and the data here produced helped inform the Law Reform Commission's final recommendations.

F/ Ministries and Other Organisations

There are several other organisations which are involved in the collection and publication of data which are either directly or indirectly relevant to discrimination. These organisations fall into three categories. First, the Commonwealth has established certain statutory bodies whose data collection functions include data relevant to discrimination. These bodies are under the control of and responsible to the Commonwealth Parliament. An example is the Australian Institute for Health and Welfare (AIHW), established by the *Australian Institute for Health and Welfare Act* 1987 (Cth). Under this Act,[102] AIHW collects data relevant to disability discrimination and, to a lesser degree, discrimination based on ethnic origin. Also in this first category are Commonwealth Government departments, such as the Department of Immigration and Multicultural and Indigenous Affairs and the Department of Family and Community Services, which collect data relevant to discrimination based on race or ethnicity and disability respectively.

We must mention here one of the major DIMIA publications, *The Longitudinal Survey of Immigrants to Australia (LSIA[103]).* The LSIA is a longitudinal study of immigrants to Australia. This research explicitly aimed at providing the government and governmental agencies with reliable monitoring data so as to improve policies, programs and services related to immigration and the settlements of immigrants. Two group follow-ups were conducted in the following periods: 1994-1999 (LSIA 1) and 2000-2002 (LSIA2). In the questionnaire for the last wave are questions relating to discrimination[104].

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[101] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report No 92 (1999).

[102] This is most likely authorised by its "health-related" and "welfare-related" functions conferred by *Australian Institute for Health and Welfare Act* 1987 (Cth), s 5.

[103] Department of Immigration and Multicultural and Indigenous Affairs, Life in a New Land: The Experience of Migrants in Wave 1 of LSIA1 and LSIA2

[104] "R.8 *What is the main problem you have/had in trying to find work?* (Probe for the main problem) English language difficulties / Qualifications not recognized / Insufficient training / Insufficient experience / Aren't enough jobs available / Employers think you're too young / Employers think you're too old / Discrimination against (males/females) / Discrimination against (racial/ethnic) background / Discrimination against religious affiliations / Health problems (including pregnancy/childbirth) / Insufficient local experience / Other (SPECIFY)" in the second longitudinal survey of immigrants to Australia, Migrating unit spouse questionnaire, Wave 2 Main.

In the section on the promotion of equal opportunity, the example on the implementation of the Access and Equity Plan 1, a concrete translation of the Charter of Public Service in a Culturally Diverse Society (see chapter II), within the DIMIA is equally significant. While the plan's intention is not to define a particular number of objectives, strategies and generic measures for results for the entire Ministry, but more to align management policy orientations on those of the Charter, it includes a section on the collection and use of the data: "each sector much consider the manner in which it will collect and use data on clients who face difficulties in their access to DIMIA services because of their language, culture, race, religion, as well as their country of birth". The required statistical data are, for the most part, acquired via administrative procedures like information sheets such as the one regarding the "settlement details" (n°886) of arriving migrants, which focuses on English language proficiency. These data, when cross-referenced with data from the *Immigration Records Information System* (IRIS) data base and the *Settlement Data Base*, should allow for the defining of a precise profile of client needs and the adapting *in fine* of the organization of services. The statistical attention to populations targeted by the Charter is clearly and logically linked to the EEO Program orientations (see Chapter II) for the target groups.

A further example : an important source of data for the Agenda was the national survey on multiculturalism which was commissioned by the Office of Multicultural Affairs and conducted by AGB: McNair between the October 1988 and February 1989.

The survey involved 4,502 interviews, including 1,552 in a general sample of the Australian population, 1,809 people born in NES countries or born in Australia of NESB, and 1,141 people from NES countries who had arrived in Australia since 1981.

A supplementary survey was commissioned to obtain more detailed information about three communities which were considered to face particular disadvantage and discrimination, namely Lebanese, Maltese and Vietnamese. This survey was conducted by Reark Research between November 1988 and February 1989 and involved a total of 1,308 interviews.

Interviews, which were conducted face to face, lasted on average up to one hour, and covered issues such as education, use of qualifications, employment, social and political participation and attitudes to multiculturalism and immigration. Some of the findings of the surveys are cited in the Agenda; many others underlie its conclusions. The data have been made publicly available separately.

Secondly, there are certain centers of research, based at publicly funded universities, which carry out studies and collect data on matters relevant to discrimination. An example is the Centre for Aboriginal Economic Policy Research at the Australian National University, the work of which includes research into discrimination against indigenous Australians.

For example, an article published by the Center for Research on Aboriginal Economic Policies[105] attempted to assess the change in the socio-economic status of Indigenous Australians at the national level between 1991 and 2001, a period which is closely linked to the decade of reconciliation. The information used in this article is taken from the three preceding censuses undertaken by the Australian Bureau of Statistics in 1991, 1996 and 2001. The comparisons relate to progress in the absolute well-being of the total Indigenous population as well as the relative well-being of Indigenous and non-Indigenous Australians. Five main categories defining social and economic status are used in the analysis (employment, education, income, housing and health). The decade is divided into two five-year periods, 1991-1996 and 1996-2001. For the first time (Indigenous Australians were included in the Census for the first time only in 1971), there is a tight link between the political cycles (the federal government changed in 1996) and the census cycle, which facilitates a comparative analysis of the execution of two political approaches[106] in terms of Aboriginal affairs[107]. The discrimination issue, however, is not raised *per se* (the only reference thereto is within the notion of disadvantage). In most of the social science studies using statistical data, the same caution exists in the analytical process. The reference terminology is still the disadvantage suffered or noted.

Two other major studies[108] were also based on an analysis of the Census (from indirect statistical data relating to income) and demonstrated that differences in income constituted a "potential element of discrimination". In Hunter's more recent study on Indigenous Australians within the labour market[109], the probability regarding "non-discrimination" in labour is estimated by calculating a rate of expected employment (assuming that, in the labour market, indigenous men and women are treated in the same manner as non-Indigenous men and women[110]). Potential discrimination is thus estimated as a proportion of the difference in employment between Indigenous and non-Indigenous peoples, which is explained by the increase in employment opportunities for Indigenous peoples in a non-discriminatory environment.

Such centers of research are effectively independent of government and are under no legal obligations regarding the nature of data they may and may not collect (other than generally applicable obligations, such as under privacy law). Thirdly, there exist various non-government organisations whose functions include research into discrimination. Examples include the Federation of Ethnic Communities Councils of Australia (which collates some data in relation to discrimination based on religion and race/ethnicity) and ACROD, the National Industry Association for Disability Services (which collects and collates data on disability discrimination). These organisations are not creatures of statute and so are theoretically completely independent from government. However, most such organisations are partially or wholly reliant on the Commonwealth government for funding. Anecdotal evidence suggests that this reliance can lead either to explicit government influence on the organisations' research activities as a condition of funding or latent influence with such organisations not wishing to engage in activities which may offend the government.[111]

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[105] *Monitoring 'practical' reconciliation: Evidence from the reconciliation decade,* 1991–2001, J.C. Altman and B.H. Hunter, Centre for Aboriginal Economic Policy Research (CAEPR), The Australian National University

[106] A focus on a "symbolic" reconciliation (indigenous rights) and "practical" reconciliation (socio-economic improvement) for the period 1991/1996, then a practical reconciliation from 1996 only: a reduction in the material disadvantages facing the Aboriginal.

[107] Hawke and de Keating from 1991 to 1996: Labour Government versus Howard between 1996 and 2001: Liberal and Conservative Governments.

[108] *Economic status of Aboriginal and other Australians: a comparison*, Jones FL, 1991, in JC Altman (ed) Aboriginal Employment Equity by the Year 2000, CAEPR, ANU, Canberra and *Occasional Paper: Aboriginal and Torres Strait Islander People in the Australian Labour Market*, Daly, 1995, ABS, Canberra. The study undertaken by Daly is cautious and points out that these differences cannot be considered as a hypothesis for the significant discrimination against indigenous employees because these reflect the variations in the system for determining income (difference between income rates and individual salaries).

[109] *Indigenous Australians in the contemporary labour market*, Boyd Hamilton Hunter, 2001, CAEPR, ANU, Canberra.

[110] In other words, that they have the same regressive coefficients.

[111] Interview with Conrad Gershevitch (Director, Federation of Ethnic Communities Councils of Australia), Canberra, 29 March 2004.

III - THE FRAMEWORK FOR THE PRODUCTION OF STATISTICAL DATA

A/ Privacy Restrictions on Collection and Publication of Discrimination Data

Federal Privacy Law

There are restrictions on the collection and use of data relating to discrimination. These apply both to government and non-government organisations, although the restrictions are more stringent for government. The restrictions operate as follows:

- *Generally applicable restrictions.* The *Privacy Act* is an unusual piece of legislation. Rather than clearly enunciating conduct deemed to be unlawful, the Act establishes ten National Privacy Principles which are relatively broad, general statements to provide guidance in the area of privacy in a co-regulatory context. The Principles cover, relevantly, "sensitive information" which includes information or an opinion about an individual's racial or ethnic origin; religious/philosophical beliefs or affiliations; sexual preferences or practices; or health information. The Principles establish that organisations must not collect or publish such information unless: it is necessary for the organisation's functioning; it is otherwise lawful; the organisation acts fairly and openly; the organisation permits the individual to view and correct the information; and, publication of the information, where lawful and practicable, is in a de-identified form. These requirements are, however, subject to a number of general and specific exemptions.
- *Restrictions applicable only to HREOC*. It is a criminal offence for a past or current member of HREOC to record, divulge or communicate any personal information they acquired by reason of their association with HREOC. Similarly, past and current members of HREOC and people who have acted on behalf of HREOC cannot be required to produce such personal information (even in court proceedings), except if otherwise required or permitted by an Act of Parliament.[112]
- *Restrictions applicable only to the ABS*. The ABS must not publish statistics, particularly of a "personal or domestic nature" in such a way as is likely to enable the identification of a particular person or organisation.[113] Employees and former employees of the ABS must not "directly or indirectly, divulge or communicate" any relevant information and must give an undertaking to this effect.[114]

[112] *Human Rights and Equal Opportunity Commission Act* 1986 (Cth), s 49.
[113] *Census and Statistics Act* 1905 (Cth), ss 12 and 13.
[114] *Census and Statistics Act* 1905 (Cth), ss, 7, 19 and 19B and *Statistics Regulations*, Schedule.

The Office of the Federal Privacy Commissioner

The main government body concerned with protection of privacy, as established by the *Privacy Act* 1988 (Cth), is the Office of the Federal Privacy Commissioner. The Office liaises frequently, although not according to any regular timetable, with non-government organisations and Commonwealth government agencies which collect data relevant to discrimination – these include, especially, HREOC, the ABS, the Australian Institute for Health and Welfare and Family and Community Services. The purpose of this liaison is to assist these bodies to comply with their requirements under privacy law. The Office cannot provide absolute "regulatory comfort" for these bodies in that the Office will not endorse a particular policy adopted as being in compliance with Australian privacy law; rather, discussions between the Office and the body are at a general level.[115]

The Office engages in two forms of inquiries to ascertain the extent of compliance with privacy law:

(i) *Audits*. The Office is empowered to audit Commonwealth government agencies, either randomly or targeting possibly problematic areas, and this power includes a right of inspection.[116] However, while reports issued by the Office must be tabled in Parliament, the Office is not empowered to enforce its findings.[117] Moreover, the regular audit program has recently been closed due to budgetary constraints. The Office does not possess a power to audit non-government organisations which it suspects may be in breach of its privacy obligations.

(ii) *Investigations*. Part V of the *Privacy Act* establishes that individuals can complain to the Office that a government or non-government organisation (the respondent) had breached privacy law. The Office investigates such complaints and, in its investigation, it has powers similar to a court regarding the examination of witnesses and obtaining relevant documents and information. It may then make findings of fact and issue declarations including that the respondent's conduct was unlawful and that the respondent should pay a specified amount of compensation. However, such findings are generally *not* conclusive or binding on the parties. To enforce a compensation order, a complainant would have to seek a *de novo* hearing in the federal judicial system, although the complainant may refer to the determination and the Office's written reasons in such enforcement proceedings.

The Office adopts a co-regulatory approach in fostering compliance with Australian privacy law by non-government organisations. […]

The Office takes special, non-legislative measures as part of its co-regulatory approach, engaging in a number of methods of communication with the private sector to highlight that sector's privacy obligations. In descending order of regulatory impact, these methods are: guidelines, fact sheets, frequently asked questions (published on the Office's website) and information derived from the

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[115] The material in this paragraph was derived from an interview with Paul Armstrong (Director, Policy, Office of the Federal Privacy Commissioner), Sydney, 6 April 2004.
[116] *Privacy Act* 1988 (Cth), s 27.
[117] *Privacy Act* 1988 (Cth), Part IV Division 3.

Office's telephone hotline.[118] In relation to discrimination, the most significant of these usually take the form of guidelines issued under s 27(1) of the *Privacy Act* – they are not legally binding, rather they are advisory in nature. Some examples include the following. First, the Office has produced in consultation with indigenous and other groups what aims to be "a practical guide to privacy issues in the handling of personal information of Aboriginal and Torres Strait Islander people".[119] This guide covers such matters as respecting cultural sensitivities, not collecting unreasonably intrusive personal information and disclosure of personal information. Secondly, the Office has produced guidelines for the private health sector which are relevant to discrimination based on ethnicity (indigenous people), disability and sexuality.[120] These guidelines apply the National Privacy Principles to common scenarios faced in the private health sector, suggesting practical methods by which organisations can comply with their privacy obligations. Thirdly, the Office has produced a more generic guide to the National Privacy Principles which would assist, inter alia, organisations collecting and publishing data in relation to discrimination.[121]

Regional privacy law: New South Wales

New South Wales has its own privacy regime which adopts a similar approach to that of the Commonwealth. The *Privacy and Personal Information Protection Act* 1998 (NSW) is the primary statute. The Act (s 19) provides a general prohibition on public sector agencies from disclosing "personal information relating to an individual's ethnic or racial origin, political opinions, religious or philosophical beliefs, trade union membership, health or sexual activities unless the disclosure is necessary to prevent a serious or imminent threat to the life or health of the individual concerned or another person". The ADB is, however, exempted from this prohibition (s 28).

[118] Interview with Paul Armstrong (Director, Policy, Office of the Federal Privacy Commissioner), Sydney, 6 April 2004.
[119] Office of the Federal Privacy Commission, "Minding our own business: Privacy Protocol for Commonwealth Agencies in the Northern Territory handling personal information of Aboriginal and Torres Strait Islander people" (1998).
[120] Office of the Federal Privacy Commission, "Guidelines on Privacy in the Health Sector" (2001).
[121] Office of the Federal Privacy Commission, "Guidelines to the National Privacy Principles" (2001).

B/ Exemptions to Anti-Discrimination Legislation

Australian parliaments at the federal and regional levels have consistently recognised a need for two forms of exemption from the operation of anti-discrimination laws. The first form of exemption constitute legal measures designed to achieve substantive justice: most commonly, they are referred to as equal opportunity or affirmative action measures. These have been described as "positive" measures,[122] in that they are designed to advance the objectives of the overall anti-discrimination regime. The second form of exemption prevents the operation of otherwise applicable anti-discrimination legislation within certain circumstances or in respect of certain groups. This category of exemption represents a compromise. That is, parliaments have deemed it desirable to enact anti-discrimination laws which are of wide and general application, but not so wide or general as to preclude the recognition that certain competing concerns may be so important as to permit a breach of these rules in specific cases.

1) Exemptions for Equal Opportunity or Affirmative Action

Most anti-discrimination statutes in Australia contain at least a general statement recognising that positive measures designed to achieve substantive justice are a valid part of the anti-discrimination regime. Federal[123] and regional[124] parliaments in Australia have tended to eschew the term favored in the United States of America, 'affirmative action', in favour of the term, 'equal opportunity' or 'special measures'. Importantly, on the whole, the effect of this legislation is *not* to require government or non-government organisations to institute policies designed to take advantage of these exemptions from the operation of anti-discrimination legislation: government can choose whether or not to take the further step to institute equal opportunity policies. Similarly, absent further statutory intervention, these legislative exemptions do not provide the judiciary with a means of ensuring that the public or private sector act in conformity with equal opportunity principles. This is in stark contrast with, for example, the USA where the courts have taken a very active role in implementing and enforcing 'affirmative action' policies.[125]

There is one exception to the above: the *Equal Opportunity for Women in the Workplace Act* 1999 (Cth) contains a requirement that employers with more than 100 employees and higher education institutions take special measures to ensure women's equal opportunity in the workplace. Employers are required to take certain steps including consultation, policy formulation, review of workplace practices and setting objectives. Employers must also lodge an annual report, constituting a self-assessment of their performance under these criteria. However, there are no direct enforcement

[122] See, for example, Ronalds, C and Pepper, R, *Discrimination Law and Practice* (2nd ed, 2003) at 155-156.
[123] See: *Disability Discrimination Act* 1992 (Cth), ss 3 and 45; *Racial Discrimination Act* 1975 (Cth), s 8(1); *Sex Discrimination Act* 1984 (Cth), ss 3 and 7D; and *Human Rights and Equal Opportunity Act* 1986 (Cth), s 31.
[124] In New South Wales, for example, see: *Anti-Discrimination Act* 1977 (NSW), s 21 (race) and s 126A (general).
[125] See, for instance, the landmark case of *Brown v Board of Education* 347 US 438 (1954).

mechanisms: the only penalty should an employer fail to meet the criteria or if it does not lodge a report is that the employer risks being named in the Commonwealth Parliament.[126]

2) Exemptions for Individuals or Groups

There are several categories of exemptions which operate to prevent anti-discrimination law from applying in certain circumstances or in respect of certain people:

(i) *Exemptions granted by responsible government body*. All Australian anti-discrimination laws provide that the relevant body charged with supervising these laws may grant exemptions from the operation of these laws on a case by case basis. At the federal level, the body is HREOC[127] and each of the States and Territories has its own body with similar powers.[128] The provision of such exemptions is "basically designed to deal with unusual and short-term events which may breach the law without an exemption, but which will not provide the basis for an on-going, long-term breach of the [relevant] Act."[129]

(ii) *Inconsistency between discrimination statute and other statute(s)*. Australian anti-discrimination statutes contain exemptions, of varying breadth, covering conduct which would otherwise constitute unlawful discrimination but which is done in compliance with other legislation or under statutory authority. For example, federal sex discrimination law provides exemptions where the otherwise discriminatory conduct is done in compliance with another statute or an order of a court, tribunal, HREOC or a workplace certified agreement.[130] Other statutes contain similar or broader exemptions.[131]

(iii) *Specific exemptions*. There are certain types of organisations which are frequently granted specific exemptions from the operation of anti-discrimination legislation. These include:

- charities[132;]
- religious groups in relation to sex discrimination at the federal level[133] and more generally at the regional level[134];
- the military, armed forces and intelligence organisations[135];
- certain sporting activities[136]; and

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[126] *Equal Opportunity for Women in the Workplace Act* 1999 (Cth), s 19.
[127] Power is granted to HREOC under *Disability Discrimination Act* 1992 (Cth), s 55; *Sex Discrimination Act* 1984 (Cth), s 44; and *Human Rights and Equal Opportunity Act* 1986 (Cth), s 11.
[128] In New South Wales, for example, the relevant government Minister may grant an exemption on the recommendation of the Anti-Discrimination Board: *Anti-Discrimination Act* 1977 (NSW), s 126.
[129] Ronalds, C and Pepper, R, *Discrimination Law and Practice* (2nd ed, 2003) at 171.
[130] *Sex Discrimination Act* 1984 (Cth), s 40.
[131] See, especially, *Disability Discrimination Act* 1992 (Cth), s 47; and *Anti-Discrimination Act* 1977 (NSW), s 54.
[132] See, especially, *Disability Discrimination Act* 1992 (Cth), s 49; *Racial Discrimination Act* 1975 (Cth), s 8(2) and (3); and *Sex Discrimination Act* 1984 (Cth), s 36. For an example of regional legislation, see *Anti-Discrimination Act* 1977 (NSW), s 55. The NSW Act also extends to voluntary bodies (s 57).
[133] See, especially, *Sex Discrimination Act* 1984 (Cth), s 37.
[134] See, for example, *Anti-Discrimination Act* 1977 (NSW), s 56.
[135] See, especially, *Disability Discrimination Act* 1992 (Cth), s 53-54; and *Sex Discrimination Act* 1984 (Cth), s 43. This is not relevant at the regional level as the Commonwealth has exclusive power to legislate in respect of military and associated matters.
[136] See, especially, *Disability Discrimination Act* 1992 (Cth), s 28; and *Sex Discrimination Act* 1984 (Cth), s 42. For an example of regional legislation, see *Anti-Discrimination Act* 1977 (NSW), s 22 (race), s 38 (sex), s 38P (transgender) and s 49R (disability).

- applications for visas to enter Australia[137].

(iv) *Unjustifiable hardship for disability discrimination*. Most Australian statutes dealing with disability discrimination contain an exemption permitting non-compliance with the relevant Act if, to do otherwise, would cause unjustifiable financial or other hardship to the discriminator in the circumstances of the case in question.[138]

3) Case-Study: Education

For some time, there has been a recognition at the federal and regional levels of government that education is a key area in which systemic disadvantage (whether or not it is the result of discrimination) must be addressed.[139] At a policy level, this recognition can be appreciated most clearly in relation to the relative disadvantage of the Australian indigenous population in education.[140] The most recent culmination of this ongoing process was *The Adelaide Declaration on National Goals for Schooling in the Twenty-first Century* ("the Adelaide Declaration") produced by the Ministerial Council on Education, Employment, Training and Youth Affairs in 1999.[141] Article 3.1 of the Adelaide Declaration states:

"Schooling should be socially just, so that … students' outcomes from schooling are free from the effects of negative forms of discrimination based on sex, language, culture and ethnicity, religion or disability; and of differences arising from students' socio-economic background or geographic location."

To this end, numerous inter-governmental programs were developed to help prevent discrimination on these grounds. A recent and rare example of an independent report seeking to evaluate the relative success of such programs is the Australia Institute's report into discrimination in private schools[142].

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[137] In this area, the Commonwealth government is permitted to enact legislation and pursue policy which would otherwise constitute unlawful discrimination on the basis of disability: *Disability Discrimination Act* 1992 (Cth), s 52.

[138] *Disability Discrimination Act* 1992 (Cth), s 11; and *Anti-Discrimination Act* 1977 (NSW), s 49C.

[139] By way of illustration, the following Commonwealth legislation specifically covers discrimination in the area of education: *Disability Discrimination Act* 1992 (Cth), s 22; and *Sex Discrimination Act* 1984 (Cth), s 21 (though s 38 make this section subject to an exception for educational institutions established for religious purposes) and 28F. For an example of regional legislation, see *Anti-Discrimination Act* 1977 (NSW), s 17 (race), s 22E (sexual harassment), s 31A (sex), s 38K (transgender), s 49L (disability) and s 49ZO (homosexuality).

[140] See, for example, the following statements by the combined federal-regional Ministerial Council on Education, Employment, Training and Youth Affairs in conjunction with the Commonwealth Department of Education, Science and Training:

- the *Hobart Declaration on Schooling* (1989) available at http://www.mceetya.edu.au/hobdec.htm;
- the *National Aboriginal and Torres Strait Islander Education Policy* (1989) available at http://www.dest.gov.au/schools/indigenous/aep.htm;
- the *National Strategy for the Education of Aboriginal and Torres Strait Islander Peoples* (1996-2002), executive summary available at http://www.mceetya.edu.au/public/pub3312.htm; and
- the *Adelaide Declaration on National Goals for Schooling in the 21st Century* (1999) available at http://www.dest.gov.au/schools/adelaide/adelaide.htm.

[141] This is available at http://www.dest.gov.au/schools/adelaide/adelaide.htm.

[142] Australia Institute (authors: Wilkinson, D, MacIntosh, A and Hamilton, C), "Public Attitudes to Discrimination in Private Schools" (May 2004) available at http://www.tai.org.au/.

IV - SUMMARY ON THE PRODUCTION OF STATISTICS

As we mentioned in passing in Part II, a certain number of institutions such as Ministries (DIMIA), public administrations (universities) or the HREOC (to a lesser degree, as we will see) produce, collate or collect statistical data which can used in the struggle against discrimination and, more broadly, in implementing multicultural policies. To use these data, these bodies all refer to the principal producer of statistical data in Australia: the Australian Bureau of Statistics (the ABS). This part will therefore introduce the Australian statistics system, its organization and operations, before looking at the categorization of grounds involved in the Census framework and the main surveys or studies that the ABS may conduct.

A/ The Statistics System

The Australian Bureau of Statistics

ABS is the official statistical department in the Australian government and is directed by an official Australian Statistician, as provided for in the Census and Statistics Act of 1905 (CSA). The CSA specifed that that ABS publish and disseminate compilations analyses of statistical information and maintain the confidentiality of information collected under the CSA. The Statistician has the authority to collect statistics and organize the Census of Population and Housing. Section 13 of the CSA gives a Minister of the State the right to make determinations providing for the disclosure, with the approval in writing from the Statistician, of information included in a specified class of information furnished in pursuance of the CSA. Section 9 of the CSA allows the Statistician to collect statistics in relation to matters prescribed, as he or she deems appropriate. These matters defined more precisely in the Statistical Regulations, which define the categories for which the Statistician may collect data, such as migration; births, deaths marriages and divorces; population and the social economic and demographic changes to the population; health and health services and quarantine; health benefits and health insurance schemes; social and welfare services; pension and superannuation schemes; accidents and injuries; public safety; law; crime; the Defense Force and police forces; local government; education…

Until 1967, there operated a significant restriction on the census and other surveys: s 127 of the Constitution which stated: “In reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted”. In other words, this provision prohibited Australia’s indigenous people from being counted in the census. In 1967, s 127 was repealed following a referendum,[143] and no similar restrictions now apply.

[143] *Constitution Alteration (Aboriginal) Act* 1967 (Cth).

The ABS has a very broad mandate in terms of data collection, which permits but does not require it to collect data in relation to all forms of discrimination.[144] The most important information which the ABS now collects is divided into a number of 'frameworks', however discrimination is not and has never been in the text of the various frameworks. This is probably because the collection of data on discrimination has not historically been an area of particular concern to the ABS.[145] There are, therefore, very few surveys administered by the ABS which *directly* seek to measure discrimination. Those surveys which do exist are directed largely towards discrimination suffered by indigenous Australians.

Indeed, the central question treated by Australian statistics is definitely "disadvantage", with a particular focus on the indigenous population. This ethnic minority is the subject of particular attention as illustrated in the various studies and surveys.

- The Census of Population and Housing. Although this is not an Indigenous-specific survey, the 2001 Census form was completed by approximately 410,000 people who identified as Indigenous, making it the most comprehensive survey undertaken of Indigenous people in Australia. Disaggregated results are available, with comparisons to the non-Indigenous or total population. Publications titled *Population Characteristics*, *Aboriginal and Torres Strait Islander Australians* (with ABS Series cat. 4713.0 - 8) summarise the main findings at national and State/Territory levels.
- The Indigenous General Social Surveys (IGSS) are the largest Indigenous-specific surveys undertaken by the ABS. The first was in 2002 and they are intended to occur at six yearly intervals. The results of the 2002 Survey will be available in April, 2004. The IGSS aims to provide information across all areas of social concern for the Indigenous population, including health, housing, work, education, and income. The survey is to have a sample of about 11,000 Indigenous people spread across all areas, designed to produce estimates at State/Territory level and broad regional data (eg metropolitan, urban, other) at the national level. See also the National Aboriginal and Torres Strait Islander Survey (1994) (NATSIS).
- The Community Housing and Infrastructure Surveys (CHINS), commissioned by ATSIC from the ABS. The first CHINS took place in 1992, with follow-ups in 1999 and another in 2001. They are now intended to take place every two years. These have two specific aims. One, to assess the state of the housing stock of Indigenous housing authorities, and two, to assess the housing and Infrastructure in 'discrete' Indigenous communities – defined areas whose population is 50% or more Indigenous. The latter is the most useful because it sheds light on the conditions under which approximately 108,000 Indigenous people live in Australia (about 1 in 4 people) most in remote areas. The results are published in an ABS series with cat. no. 4710.0 *Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities, Australia*.

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[144] *Census and Statistics Act* 1905 (Cth), s 9 and *Statistics Regulations* (Cth), cl 5.
[145] Interview with Horst Posselt (Director, Family and Community Statistics, ABS), Canberra, 29 March 2004.

- The National Health Surveys have been taking place since 1995 and have included an Indigenous identifier. From 2001, the surveys have had an Indigenous component, although the sample sizes are relatively small. These are intended to take place every 3 years. Results from these are published in ABS series cat. no. 4806.0 *National Health Survey: Aboriginal and Torres Strait Islander Results.*
- The National Health Survey Results and other data gathered from administrative data sets (hospital records, birth and death certificates and so on) gathered by the Australian Institute of Health and Welfare (AIHW) are published in a joint ABS/AIHW publication series cat. no. 4704.0 *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Population.* These are released every second year, the most recent in 2003.

Other ABS surveys include the National Drug Strategy**,** the Household Survey (1998), the Labour Force Surveys (1994 on), and the Australian Housing Survey (1999). All of these have Indigenous components.

The Census[146]

The census is the main statistical instrument providing data which *inform* the design and application of public policy. Defining the characteristics of the population and housing impacts on planning, administrative, development and assessment activities relating to public policy. These characteristics are used to study the social and economic conditions of particular groups in the population (notably those targeted by equity programs and, in particular, the Aboriginal).
The population estimates resulting from the census are used to determine the number of seats assigned to each State and Territory in the House of Representatives. They are also used to assess the Commonwealth financial aid grants to the States and Territories.

The census is a centralized activity conducted and controlled by the Australian Statistician pursuant to the *Census and Statistics Act 1905*, which guarantees the homogeneity of the collection methods within each of the States as well as the confidentiality of the collected information.
Australia performs a census every five years (now obligatory pursuant to the 1977 amendment to the *Census and Statistics Act*[147]).
The contents of the census have changed since the first census of 1911. New categories have been included, such as age, civil status and religion, while others have been included or excluded depending on social, political and demographic changes, but also in answer to requests from researchers or the general public. The chart below traces this evolution from 1911 to 2001 for the grounds the subject of this study.

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[146] Most of the information presented here is taken from the: ABS • HOW AUSTRALIA TAKES A CENSUS • 2903.0 • 2001
[147] It states: 'the census shall be taken in the year 1981 and in every fifth year thereafter, and at such

TOPICS	1911	1921	1933	1947	1954	1961	1966	1971	1976	1981	1986	1991	1996	2001
Name	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Age	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Sex	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Marital Status	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Relationship (family structure)	*	*	*	*	*	*	*	*	*(1)	*(2)	*(3)	*	*	*
Birthplace	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Birthplace of parents		*						*	*	*	*	*	*	*
Year of arrival (period of residence in Australia	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Citizenship	*	*	*	*	*	*	*	*	*(5)	*(5)	*(6)	*	*	*
Aboriginal/Torres Strait Islander origin (Race)	*	*	*	*	*	*	*(7)	*(8)	*(8)	*	*	*	*	*
Ethnic Origin											*(9)			*
Internal migration usual residence														
- 1 year ago									*	*	*	*(11)	*	*
- 5 years ago								*	*	*	*	*	*	*
Blindness, deaf-mutism	*	*	*											
Handicaps									*					
Language use		*(12)	*(13)						*(14)	*(15)	*(16)	*	*	*
Religion	*	*	*	*	*	*	*	*	*	*	*	*	*	*

Notes:

(1) Prior to and including 1976, the term *relationship to head* was used.

(2) The term *head* was considered inappropriate and *relationship to Person 1* was asked.

(3) Since 1986 *relationship to Person 1/Person 2* has been asked.

(5) Prior to 1976, *nationality* rather than *citizenship* was asked.

(6) Since 1986 the person has been asked whether or not they were an Australian citizen.

(7) In all censuses prior to 1971, respondents were required to state their race and, where race was mixed, to specify the proportion of each.

(8) In the 1971 and 1976 Censuses, a question with response categories of European, Aboriginal, Torres Strait Islander and Other was included.

(9) A question on each person's ancestry was asked for the first time in 1986.

(11) State level only.

(12) Question asked whether the person could read and write.

(13) Question asked whether the person could read and write a foreign language if unable to read and write English.

(14) The 1976 Census asked for *all languages regularly used*.

(15) In 1981 ability to speak English was asked.

(16) Since 1986 two separate questions have been asked - language used and ability to speak English.

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other times as are prescribed'.

To modify the content or terms of these categories, census data users and the general public are invited to communicate their remarks to the ABS via written proposals[148]. Based on these written submissions (130 were examined for the 2001 Census), consultations are held in each of the States and Territories. The Government's decision is based on these consultations. Draft recommendations for the census contents are discussed by the Australian Statistics Advisory Council (ASAC) four years before the census. The nature and content of the census are then submitted to Parliament.

The Australian Statistics Advisory Council (ASAC[149])

The Council includes members from the statistics bodies of the various Australian States and Territories. Through these consultations (committee meetings), the Council examines the ABS' needs in information and produces and defines a number of orientations regarding ABS priorities (for the short and long term). For example, it wished to include in its ABS work program a commitment related to the Indigenous Community Engagement Strategy, particularly with regard to the restitution of information to the Aboriginal communities (access to statistical data). In its Annual Report (2002-2003), it also identifies a need for: "improved statistical information were the factors discriminating successful businesses and the barriers to improved labour force participation. Strong emphasis was also given to ensuring the quality of population estimates, given their key role in determining funding and electoral matters[150]". Finally, the Australian Statistics Advisory Council provides opinions on the census' categories. With regard to the 2006 census, it supports the introduction of a question on disability (these data are needed for planning governmental and non-governmental services for disabled persons) and insists on the need for a broad consultation regarding the development of the census' content.

[148] Information Paper: Census of Population and Housing, ABS Views on Content and Procedures. 2007.0

[149] The Australian Statistics Advisory Council was established by the *Australian Bureau of Statistics Act 1975.* Under subsection 18(1) of the *Australian Bureau of Statistics Act 1975* the Council is to advise the Minister and the Australian Statistician on:
"(a) the improvement, extension and co-ordination of statistical services provided for public purposes in Australia;
(b) annual and longer term priorities and programs of work that should be adopted in relation to major aspects of the provision of those statistical services; and
(c) any other matters relating generally to those statistical services."
Mission : *« To ensure that, in keeping with Council's statutory charter, the advice furnished to the Minister and the Statistician in relation to the collection and dissemination of statistics has due regard to relative priorities, is objective, relevant, timely, constructive and practical, and that it is sensitive to the needs of both suppliers and users of statistical data" ASAC, Annual Report, 2002-03, Commonwealth of Australia 2003*

[150] Ibid, page 10

B/ Categories by Grounds

1) Ethnic Origin

The Concept

Although ancestry, ethnic identity and cultural diversity refer to issues that could be considered distinct, in Australian statistics, they share a common fundamental concept: ethnicity (affiliation to an ethnic group). This concept is based on the definition given in the *Macquarie Dictionary Definition*[151] (3rd Edition, 1997) which states:

1. relating to or peculiar to a population, especially to a speech group, loosely also to a race 2. relating to the origin, classification, characteristics, etc. of such groups 3. relating to members of the community who are migrants or the descendants of migrants and whose native language is not English. 4. as coming from an identifiable culture.

In Australian statistics, ethnicity also relates to a shared identity or similarity between a group of people in relation to one or more parameters. These parameters were enunciated in the *Population Census Ethnicity Committee*[152] report written by W.D. Borrie in 1984. Drawing from a statement of the British House of Lords[153,] it noted that a principal factor is the fact that an ethnic group perceives itself, and is perceived by others, as a distinct community by virtue of certain characteristics. These distinct characteristics, which may not necessarily be present for each of the ethnic groups, include:

- a long, shared history, sustained in the collective memory;
- a cultural tradition, including family and social customs, that may be based on religion;
- a common geographic origin;
- a common language (not necessarily limited to this group);
- a common literature (written or oral);
- a common religion;
- the group is a minority (often with a notion of oppression); and
- is racially identifiable.

This approach, which relies on adequate characteristics to define ethnic or cultural groups, allows for the analysis of the ethnic affiliation concept in two ways: the first is based on the group's self-identification, the second is based on history.

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[151] *The Macquarie Dictionary Definition* is the Australian dictionary of reference.
[152] *The Measurement of Ethnicity in The Australian Census Population, Report to the Australian Statistician by the 1986 Population Census Ethnicity Committee (ABS Cat. No. 2172.0)*
[153] *UK Law Lords statement reported in Patterns of Préjudice*, Vol 17, N°2, 1983.

Australian statistics retain the first approach of "self-identification". Ethnic affiliation is thus considered to be a multi-dimensional concept based on a certain number of distinct characteristics and which uses an "individual's perception" approach.

Measuring Ethnic Origins

A Brief History

The methods for measuring ethnic and cultural diversity in Australia have evolved along the multiculturalist model. Since the beginning of the 20th century, the classification of "immigrants" has used the nationality and country of birth categories. It was broadened in 1971 to include country of birth of the parents. This advance corresponds to the increasing awareness of the multicultural nature of Australian society. The recognition of the "diversity" of Australians' backgrounds coincides with the abolishing of the White Australian Policy in 1973 and the implementation of multiculturalism policies. The need to classify Australians other than by their country of birth arises from the change in the way Australians perceive their origins and their enhancement within a multicultural society. However, the 1971 trial which included the introduction of the country of birth of the parents into the census did not achieve its targets. User groups and university researchers called upon the ABS to include in the 1981 Census a direct question on the population's ethnic backgrounds.

The project did not conclude in time for that year's census, however, and a committee of experts under the direction of the demographer W.D. Borrie was created to reflect on the *ethnic question* and its form. This *Population Census Ethnicity Committee* presented its report in 1984 and concluded that a question on a person's background was more appropriate than one on ethnicity. Indeed, the different tests that were conducted convinced the Committee that a direct question on "identity" or affiliation was not understood. Therefore, *self perception* seemed less appropriate and apt to receive less answers than a question based on a *historical approach*. Nevertheless, the Committee recognized that self perception was the most satisfactory means to obtain data on the diversity in backgrounds, particularly in a situation where immigration covers longs periods of history and includes intermixing over generations. However, "self perception" could not be used without including the word "ethnic", which caused misunderstandings and hostile reactions. The Committee therefore suggested the introduction of a question on *ancestry* as follows:

What is each person’s ancestry ?
(for example : Greek, English, Indian, Armenian, Aboriginal, Chinese…)

Although the answer rates and the quality of the answers were satisfactory, the use of the census results on ancestry was relatively weak. For this reason, the question was abandoned in the next census and only re-appeared in 2001. In the meantime, ethnicity was constructed through surrogate

variables, such as: place of birth, place of birth of the parents, main language other than English spoken at home, religion, proficiency in spoken English or the year of arrival in Australia.

A new test was carried out[154] during the preparation of the 1996 census and concluded that the ancestry data was of poor quality because of: the low answer rate, the extreme magnitude of Australian ancestry, including that relating to people born outside of Australia, and the uncertainty of respondents with regard to the meaning of "ancestry". The question was still not included in 1996, but new user demands kept arriving at the Census Bureau and a new committee was created, the *Census Consultative Committee on Ancestry*. The Committee held consultations with users to identify the most acceptable wording from the perspective of the population's expectations, as well as statistical methodology criteria. A question on ancestry including pre-coded answers was chosen. It was used along with the country of birth of the parents (with two possibilities: born in Australia or born *overseas*) and that of the individual. In this way, the ethnic origin of Australians over two generations was obtained by cross-referencing the country of birth (in detail), the country of birth of the parents (two possibilities) and ancestry.

These variables were combined with other classifications, such as the Standard Australian Country Classification (SACC), the Australian Standard Classification of Languages (ASCL) and the Australian Standard Classification of Religious Groups (ASCRG).

An effort to standardize the collection of data concerning ethnic origins was carried out with this measuring method and led to the defining of two standards:

- **Standards for Statistics on Cultural and Language Diversity (SSCLD)**
- **Australian Standard Classification of Cultural and Ethnic Groups (ASCCEG)**

The Australian Bureau of Statistics (ABS) developed these new statistical standards mainly in answer to the request for a coherent framework for the collection and circulation of data on cultural and linguistic diversity. They replace the Non-English Speaking Background standard which was previously used to measure the needs and disadvantages relating to culture and considered overly general[155].

These standards were approved by the Council of Ministers on Immigration and Multicultural Affairs (COMIMA) in April 1999 and included questions and classifications with coded nomenclatures and output categories to be used in data collection, whether through interviews or self-enumeration.

The implementation of this standard has two objectives:

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[154] *Census working paper 94/4- Ancestry*, "Testing of ethnic origin. Questions for the 1996 census", Population census development, September 1994.

[155] The NESB was no longer deemed to be an appropriate measurement of disadvantages relating to culture, notably in terms of access to government services, for various reasons: contradictory definitions, the fact that they brought together people facing a disadvantage with people who did not, the fact that they did not allow for the separation of the different Australian cultural and linguistic groups – these led to negative connotations.

- To provide means for standardizing the methods ABS and other agencies use to collate and circulate information regarding the particular characteristics of a person or a group of people, which information describes their origins, culture and language, through the defining of a common standard.
- To develop a methodology that can identify, measure and monitor needs, in terms of services relating to the advantage or disadvantage of a culture or language in order to facilitate equal access, for example.
- To provide a measurement of the cultural and linguistic diversity (in broadest terms) of Australian society.
- To replace the Non-English Speaking Background (NESB) indicator[156].

A minimum core of variables must be used in statistical and administrative data collections in all of the Australian States and Territories. Included are the four following variables:

- Country of Birth of Person
- Main Language Other Than English Spoken at Home
- Proficiency in Spoken English
- Indigenous Status

However, the standard covers a larger number of variables:

- Country of Birth of Person
- Main Language Other Than English Spoken at Home
- Proficiency in Spoken English
- Indigenous Status
- Ancestry
- Country of Birth of Father
- Country of Birth of Mother
- First Language Spoken
- Languages Spoken at Home
- Main Language Spoken at Home
- Religious Affiliation
- Year of Arrival in Australia

[156] The NESB was no longer deemed to be an appropriate measurement of disadvantages relating to culture, notably in terms of access to government services, for various reasons: contradictory definitions, the fact that they brought together people facing a disadvantage with people who did not, the fact that they did not allow for the separation of the different Australian cultural and linguistic groups – these led to negative connotations.

An individual variable may be used to gather precise information from the statistical or administrative data in order to meet a particular need. While meeting a particular need for information, this method is considered by Australian statistics to only provide a superficial measurement of cultural and linguistic diversity.

A set of variables can be used to gather a range of cultural and linguistic information. This approach can lead to a relatively balanced method for measuring the cultural diversity of a population or the cultural and ethnic characteristics of an individual.

The standard's various variables are set out below. The exact wording of the questions is included in the appendices.

Country of birth of person

This variable is mainly used to determine if a person is a migrant to Australia or not, the country of his/her origin and the community to which he/she will likely be affiliated.

Therefore, this variable provides fundamental and objective information on the origins of a person. Many bodies believe that this is a crucial measurement of cultural origins and is a principal element in their regular data collection activities. This variable allows for easy comparisons with existing census data and data from the ABS studies or other international data. When cross-referenced with other cultural and linguistic variables, the country of birth of the person variable allows for the identification of sub-groups within a migratory population.

Migrants and their descendants have been identified by program developers and services providers as constituting population groups most likely to face disadvantages in accessing governmental and community programs in Australia.

The place of birth therefore allows for not only the identification of the extent of people coming from certain groups who benefit from a relative advantage, but also the measurement of disadvantages suffered.

The Standard Australian Classification of Countries (SACC) is used to gather, collate and disseminate data concerning the country of birth of individuals. The word "country" is thus used to described completely independent countries (states of the nation), administrative subdivisions of the United Kingdom (i.e. England, Scotland, Wales and Northern Ireland), external territories and dependencies of independent countries. This classification has a hierarchical structure based on three levels, of which the most detailed, the third level, includes 244 items.

Country of birth of Father/Mother

This category identifies the country in which the father/mother of a person was born.

One of the important components of Australian cultural and linguistic diversity resides in the manner in which second generation Australians perceive their culture, ethnic affiliation or parents' language. The combination of the country of birth of the father/mother variable with religious affiliation or first language spoken (see below) variables assists in the evaluation of cultural and linguistic preservation.

Questions relating to the country of origin of the mother follow the same principle. The classification follows the same standard (SACC) as the question on the country of birth of the respondent.

Main language other than English spoken at home.

This variable provides information on the number of people who only speak English and, where one or more non-English languages[157] are spoken, the main language spoken. This question was included in the 1986 census and serves as a filter for Proficiency in Spoken English as persons speaking English only are not included.

The data collected from this question are considered to be an indicator of active ethnicity and allow for the study of generational preservation of the mother tongue. This language information is also required for the research and development of interpreting or translation services and the execution of national and State linguistic policies.

One of the problems relating to this variable, particularly in achieving administrative objectives, is that it also takes into account people whose main language proficiency is in English, but who marginally use a second language other than English (the extent of which cannot be determined). If the objective is to identify a possible disadvantage relating to poor proficiency in the language, this category must be cross-referenced with Proficiency in Spoken English.

The *Australian Standard Classification of Languages* (ASCL) is used to collect, collate and distribute data relating to the use of languages in Australia. It includes three hierarchical levels, of which the most detailed lists 193 languages.

Proficiency in spoken English

This category is used to evaluate the proficiency in English of persons speaking a language other than English.

The data flowing from this variable are mainly used to identify persons who may face a disadvantage because of their lack of proficiency in spoken English. This information can be used to develop specific programs for a given population whose lack of proficiency in spoken English may be a barrier to accessing programs and governmental services, and to allow this population to participate equitably in Australian society.

[157] Sign language is considered a non-English language.

Indigenous status

These various classification systems have significant personal and social consequences for this population and have evolved over time. Today, two very distinct definitions co-exist.

The first definition, used most often in legislation, defines an Aboriginal as "a person who is a member of the Aboriginal race of Australia". The other definition which is more broadly used by administrative bodies, but also in certain Supreme Court rulings and legislative documents, defines the Aboriginal as person who is "a member of the Australian Aboriginal race, identified as an Aboriginal and accepted as an Aboriginal by the Aboriginal community itself".

Problems arise with both current definitions. The first definition refers to "race" and seems to be a tautology providing no indications of proof in terms of blood quotum that would be required to satisfy it and even fewer indications on the manner in which valid proof could be collected and evaluated. The second definition also is problematic in that it does not clearly specify the meaning of the term "member of the Aboriginal race": the defining of an individual's identity through his/her affiliation to an Aboriginal community not only may not be found to be predominant, but the "Aboriginality" of the community itself could also be put into question. Therefore, how and when these two definitions should be used have been the subject of numerous discussions and many debates have occurred concerning the manner in which these two definitions could be combined and the most important criteria to be considered to meet the need of such a definition.

The restrictions inherent to these definitions are illustrated by the broadening of the identification of the Indigenous population as revealed by the last census results, the different studies which underline that the needs of the native people can differ considerably from one region or context to the other and even the conflicts relating to voter eligibility or the ability to present one's self to the ATSIC elections.

The search for an official definition of "aboriginality" therefore refers back to its effective use, that is the recognition of a population historically the subject of discrimination as well as the achievement of public programs meant to cure the discrimination.

From 1830 to the 1950's: reference to the blood-quotum

While the Indigenous people were first classified by reference to their place of residence during the first decades of colonization, mention of the blood-quotum as a means to define this group was soon current. Classifications by blood-quotum were introduced in the New South Wales legislation of 1839 before spreading to the other Australian Territories and States (South Australia in 1844; Victoria in 1864, Queensland in 1865; Western Australia in 1874 and Tasmania in 1912).

Up until the 1950's, the various States regularly enacted laws relating to mechanisms for the inclusion and exclusion of this population (in terms of rights or benefits and referring to Aboriginal blood-quotums). This legislation was based on observing the colour of skin and often led to contradictory or incoherent results. The appropriateness of this definition has not been considered in depth.

The enactment of the federal *Commonwealth Franchise Act 1902* (which prohibits the "Aboriginal natives" from participating in elections unless they were previously registered on the voting lists) led to state discrimination, while the federal government generally applied the administrative use of "blood criteria" in deciding whether an individual was an Aboriginal or not (in order to account for him/her by virtue of Section 127 of the Constitution or under the "White Only" employment legislation [*Excise Tariff Act 1902*]).

The 1960's and 70's: the Race definition.

Although the definitions were never considered as being significant by the Aboriginal community itself, the tacit acceptance by the Federal Government of the Territories' definitions lasted until the 1950's. The policies set out at the end of the 1960's and during the 1970's occur during a more progressive period in which the definitions relating to blood-quotum were abandoned. Throughout the 1970's, the majority of laws defined an "Aboriginal" as a person who is of the aboriginal race. While this definition is an improvement over the 'blood-quotum' definition, it runs up against the existence of an aboriginal race (scientists no longer use the term 'race' and the defining of populations based on their genetic characteristics becomes non-exclusive : territory, culture, religion, etc.).

The 1980's: a definition in three parts

During the 1980's a new definition was proposed by the Constitution Section of the Department of Aboriginal Affairs *(Report on a Review of the Administration of the Working Definition of Aboriginal and Torres Strait Islander, Canberra, 1981):*

> An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Straight Islander ancestry who perceives himself/herself as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he/she lives.

A report published by the Aboriginal Affairs Study Group of Tasmania[158] indicates that this definition contains three criteria that are *necessary and sufficient* for identifying an individual as an Aboriginal, and these are sufficient for such an identification in Tasmania.

This three-part definition (identification of the ancestry, identification by the individual and by the community) was rapidly adopted by all federal government departments as the 'working definition' to determine rights to services and specific benefits.

It also managed to infiltrate State legislation (for example, NSW, in the *Aboriginal Land Rights Act 1983*, where 'Aboriginal' means a person who is:

(a) a member of the Aboriginal race of Australia,
(b) perceives himself/herself as an Aboriginal, and
(c) is accepted by the indigenous community as being an 'Aboriginal').

This definition was also used by the Supreme Court to give meaning to the term “Aboriginal race" in Article 51 (xxvi) of the Constitution.(10)

[158] Report of the Aboriginal Affairs Study Group of Tasmania,1978, p. 16

It was also recognized that a reference to ancestry does not include all the characteristics of a racial group, which bears numerous components.

This definition is perceived as being a means to protect individuals from stereotyping on the part of the majority of Australians (a people that seems to live *outside of,* or taking advantage of, the system) and does not, however, eliminate the perceived relationship between ‘Aboriginal’ and ‘belonging to the aboriginal race’ (despite the Ministry for Aboriginal Affairs requesting amendments).

The 1990's: problems arising from the three-part definition

During the 1990's, the three-part definition continued to be used administratively and by the courts to provide substance to the legislative expression 'person of the Aboriginal race'. However, in practice, its use was open to different interpretations. Which of the three criteria should be predominant when the others are difficult to use?

For example, the Tasmanian Aboriginal Centre (TAC), principal service provider to Aboriginal in Tasmania, preferred proof of ancestry and re-evaluated the eligibility criteria for access to services which is now based on more restrictive conditions than those previously imposed for aboriginality certificate applications. The TAC also started to deny the right of some children to attend the community aboriginal school (ACS), as well as access by indigenous-identifying individuals to other services.(18) This led the Tasmanian branch of the ATSCI to hire consultants to prepare a report on the manner in which the three criteria of the definition currently used in the Commonwealth could be applied in Tasmania. The *Final Report of the Community Consultation on Aboriginality in Tasmania, February 1996* confirmed the TAC orientation and indicated that the individual search for an identity should meet each of the three criteria, and that when indigenous ancestry is proved, authentic justification should be provided demonstrating direct ancestral lineage to the traditional indigenous society at the time of colonization via a known surname. The report suggested that an independent unit be created to research and verify submitted genealogical information supporting requests.

However, the question concerning the system's adequacy was subject to real and significant controversy during the 1999 ASTIC elections in Tasmania. The elections were put into question because a portion of the voters were not, in fact, 'Aboriginal', on the one hand, and, on the other hand, because the census revealed 14,000 Aboriginal in Tasmania while there were only 800 voters.

Standardization of the Census.

In every census up until 1970, the respondents were asked to state their race and if it was "mixed", to indicate the proportion of each origin. Before 1971, individuals who were considered to be more than 50% Aboriginal (in terms of their genetic profile) were excluded from official population count. To reach this determination, the censuses contained questions on race which would today be considered

by many to be intrusive and harmful. In 1967, a referendum was held to change the constitution so that all Indigenous Australians could be included in the census. This referendum met with great success and resulted in a concerted effort to improve the quality of statistics relating to the indigenous population.

Census forms were specifically designed to be used in rural and isolated communities and were presented. Emphasis was put on the participation by indigenous peoples in the data collection process. The question concerning the definition of an aboriginal person or a Torres Strait Islander was discussed and clarified in consultation with indigenous groups and bodies over several years. In the 1967 and 1976 census, a question was included with answer categories such as European, Aboriginal, Torres Strait Islander or Other. Since 1981, the Australian Bureau of Statistics has included a specific question in the census which requires that one identifies himself/herself as indigenous or non-indigenous.

In the 1996 and 2001 census, the question was worded as follows:

> Is the person of Aboriginal or Torres Strait Islander origin? No ___ Yes, Aboriginal __ Yes, Torres Strait Islander ___ (for persons of both Aboriginal and Torres Strait Islander origin, mark both 'Yes' boxes).

This question's main goal is to define the number and distribution of people of aboriginal and/or Torres Strait Islander descent. The complete and true identification of the indigenous peoples through the census, studies and administrative data collections are fundamental to obtaining high quality information on aboriginal and Torres Strait Islander peoples. This has required a substantial effort on the part of the government and non-governmental agencies to achieve general acceptance of a standard question concerning indigenous origins in all main data collection activities. It provides a coherent conceptual framework for gathering information on these peoples in statistical collections (conducted by the ABS or otherwise) and within relevant administrations. This standard is valid for estimating the population, but also relates to other statistical data in areas such as: births, deaths, admissions to hospital, the workforce, the economy, education, and laws and justice.

This category is therefore crucial since it determines the specific programming, promotion and provision of services to this population and impacts the administration of government policies. It also allows for the monitoring of their well-being.

ABS STANDARD QUESTION ON INDIGENOUS STATUS

In 199-, the ABS officially adopted the following question as a standard in identifying individuals as being members of the indigenous population:

Are you of Aboriginal or Torres Strait Islander origin?
For persons of both Aboriginal and Torres Strait Islander origin, mark both 'Yes' boxes._ No
_ Yes, Aboriginal
_ Yes, Torres Strait Islander

> The categories intended for use in indigenous data collection are defined by the answers to the appropriate question in the question module, but include the additional category "not stated/inadequately described", where necessary.

1. No
2. Yes, Aboriginal
3. Yes, Torres Strait Islander
4. Not stated/inadequately described

However, these input categories do not include the 'both Aboriginal and Torres Strait Islander origin' category, because this category is defined when the two 'yes' boxes are marked. In this case, the results are combined and appear in the standard output. The output categories for indigenous status, as defined by the National Health Data Dictionary and the National Community Services Data Dictionary, are identical to those validated by the collection protocol and create the following output data:

1. Aboriginal but not Torres Strait Islander origin
2. Torres Strait Islander but not Aboriginal origin
3. Both Aboriginal and Torres Strait Islander origin
4. Neither Aboriginal nor Torres Strait Islander origin
5. Not stated/inadequately described

The standard ABS question is based on the 'Commonwealth working definition', but does not include its third element, namely 'an Aboriginal or Torres Strait Islander is a person who is accepted as such by the community in which he or she lives'. Gathering information on the basis of the community's acceptance is often impractical and can often lead to inaccuracies. For this reason, it was not included in the ABS standard.

Definition:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Straight Islander ancestry who perceives himself/herself as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he/she lives.

As we have seen, while the aboriginal status[159] has often raised questions, in practice, the ABS only uses the principle of self perception for the three elements (ancestry, self perception and community acceptance[160].

The use of appropriate terminology to describe indigenous populations was the subject of a formal request submitted by the Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission (ATSIC), amongst others, to the ABS. References such as 'aboriginality', 'ATSI' or 'ATSIC' people are banned and 'Aboriginal and TSI peoples' or 'Indigenous peoples' must be used to describe these population groups. Australian statistics admit that ancestry could ideally be determined by asking whether a person has an Aboriginal or Torres Strait Islander ancestor. Self-perception could also be used to ascertain whether a person identifies himself/herself culturally as an Aboriginal or Torres Strait Islander. In this case, a person could state he/she has an aboriginal ancestor while not perceiving himself/herself as such. However, one can accept that the question relating to indigenous status can be considered a measurement of both ancestry and part of cultural identity.

Growth of the indigenous population in the intervals between the last four censuses (1986, 1991, 1996 and 2001) has increased at a rate higher than that of the total population. The results of the 1996 census indicated that the indigenous population increased by 55% since 1986 against 12% for the non-indigenous population over the same period of time. This increase can not be entirely explained by migration or high birth rates in the population.

It is more likely due to the fact that an increasing number of Aboriginal and Torres Strait Islander have identified themselves as indigenous, not having done so in the past. This desire to be identified as indigenous also applies to children from mixed couples. In fact, while the census allows for 'double recognition' of these children (Aboriginal *and* Torres Strait Islander), it does not allow for the possibility of recognizing both indigenous and non-indigenous origins. A major portion of this increase can therefore be explained by an increased desire on the part of individuals to assert their indigenous origin on the census form.

For some, the questionnaire implicitly suggests that persons from mixed origins (aboriginal and non-aboriginal) identify themselves as indigenous.

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[159] A formal request to the ABS, in particular, for the use of adequate terminology to describe the indigenous populations was made in November 1992 by the Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission (ATSIC). References such as 'aboriginality', 'ATSI' or 'ATSIC people' are banned and 'Aboriginal and Torres Strait Islander peoples' or 'Indigenous peoples' are to be used to describe these population groups.

[160] Australian statistics recognize that ancestry could ideally be determined by asking a person if she/he has an aboriginal or Torres Strait Islander ancestor. Self-identification could be used to ascertain whether a person self-identifies as an Aboriginal or Torres Strait Islander. In this case, a person could state he/she has an aboriginal ancestor without, however, self-identifying as such. It is admitted, however, that the question relating to indigenous status can be considered both a measurement of ancestry and part of cultural identity.

Ancestry

The 'Ancestry' variable describes the ethnic or cultural heritage of a person, that is to say the ethnic or cultural groups with which this person identifies himself/herself.

From an operational point of view, ancestry is thus defined as the ethnic or cultural groups as perceived by a person.

For example, a respondent can mark off four ancestries if each of his/her grandparents is from a different ethnic or cultural origin (Italian, Greek, German, English[161]). However, a person with the same ancestry as another person may identify himself/herself as Australian because one or both of his parents were born in Australia or because of a cultural or national attachment to Australia.

Through a self perception process, this variable not only defines the affiliation of an individual to an ethnic or cultural group or a nationality, but also his/her ancestry being of one or more specific groups.

This ancestry variable can be cross-referenced with the country of birth, indigenous status, religious affiliation and language variables to identify specific ethnic or cultural groups.

However, in the Australian context, the fact that many Australians from distinct ethnic or cultural backgrounds do not generally indicate such, makes the use of this particular variable somewhat problematic. It is therefore not considered a pertinent indicator of needs for services and cannot be used alone in assessing the manner in which certain individuals can be associated to an advantage or disadvantage when compared to others. It is generally considered to be an approximate measurement of cultural diversity.

A major benefit flowing from this variable is that it allows for the determination of the affiliation to ethnic or cultural groups when the country of birth or language variables do not identify them, or only partially. For example, the ancestry variable assists in identifying and measuring ethnic and cultural minorities whether they are located in regions geographically defined or disparately scattered over various world regions.

Furthermore, it is important to note that most people in Australia come from various cultural environments and not one unique ethnic or cultural group. These people therefore provide multiple answers to questions on ancestry, ethnic affiliation or cultural identity. Answers will often indicate an identification with Australia in a national or cultural sense, but will allow for the recognition of continued links with other ethnic or cultural groups (for example, Irish Australians or Italian Australians). This

[161] The ancestry question will register all requests for association with ancestry with ethnic and cultural affiliations. As such, multiple answers are encouraged. Accurate estimates of the proportion of native people in the general population are difficult to achieve as the data is based on information provided on a “good will” basis by persons who self-identify as indigenous.

does not mean that people who identify themselves mainly in terms of affiliations and varied ethnic and cultural ancestry do not consider themselves also as Australians.

The problem with the word "Australian" derives from the fact that it is used as an adjective to describe the culture which has developed in the country over the past two hundred years as well as for qualifying the members of an identical citizenship independently from their ethnic, cultural or community affiliation within Australia.

Census

The question concerning a person's ancestry was first asked in the 1986 census. The introduction of this question was a result of the research conducted by the Population Census Ethnicity Committee on the need for ethnic affiliation data other than language, place of birth or place of birth of the parents. While the question was designed to identify the respondent's origins rather than their subjective perception of their ethnic origin, the various semantic interpretations of the term 'ancestry' did not eliminate all the subjectivity inherent in answering the question.

The evaluation of the 1986 results proved that data resulting from the 'ancestry'[162] category were not added to those obtained previously on language and place of birth for a good number of cultural groups. However, it provided additional information on a few cultural groups whose members are born in many countries (for example, people of Chinese or Indian descent) or who belong to distinct groups in a country (for example, the Maori as a sub-group of people born in New Zealand). The additional information was of less use when the person had already indicated the use of a language spoken by a cultural group (for example, Cantonese or Hindi).

[162] *Census working paper 94/4- Ancestry*, "Testing of ethnic origin. Questions for the 1996 census", Population Census Development, September 1994.

2) Religion

Definition

Religion is considered to be an indicator of a society's cultural diversity by Australian statistics. In order to report on this diversity, the Australian Bureau of Statistics (ABS) developed the *Australian Standard Classification of Religious Groups (ASCRG).*

It has been used for the collecting, collating and communicating of data relating to the Australian population's various religious affiliations and also aims to improve the quality of information in statistical data at the administrative level (admission to hospital or school registration forms).

These statistical data are divided into groups and can be used to develop programs in various areas: adapting education services, the construction of religious buildings, providing and equipping care services or the diversification of social services carried out by religious organisations. They can be used to determine the need for "chaplaincies" in schools, hospitals, universities and any other institution and also for scheduling public radio or other media broadcasts.

Within this classification, religions are grouped into progressively larger categories on the basis of their similarity in terms of beliefs, practices and the cultural heritage of their adherents. Religions and religious groups are often closely linked because of their intrinsic characteristics and can thus be found at the same level in the classification structure. This methodology has been supported and amended by the information and advice of researchers and religious experts, and has been the subject of a broad consultation with the relevant religious groups and communities.

The taking into account of the number of adherents of each of the specific religious groups was a factor enabling the development of a structure which reflects the composition of religious practices in Australia. In 1996, this classification was granted the status of a national statistics standard.

It is to be noted that Australian statistics do not provide an official or restrictive definition in this classification. Indeed, it is difficult, perhaps even impossible, for it to provide a precise definition for 'religion' or of what constitutes "a religion" because of the intangible and broad nature of the subject. Religion is generally considered to be a set of beliefs and practices, usually implying the recognition of the divine, a being or a superior power, based on which people arrange their lives from a moral and practical perspective. This definition of a religion which blends beliefs, practices and the existence of a Supernatural Being who gives form and meaning to life, was used by the High Court of Australia in 1983 when it recognized that «la croyance, les pratiques et les observances de l'Eglise de la Nouvelle Toi (Scientologie) formaient une religion dans l'Etat de Victoria", and further stated

"For the purposes of the law, the criteria of religion are twofold:
first, belief in a Supernatural Being, Thing or Principle; and
second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

As useful as it may be for describing some religious entities, the Australian statistics' definition does not cover all sets of belief that are universally (or largely accepted) considered to be religions. The Australian statistics classification has used the latter approach. For example, Buddhism is universally accepted as a religion although it does not recognize a personal God. Similarly, Confucianism is considered to be a religion because its members adhere to a moral code, although it does not imply any belief in the supernatural. However, not all philosophies including a belief in the "*nature of life*" or codes of conduct are accepted as religions within this classification[163].

Because of the multitude of factors that could be used to qualify religion, Australian statistics have used criteria to determine a narrow level of classification: the number of adherents, organisation methods and the structure of religions in Australia. Consequently, this narrow level includes: *"groups of religions, religions, and subsets of religions, such as, religious denominations, administrative and organisational groupings, groups of churches, churches, and breakaway groups".*

All of these entities which do not constitute discrete religions, are components of one or more sub-groups within the range of worldwide religions. They are described here as religious groups because they comprise a group of people who share a set of religious beliefs and practices or who belong to organisations which are united by a common religious theme. This allows them to be considered religious groups at the most detailed level of classification.

In practice, only those religious groups who have a large membership are distinctly identified within the structure of this classification. However, all other religions are covered as they can be included in a residual category (various, other, non-classified category). The classification coding also allows for the identification of religious groups which are not specifically identified, should such an occasion arise (for example, the case of the category "Jedai" in the 2001 Census). Finally, this classification also includes a sub-group entitled "*no religion*".

[163] For example, Marxism is considered by some to be a religion because it is based on a coherent set of beliefs, but it is more generally considered to be a political philosophy and is therefore excluded from the classification.

Classification criteria:

Three classification criteria are used in the ASCRG to create classification categories:

- Similar religious beliefs;
- Similar religious practices; and/or
- Cultural heritage.

Based on a broad application of all the classification criteria and taking into account the size (relative weight) of religions in Australia, Buddhism, Christianity, Hinduism, Islam and Judaism are the largest groups within the classification. The application of the criteria enables the dividing of principal groups into sub-categories. This leads to a pyramid structure: Religious Groups (basic units) are aggregated into smaller groups, the *Narrow Groups* (on the basis of their similarity in relation to the classification criteria), which are gathered into principal groups. The result is as follows:

1. BuddhismBuddhism

2. Christianity
   - Anglican
   - Baptist
   - Brethren
   - Catholic
   - Church of Christ
   - Jehovah's Witnesses
   - Latter Day Saints
   - Lutheran
   - Eastern Christian
   - Orthodox
   - Presbyterian and Reformed
   - Salvation Army
   - 7th Day Adventist
   - Church of the Unification
   - Pentecostal
   - Other protestant
   - Other Christian

3. Hinduism
   - Hinduism

4. Islam
   - Islam

5. Judaism
    - Judaism

6. Other religions
    - Indigenous Australian traditional religions
    - Bahaism
    - Chinese religions
    - Druze
    - Japanese religions
    - Nature Religion
    - Sikhism
    - Spiritualism
    - Theism
    - Zoroastrian
    - Various religions

7. No religion
    - No religion

3) Disability

Definition and classification of disabilities

Over the past three decades, legislation, as well as national and international policies, have emerged to fight discrimination against handicapped people, such as the *Standard Rules on the Equalisation Of Opportunity for People with Disabilities* and the *Disability Discrimination Act.*

One of the fundamental principles of this legislative framework, as used by the Department of *Family and Community Services (FCS)*[164] and the *Office of Disability*[165] is as follows: a handicapped person should be able to fully participate in the economic and social life, within the limits of his/her abilities. **On that basis, the framework provided by the [166] *Discrimination Act (DDA)*, led to cumulative effects by reinforcing the position and acceptance of handicapped people in Australian society.**

The broadest definition of disability in the DDA includes[167]:

- "*Physical, psychiatric, sensory, neurological of learning disabilities, physical disfigurement and presence in the body of disease-causing organism"* disabilities.
- Disabilities people face, have faced, and those they face or think they face.
- "Associated" persons (partners, family, individuals responsible for the disabled person or work, sport or leisure partner.

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[164] FACS was created to group governmental programs aimed at directly or indirectly providing each Australian with the ability to fully participate in economic and social life. Its responsibilities include:

- **developing, encouraging and advising the government on social policies and services**
- **providing a number of social services, such as financial aid or assistance for individuals, families and communities (either directly or through service providers),**
- **undertaking research in conjunction with universities and other research organisations to contribute to quality social policy development**
- **managing funds allocated by the Federal Government, State or Territory and the different programs in accordance with the current social policies**
- **granting aid to the development of Australian organisations as well as foreign organisations.**

[165] The *Office of Disability* was founded in 1985 after a capital assessment of the programs and services for handicapped people. This report aimed to include handicapped people, their families and carers. In so doing, it :

- **attempts to link handicapped people with their carers and the Government**
- **aims at influencing, developing, applying and contributing to policies meeting the needs of handicapped people, their family and carers, with the objective of broadening their socio-economic role**
- **to contribute to the coordination between the various Australian States, including management of social security which includes social security measures applicable to handicapped people and their carers.**

[166] The term "handicap" is generally no longer used in the disability field in Australia and is viewed as unacceptable by many in the field, due to its pejorative connotations.

[167] This definition also covers persons in palliative or therapeutic care, as well as persons accompanied by a guide-dog or any other trained dog, and those accompanied by an interpreter, reader, assistant or any other person providing assistance.

This very broad definition attempts to cover any potential ground for discrimination. It is intended to ascertain whether the discrimination results from a real or presumed disability and whether the person was treated differently because of a real or presumed disability.

The definition's objective, therefore, is to describe the group of relevant persons as opposed to the degree or type of specific disability, or to provide a certain type of service. However, the definition of disability used by social programs tends to be more restrictive, since these definitions aim to assist in the allocation of limited resources to persons with specific needs in specific circumstances.

The FCS Department programs and services were created in accordance with different laws such as the *Social Security Act* and the *Disability Service Act* which use an extensive range of definitions for "disability" based on "needs" in terms of aid services, available funding and the desire to concentrate on handicapped persons' "ability" to act.

The introduction of standard definitions in the *Commonwealth State Territory Disability Agreement* has allowed for the collection and analysis of data, as well as comparisons across Australia[168]. This leads to a better understanding of the gaps, overlapping and successes of the policies and services relating to handicapped persons.

The definition of disability has a tendency to change depending on the objective of a policy, service, research or legislation. The definitions are used to identify a target group or specific initiative or to determine the validity of a payment or program.

The use of the same definition in one program or policy will not achieve the same results in another program or policy.

Problems with the Definitions

Income Support

The social security legislation does not define "disability" in order to determine the eligibility for income support payments. On the contrary, it concentrates on the functional impact of a mental or motor impairment affecting a person's ability to work. *Disability Support Pension* is the most significant aid for people with long-term disabilities. (The other measures for handicapped people, in terms of expenditures, are: "*Carer Payment ", "Carer Allowance", "Sickness Allowance", "Mobility Allowance", "Pensioner Education Supplement", "DSP", "Pensioner Concessions Cards" et "Health Care Card"*)[169].

[168] Madden, R. Black, K., and When, X., The definitions and categorisation of disability in Australia, Australian Institute of Health and W.
[169] A Guide to Commonwealth Government Payment, Centrelink 1 July – 19 September 2003

Required eligibility criteria are:

- *Physical, intellectual or psychiatric* impairment resulting in at least 20 points under the *Tables for the Assessment of Work-related Impairment for Disability Support Pension*; and
- A continued inability to work as a result of the impairment or a need for requalification over the following two years; or
- Total blindness.

For persons responsible for a handicapped family member, eligibility for payment or allocations is defined by the *Social Security Act* and requires that the person being cared for have a handicap or a medical condition which requires indispensable daily care for basic activities such as moving, communicating, person hygiene, eating and self protection. This seems to be deliberately different than the *Disability Support Pension* definition as it focuses on taking into account an absolute need for care as opposed to a limitation in the ability to work.

Employment Service

The *Disability Discrimination Act* was of significant influence in dealing with the question of unequal employment opportunities for handicapped people. It contributed to the acceptance that handicapped people should have access to a broad range of employment opportunities and other assistance in order to achieve equal opportunity[170].

In accordance with the Disability Services Act, the FaCS conducts programs for all severely handicapped people with a limited ability to work. The definition of handicap in the Disability Services Act is therefore limited to a sub-set of handicapped persons.
The target group in question concerns any handicapped person who:

- Suffers from an *"intellectual, psychiatric, sensory or physical"* impairment or a combination of these impairments.
- Has a permanent handicap, or one that is considered permanent, with, as a consequence:
- A substantial reduction in the person's ability to communicate, learn or be mobile; and the need for continuous assistance.

This led to the "*Statement of Principles and Objectives* " [171] which is imposed on the administration and applied by employment agencies.

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[170] Mainstream employment programs are the responsibility of the Department of Employment and Workplace Relations
[171] The principles recognise that people with disability have the same right as other members of the society, they advocate the application of "the least restrictive " principle in assisting people to reach their individual potential. The Objectives relate more directly to service delivery.

The definitions used by the Disability Services Act and the Disability Discrimination Act are deliberately different and have very distinct objectives.

Data Collection

The FaCS' Statistical Data

Data from the FaCS Department relating to pensions and benefits are available. However, handicapped people do not receive all pensions or benefits. Although administrative data are available at a detailed geographic level, they are therefore not a reliable indicator of the extent of handicaps within the population. The FaCS Annual Report provides a broad idea of the application of the anti-discrimination policy.

The FaCS Annual Report

The *FaCS* Annual Report is obligatory under the "*Commonwealth Disability Strategy*" and the "*Disability Discrimination Act 1992*".

Each State branch, agency and office must estimate its activities in relation to relevant activity indicators from January to March 2002 for the 2001-2002 data collection report.

The required participation rate for small and medium sized companies is 10%.

Table 99 CRS Australia performance report against the Commonwealth Disability Strategy Reporting Framework *continued*

PROVIDER ROLE *continued*		
Objective: To ensure that clients with disabilities are able to have their issues and concerns addressed		
Performance indicator	**Performance measure**	**Current level of performance**
Complaints/grievance mechanisms, including access to external mechanisms, in place to address concerns raised about performance	Established complaints/grievance mechanisms, including access to external mechanisms, in operation	100 per cent CRS has established a comprehensive complaints/grievance mechanism in place with access to internal and external mechanisms such as the Administrative Appeals Tribunal. CRS Australia staff are trained in receiving and handling client feedback through induction programs and other training opportunities
EMPLOYER ROLE		
Objective: To eliminate disability discrimination in the workplace		
Performance indicator	**Performance measure**	**Current level of performance**
Employment policies, procedures and practices comply with the requirements of the *Disability Discrimination Act 1992*	Number of employment policies, procedures and practices that meet the requirements of the *Disability Discrimination Act 1992*	CRS Australia incorporates the requirements of the *Disability Discrimination Act 1992* in its employment policies, procedures and guidelines CRS Australia is currently reviewing all its human resources policies and procedures and, in conjunction with this, is also reviewing compliance with the requirements of the *Disability Discrimination Act 1992*

continued

The Disability Issue within the Scientific Community

"Any restriction or lack (physically, psychologically) resulting from an impairment of ability to perform an activity in the manner or within the range considered normal for a human being." This is the World Health Organization's (1980) definition and demonstrates that the disability concept depends on the perception of the people being interviewed. The concept therefore appears to be difficult to describe even through thorough analyses of surveys conducted as individual interviews and including numerous questions.

Since 1981[172], the Australian Bureau of Statistics (ABS) has conducted disability surveys. These have provided a good deal of detailed information on the extent of disabilities in Australia, the effects of disabilities on daily life and participation in community activities, as well as the need for and use of assistance by handicapped people. Furthermore, information from the surveys cannot be reproduced in limited geographic areas or for small population groups.

[172] Before that time, questions relating to respondents' disabilities were included in the 1911, 1921 and 1933 censuses. Respondents were asked to indicate whether they were deaf, dumb or blind. A more general question on the effect of disabilities was asked in 1976. However, the quality of the data was poor and no results were released.

Therefore, there was a robust demand for data collection on the extent of handicaps in the Australian population for the 2001 survey, which data has been used in conjunction with more detailed data. The disability issue has attracted the most reports which have provided significant support for the taking into account of the disability issue in future studies.

The criteria allowing for a topic to be included in a study generally are:

- The topic is of significant national importance
- There is a need for data on the topic for small groups or small geographic areas[173]
- The subject is relevant to the study.

According to the ABS, the first two criteria have been met. However, there is a concern relating to the third criterion because of the difficulty involved in defining and identifying a handicap, also because of the limited space allowed for in the study form and the method in which the form is developed (self-enumeration by each household).

In 1995, the ABS created the *Census Consultative Group on Disability* to identify user demands for these data, to study international practices and to develop and test questions concerning disabilities that could provide precise and acceptable data. The questions compiled through these consultations were tested in order to select the most appropriate question (or a small number of questions) that could result in high quality data on disability.
The results from the question tests relating to disability for the 1996 and 2001 study demonstrated that the questions did not provide results close to the survey estimates on handicaps.
It was therefore decided that it was impossible to devise a question for that type of form and that would be comparable to the disability concept used in the main survey. Therefore, no question on disability was included in the 1996 and 2001 censuses (see the Appendix on Handicaps).

[173] While much of data for developing Federal and State policies and community-based programs, and for program and service delivery funding allocation required only a large geographic area, detailed data at the small area level and for small population groups, such as indigenous people, are required for efficient planning and funding of disability service delivery.

The Statistical Clearing House (SCH)

In 1996, the *Small Business Deregulation Task Force* published a report entitled "*Time for Small Business*". The report recommended that a central authorization process be implemented for business surveys conducted by the *Commonwealth Government.* This process' objective was to ensure that these surveys were necessary, well targeted and that they did not overly pressure the businessmen involved. The SCH was created in response to this need. Similarly, all the surveys conducted with 50 companies or more and by or in the name of an Australian Government agency must be authorized by the *SCH*. For example:

The Commonwealth Disability Services Study, 1998

This survey's target population comprises all the service organisations for handicapped people supported by the *Commonwealth* and providing assistance in terms of employment, counseling, information and other services for handicapped people. The data groupings below include the Commonwealth Rehabilitation Service. This collection provides the information necessary for planning, developing and conducting *Commonwealth Disability* programs. It also allows the *Commonwealth* to fulfill its obligations in updating a series of data bases (minimum data sets) as set out by the *Commonwealth/State Disability Agreement*. The MDS was introduced in 1995 and is a collection of national data on aid services for handicapped people supported and provided by each State and the Commonwealth in accordance with the Commonwealth/State Disability Agreement. The data provided by this collection provides a clear overview of the Commonwealth-financed services available to handicapped people. These data were published so as to inform the Commonwealth, States, Departments, services, consumers and the entire community. There are currently no other data collections available which provide as complete a range of data with regard to services for handicapped people and the people they benefit.

This study's objectives are:

The objectives of the census collection are;
· *to meet basic contract and Program accountability requirements, in terms of what services are being delivered, the number of consumers being assisted, the outcomes being achieved.*
· *to meet basic information requirements for Commonwealth planning, ie. to detail the nature of services provided nationally to identify gaps or oversupply.*
· *to meet policy development requirements, for example to look at under representation or access issues for particular consumer groups.*
· *to meet the Commonwealth's Minimum Data Set reporting requirements.*

Service information collected includes :
staff hours;
hours, days and weeks of operation by the service;
the number of consumers supported during various reference periods.
Individual consumer information includes;
basic demographic information about the person with a disability;
disability related information such as type of disability, other disabilities, method of communication, level of personal support required, work assistance required and type of DSS benefits received; work related data including hours worked, wage and basis of employment.

Non-treated Data

The ABS conducted other surveys on disabilities in 1981 and 1983. Surveys on disabilities, aging and care were conducted in 1993 and 1998[174]. These disability surveys have provided detailed information for Australia and its States. They enumerate a certain number of demographic questions similar to those found in the study. They provide a series of data charts cross-referenced by age, sex, training, employment and household status.

The ABS has developed a module on the disability question that can be used in a series of ABS household surveys to identify handicapped persons, but not on a small scale. A question relating to handicaps should be introduced in the next census.

Before concluding on this section, it is important to underline that the handicap issue, perhaps more than any other, enables us to understand the importance of the link between a legal definition (that of the DDA) and statistical definitions involved in fighting discrimination. Australia's Institute of Health and

[174] In particular, the 1998 ABS Survey of Disability, Ageing and Carers (SDAC) which is now the survey of reference.

Welfare's (AIHW[175]) submission to the DDA is a good example. Indeed, this submission aims at modifying the DDA's disability definition (currently restricted to being a medically-based definition). Relying on the World Health Organization's International Classification of Functioning Disability and Health (ICF[176]) standard, the AIHW intends to recommend a definition based on a social model. Indeed, the ICF definition recognizes the central role played by environmental factors in the making up of a disability and does not limit itself to the question of an intrinsically individual disability. It 'justifies anti-discrimination law and policy by identifying society as responsive for the disadvantage associated with impairments'.

The current DDA definition of discrimination relates to how the 'discriminator' treats a person with a disability. In the context of the ICF framework, discrimination is viewed as an environmental barrier which may affect a person's activities and participation.

If the DDA definitions are in harmony with the ICF framwork, it may guide future interpretation of the Act.

4) Sexual Orientation

In Australia, it is difficult to ascertain the exact number of people subjected to discrimination because of their sexual orientation. Besides the census, there are currently no reliable statistics providing the number of same sex couples in Australia.

This concept was introduced for the first time in the 1996 Australian Census[177] and appeared again in the 2001 Census. It is included in the definition of common-law marriages, which refers to the concept of a 'de facto marriage', is a social classification category pertaining to civil status (MDCP).

A de facto marriage occurs when the relationship of two people of the same sex or of opposite sexes who live in the same household is reported as: de facto, a partnership, common law, husband, wife, concubine, in love, lover, boyfriend, girlfriend. Individuals are considered married if they are in a de facto marriage or if they live with a person who is registered as being married. Information on same sex couples is thus linked to the question of the nature of the relationship within the household (question 5). This relationship is included under the family code and is classified as being an associate within a de facto marriage. (see Relationship in Household, RLHP[178]). The categories included in this

[175] *Review of the Disability Discrimination Act 1992*, draft report, AIHW, December 2003.
[176] The International Classification of Functioning, Disability and Health (ICF) defines functioning and disability as multi-dimensional concepts, relating to the body functions and structures of people, the activities they do and the life areas in which they participate, the factors in their environment which affect these experiences (AIHW 2003. Australian ICF user guide version 1.0). AIHW cat. No. DIS33. Canberra.
[177] The Australian *Bureau of Statistics*, for the first time, included questions relating to lesbian and gay couples under the category "de facto couples" in the 1996 Census.
[178] For further information, refer to 2001 CENSUS DICTIONARY (2901.0), ABS

classification are: married in a registered marriage; marriage in a de facto marriage; not married[179]; not applicable and visitor from overseas.

The definition of a same sex couple is therefore as follows: two people of the same sex who indicate a de facto partnership in answer to the question on the nature of relationships within a household and who usually reside in the same household.

The 1996 Census which gathered this data for the first time *only* indicated that 10,215 lesbians and gay couples could state that they were in a same sex relationship (other sources generally estimated that at least 10% of the adult population of Australia is gay or lesbian[180]). The 2001 Census counted 37,800 persons of 15 years of age or more who stated that they were in de facto same sex marriages. This only represents 0.5% of enumerated persons within the social classification of civil status. Within the 11% of de facto same sex marriage households, there are children, as opposed to 42% for opposite sex de facto marriages (and 59% for registered marriage households).

ABS recognizes that people are still hesitant, even reticent, to be identified in the "same sex de facto marriage" and the lack of information relating to same sex couples being counted as such in the 2001 Census limits the usefulness of these data.

Most gay and lesbian lobbies[181] feel that the term "de facto" on the census form is understood by most Australians to mean relating to a heterosexual unmarried partner. (The American census avoided this problem by using the expression "unmarried partner", cross-referenced with the question on the respondents' sex.) Besides this consideration, it is true that gay men and women who are single or who do not live with their partners are not able to be identified in the census[182].

Although the attached census form[183] provides no instructions or examples relating to a same sex couple declaration via the "de facto" category, there has been no submission requesting a study on how to obtain more explicit information or the need to introduce a specific category for sexual orientation in the next census; as opposed to New Zealand[184], where the production of this type of statistics is legitimate under the recent Human Rights Amendment 2002 and the restriction (in terms of methodology and usefulness) applying to the only reference to same sex couples (as a direct

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[179] relates to a person who does not live with another person in a declared registered marriage or a de facto marriage. This includes people living alone, with other family members or in shared housing.
[180] see Jenni Millbank, “If Australian law opened its eyes to lesbian and gay families, what would it see?” (1998) *Australian Journal of Family Law* 12 .
[181] See http://www.galewa.asn.au/. Gay & Lesbian Equality (WA) Inc. is Western Australia's peak gay and lesbian human rights lobby group. GALE was at the centre of the recent campaign for equal treatment under the law for all Western Australians, irrespective of sexual orientation.
[182] According to D.Meyer, spokesperson for GALE (see ibid): "It would be trivial for the ABS to add an optional question on sexuality, similar to the optional questions on religion or on ethnicity."
[183] *How to complete your Census Form*, Household Guide, ABS 2001
[184] *Submission from the New Zealand AIDS Foundation on Census 2006: Preliminary views on content*, New Zealand AIDS Foundation, June 2001.

extension of these submissions, focus groups were conducted regarding the introduction by New Zealand statistics of such a category in its census[185]) is considered unduly broad.

In Australia, few statistical studies focus on sexual orientation and even less on the potential discrimination that same sex couples could face. Most of the studies are generally restricted to exploring issues relating to health and AIDS research, more specifically.

Certain qualitative studies have been conducted by other bodies. One of the few examples is *The Pink Ceiling is Too Low*[186] conducted by the Australian Centre for Lesbian and Gay Research in 1999. This qualitative study reveals the prevalence of discrimination against lesbians, gay men and transsexuals in the workplace.

However, gay and lesbian lobbies seem to focus more on the legal aspects of the fight against discrimination on the grounds of sexual orientation rather than on statistical recognition. The submissions they produce relate to amendments to a specific law at the State level[187] (see Part I). It is in fact the progress in legislation relating to homosexuality that will provide for a statistical assessment of this population.

For example, in Australia, changes to provisions relating to non-testamentary inheritances and successions have created two categories, "domestic partners" and "admissible partners", in the legal treatment of unmarried persons living together. The domestic partner is defined in broad terms: a person other than the legal spouse who – whether of the same sex as the deceased or not – lived with the deceased at some period as a partner in a truly domestic context. Like some other countries, married couples are not included in this new category. In certain circumstances, however, a same sex partner can in fact have priority over the officially married spouse of the same person in cases of non-testamentary successions.
New South Wales has created a new category for people living together, different than that for married couples. Homosexuals and heterosexuals living together are both considered as living in a de facto union. The rights and responsibilities of married and de facto couples overlap to some extent as certain property rights usually reserved for married couples are possible today for persons living in a de facto relationship[188].

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[185] *Sexual Orientation Focus Group Research, a qualitative study*, UMR Research, August 2003.
[186] Irwin, J. (1999). *The pink ceiling is too low: Workplace experiences of lesbians, gay men and transgender people*. Sydney, NSW: The University of Sydney, Australian Centre for Lesbian and Gay Research.
[187] *Submission to the Attorney General's Department in response to the Law Reform Commission Report 92 (1999) Review of the Anti-Discrimination Act 1977 (NSW)* conducted by the GLRL **(**The Gay and Lesbian Rights Lobby (GLRL), established in 1988, is the representative organisation for gay and lesbian rights in New South Wales. Our mission is "affirming our pride in our identity by achieving legal equality and social justice for lesbians and gay men"). In New South Wales, they led the fight for recognition of same sex de facto relationships, which led to the enactment of the Property (Relationships) Legislation Amendment Act 1999.
[188] *Property (Relationships) Legislation Amendment Act 1999* (NGS).

It remains, however, that current events do not seem to favour homosexuals. The Australian Conservative Prime Minister, John Howard, has submitted a document to Parliament to prevent the legal recognition of a gay marriage. He wishes to modify the law on marriage so as to make its exclusively heterosexual characteristic explicit. This decision aims to fill a legal gap which would allow homosexual couples who married abroad to receive legal recognition of their union in Australia. Another proposed bill would also prevent homosexual couples from adopting children outside of the country. However, the Federal State now recognizes the material link which exists in same sex couples regarding certain benefits. Thus, after one's spouse has deceased, a gay or lesbian person can receive his or her deceased partner's pension.

CONCLUSION

The study and understanding of the statistical data collection system developed within the framework of the Australian anti-discrimination mechanisms could not fail to include the historical and political context relating to its formulation. The progressive recognition by Australian society of its multicultural identity, which includes national, ethnic, cultural and social components, has allowed for the development of the various strategies used in the fight against discrimination. More than anything, these rely on the effectiveness of a judicial framework (federal and state laws prohibiting discrimination), which can be used throughout Australia by the agencies charged with supervising the application of the law and the effective operation of complaint handling.

Public policies' promotion of equality and diversity have also followed the broadening of the multiculturalism concept from a focus on the management of the consequences flowing from an ethnically diverse immigration to the inclusion of other specific categories in equal access programs, such as women, the Aboriginal, or handicapped persons.

The role of statistics and monitoring play a central role in these mechanisms, as we have seen. Although the focus of Australian statistics is not concentrated on measuring discrimination *per se* (few studies or surveys have used this "entrance key"), it allows for data to be collected on the ethnic, social and cultural components of society, thus allowing for socio-economic comparisons between the different groups (principally the Aboriginal and the rest of the Australian population) and to give substance to the disadvantage concept (inequality seen as one of the effects of discrimination).

Statistics are also used in the monitoring of the application of equity and equal access programs. The statistical categorization of the groups targeted by these programs allows for the reporting on their implementation by most of the relevant administrations. The Australian statistics' effort to standardize these categories is aimed precisely at obtaining a uniformization of the data and nomenclatures used in order to enable the production of a reliable diagnostic of the identified groups. The difficulties encountered in establishing a reliable measurement of the aboriginal population in the census are a witness to the importance of continuing with this endeavour. It remains that the data available to examine the various grounds of this study (ethnic and racial origin, religion, disability and sexual orientation) remain unequal and variable, depending upon the sources. The weak nature of the material and documents relating to discrimination on the ground of sexual orientation and religion prove this.

This can be explained in two ways: the first is because, unlike racial discrimination or that against handicapped persons, Australia does not have a uniform legislative instrument to deal with sexual orientation or religious discrimination[189]. The second reason is more complex: while the existence of a real intolerance towards these groups is known, it does not arouse an interest (from a legal, political or scientific research perspective) equal to the attention brought to racial discrimination or discrimination against handicapped persons.

[189] This does not mean that these forms of discrimination remain completely unprotected by the prohibiting legislation – for example, some limited forms of protection exist with regard to religious discrimination within the Constitution and the Racial Discrimination Act of 1975 (Cth). Likewise, certain other (limited) protections exist in various States for discrimination based on sexual orientation, but not at the level of federal legislation (see Appendix A).

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APPENDIX

A/ Appendix A : Ground of unlawful discrimination

Ground of unlawful discrimination covered by the three Federal Acts (Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act) and the Acts operating in New South Wales (NSW), Australian Capital Territory (ACT), Victoria (VIC), Queensland (QLD), Northern Territory (NT), Western Australia (WA) and Tasmania (TAS).

GROUND	FED	NSW	ACT	VIC	QLD	NT	SA	WA	TAS
Sex	•	•	•	•	•	•	•	•	•
Marital Status	•	•	•	•	•	•	•	•	•
Pregnancy or potential pregnancy	•	•	•	•	•	•	•	•	•
Family responsibility	•	•	•	•	•	•		•	•
Parental status			•	•	•	•		•	•
Sexual harassment	•	•	•	•	•	•	•	•	•
Race	•	•	•	•	•	•	•	•	•
Racial hatred	•	•	•	•	•		•	•	•
Racial vilification	•	•	•	•	•		•		
Disability	•	•	•	•	•	•	•	•	•
Disability harassment	•								
Sexuality		•	•	•	•	•	•	•	•
Transexuality		•	•	•	•	•	•	•	•
Age		•	•	•	•	•	•	•	•
Political belief or activity			•	•	•	•		•	•
Religious belief or activity				•	•				•
Trade union activity			•	•	•	•			•
Breastfeeding			•	•	•	•			•
Associate	•	•	•	•	•	•			•
Transgender vilification		•			•				
HIV/AIDS vilification		•							
Homosexuality vilification		•			•				
Religious vilification				•	•				
Victimisation	•	•	•	•	•	•	•	•	•
Incitement	•			•	•	•	•	•	•
Aiding and permitting	•	•		•	•	•	•		•
Vicarious liability	•	•		•	•		•	•	

Source: *Discrimination Law and Practice,* Second Edition, C.Ronalds and R.Pepper, The Federation Press, 2004

B/ Appendix B. Web Sites Related to Anti-discrimination Monitoring and Enforcement

Federal Level

Aboriginal and Torres Strait Islander Commission (ATSIC)
http://www.atsic.gov.au/

Aboriginal and Torres Strait Islander Social Justice Commissioner
http://www.humanrights.gov.au/social_justice

Australasian Legal Information Institute
http://www.austlii.edu.au/

Department of Immigration and Multicultural and Indigenous Affairs
http://www.immi.gov.au/index.htm

Department of Family and Community Services
http://www.facs.gov.au/internet/facsinternet.nsf

Equal Opportunity for Women in the Workplace Agency
http://www.eowa.gov.au/

Human Right and Equal Opportunity Commission
http://www.hreoc.gov.au/

New South Wales

Anti-Discrimination Board
http://www.lawlink.nsw.gov.au/adb.nsf/pages/statsindex

Administrative Decisions Tribunal (Equal Opportunity Division)
http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt_6

Queensland

Anti-Discrimination Commission
http://www.adcq.qld.gov.au

South Australia

Commissioner for Equal Opportunity
http://www.eoc.sa.gov.au

Tasmania

Anti-Discrimination Commission
http://www.justice.tas.gov.au/adc/adcfrontpage.htm

Victoria

Equal Opportunity Commission Victoria
http://www.standuptoracism.com.au/index.asp

Victorian Civil and Administrative Tribunal
http://www.vcat.vic.gov.au

Western Australia

Commissioner for Equal Opportunity
http://www.equalopportunity.wa.gov.au/

Office of Director for Equal Employment Opportunity in Public Emploment
http://www.oeeo.wa.gov.au

Australian Capital Territory

ACT Human Right Office
http://www.hro.act.gov.au/index.html

Northern Territory

Anti-Discrimination Commission
http://www.nt.gov.au/justice/adc/index800.html

C/ Appendix C. List of interviewees and interlocutors

AIDS Council of New South Wales (ACON), Sydney: Stephen Gallagher (Policy Officer), David Buchanan (Acting President and Board Member), Stevie Clayton (CEO)

Anti-Discrimination Board of New South Wales (ADB), Sydney: Felicity Huntington (Education Officer, Indigenous Outreach Unit), Nathan Tyson (Team Leader, Indigenous Services), Narelle Hennessy (Inquiry Commission Officer, Indigenous Outreach Unit)

Australian Council for Rehabilitation of the Disabled (ACROD), Canberra : Margaret Verick (Policy Officer)

Centre for Aboriginal Economic and Policy Research (CAEPR) at the Australian National University (ANU), Canberra: Dr Boyd Hunter (researcher)

Consultation and Access Section, Office of Disability, Department of Family and Community Services (FaCS), Canberra: Rosemary Woldhuis (Assistant Director)

Department of the Commonwealth Attorney-General: Matt Minogue (Senior Policy Officer)

Department of Immigration and Multicultural and Indigenous Affirs (DIMIA), Canberra: Dr Thu Nguyen Hoan (Assistant Secretary), Elizabeth Kentwell (Acting Director), Leah Nichles (Director, Policy and Coordination), Dr Magaret Clark (Director and Policy Section), Abbas Adam (Director, Productive Diversity Section).

Director, Family & Community Statistics, Australian Bureau of Statistics (ABS), Canberra: Horst Posselt (Director)

Federation of Ethnic Communities' Councils of Australia (FECCA), Canberra: Conrad Gershevitch (Director)

Functioning and Disability Unit, Australian Institute of Health and Welfare (AIHW), Canberra: Dr Phil Anderson, Dr Nicola Fortune

Human Rights and Equal Opportunity Commission (HREOC), Sydney: Craig Lenehan (Acting Director, Legal Section), Rocky Clifford (Director, Complaints Handling Section)

Office of the Federal Privacy Commissioner (OFPC), Sydney: Paul Armstrong, (Director, Policy)

People Living With HIV/AIDS New South Wales, (PLWHA), Sydney, John Rock (Board Member of 'People Living with HIV/AIDS')

University of New South Whales, Sydney: Mehera San Roque (Lecturer in Law), Ronnit Redman (Senior Lecturer and Expert in Discrimination Law)

University of Sydney, Sydney: Sarah Heesom (Director of Student and Staff Equal Opportunity Unit), Dr Christine Inglis (Sociologist, Director of the Multicultural Research Centre)

D/ Appendix D. Ethnic and Indigenous Institutions

The Aboriginal and Torres Strait Islander Commission (ASTIC)

The Aboriginal and Torres Strait Islander Commission is the principal Commonwealth body responsible for Aboriginal and Torres Strait Islander affairs and is a crucial consultative body responsible for the administration of an entire range of federal programs for indigenous Australians.

Created pursuant to the Aboriginal and Torres Strait Islander Commission Act[190] in 1989, it amalgamates the former Ministry for Aboriginal Affairs (created in 1972) and the Commission for Aboriginal Development (created in 1980) It combines a number of functions: representation, implementation of policies and administration. Because it has a representative branch, Aboriginal and Torres Strait Islander can participate in governmental processes. The elected representatives may take decisions relating to programs and policies affecting their communities at both the regional and national level.

The Commissions statutory responsibilities[191], as described in detail in Article 7.1 of the Act creating the Commission, are as follows:

- "to formulate and implement programs for Aboriginal persons and Torres Strait Islander;
- to monitor the effectiveness of programs for Aboriginal persons and Torres Strait Islander, including programs conducted by bodies other than the Commission;
- to develop policy proposals to meet national, State, Territory and regional needs and priorities of Aboriginal persons and Torres Strait Islander;
- to assist, advise and co-operate with Aboriginal and Torres Strait Islander communities, organisations and individuals at national, State, Territory and regional levels;
- to advise the Minister on:
    - matters relating to Aboriginal and Torres Strait Islander affairs, including the administration of legislation; and
    - the co-ordination of the activities of other Commonwealth bodies that affect Aboriginal persons or Torres Strait Islander;
- when requested by the Minister, to provide information or advice to the Minister on any matter specified by the Minister;
- to take such reasonable action as it thinks necessary to protect Aboriginal and Torres Strait Islander cultural material and information, being material or information that is considered sacred or otherwise significant by Aboriginal persons or Torres Strait Islander;
- at the request or with the concurrence of the Australian Bureau of Statistics but not otherwise, and without infringing the privacy of any individual, to collect and publish statistical information relating to Aboriginal persons and Torres Strait Islander;
- such other functions as are conferred on the Commission by this Act or any other Act;

[190] http://www.austlii.edu.au/au/legis/cth/consol_act/aatsica1989478/
[191] The Aboriginal and Torres Strait Islander Commission Act, Sect. 7.

- such other functions as are conferred on the Commission by the Prime Minister by notices in force under section 8;
- such other functions as are expressly conferred on the Commission by a law of a State or of an internal Territory and in respect of which there is in force written approval by the Minister under section 9;
- to undertake such research as is necessary to enable it to perform any of its other functions;
- to do anything else that is incidental or conducive to the performance of any of the preceding functions."

It is important to note that this commission for the Aboriginal' economic development (ASTIC) is the subject of a controversial reform project and that funding for the promotion of Aboriginal have been limited by budgetary concerns.

The Racial Discrimination Commissioner

Article 19 of the Racial Discrimination Act provides for the creation of a Racial Discrimination Commissioner. Article 20 of the same Act defines the Commission's functions with regard to racial discrimination, which are managed by the Commissioner. These functions are as follows:

- investigate allegations of breaches of the Act and attempt to resolve the cases in question through conciliation;
- promote the understanding, acceptance and respect of the law;
- design, execute and encourage research, education and other programs to:
    - fight racial discrimination and prejudices that lead to racial discrimination;
    - promote understanding, tolerance and friendship amongst racial and ethnic groups, and to communicate the Convention's principal objectives[192];
- write and publish directives preventing breaches of the law; and
- when deemed necessary by the Commission, to intervene in legal cases which have racial discrimination components, with the relevant Court's permission and in accordance with the conditions that may be imposed by the Court.

Social Justice Commissioner for Aboriginal and Torres Strait Islander

The Office of the Social Justice Commissioner for Aboriginal and Torres Strait Islander was created by the law amending the legislation on human rights and equal opportunity[193]. The Office was created pursuant to the Royal Inquiry Commission's recommendations concerning aboriginal deaths in prison[194] and the national survey on racial violence, which both declared the need for a permanent follow-up on the application of the indigenous Australian population's fundamental rights. This law was enacted on January 13, 1993.

The Commission's responsibilities, which are carried out by the Commissioner,[195] are as follows:

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[192] *The United Nations Convention on The Elimination of All Forms of Racial Discrimination*
[193] *Human Rights and Equal Opportunity Legislation Amendment Act (N2) 1992*
[194] See the following paragraph concerning the Royal Inquiry Commission's survey on aboriginal deaths in prison.
[195] *Ibid, Article 46 C.2*

- to present reports every year to the Justice Minister including recommendations for measures to be taken, concerning the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander;
- to encourage the human rights debate relating to Aboriginal and Torres Strait Islander and to promote awareness in this regard;
- to implement research, education and other programs in order to promote the fundamental rights of Aboriginal and Torres Strait Islander and the full enjoyment and exercise of these rights;
- to study enacted or proposed legislative provisions to ensure that they recognize and protect the Aboriginal and Torres Strait Islander' fundamental rights, and to present the study conclusions to the Minister.

The Act[196] authorizes the Commissioner to request documents and information from government institutions if he/she has reason to believe that these institutions have materials that may relate to the Commission's responsibilities. Furthermore, by virtue of the Commonwealth laws concerning indigenous property rights[197], every year, the Social Justice Commissioner for Aboriginal and Torres Strait Islander must provide the Commonwealth Minister with reports on the application of the law and its impact on the exercise and enjoyment by the Aboriginal and Torres Strait Islander of their fundamental rights.

The Federal Government's announcement that it intends to restructure the Human Rights and Equal Opportunity Commission (this restructuring will consist in replacing five of the six current Commissioners with three vice-presidents; one vice-president will continue to be generally responsible for racial discrimination and social justice matters) should lead to the elimination of the Social Justice Commissioner position. This proposal was the subject of a CERD (*Committee on the Elimination of Racial Discrimination*) proposal aiming at a reconsideration of the elimination of the specific position of Social Justice Commissioner for Aboriginal and Torres Strait Islander. The Federal Government, in answer to this suggestion, insisted that the restructuring will allow for a better handling of problems relating to indigenous Australians and racial discrimination. While the government has appointed a new Social Justice Commissioner for Aboriginal and Torres Strait Islander, it has not officially reconsidered its intentions to restructure the HREOC. The Aboriginal and Torres Strait Islander Commission[198] remains concerned that this position is unchanged.

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[196] *Ibid, Article 46 C.2*
[197] *Article 209 of the Native Title Act 1993*
[198] *Aboriginal and Torres Strait Islander Peoples and Australia's obligations under the United Nations Convention on The Elimination of All Forms of Racial Discrimination: a report submitted by ATSIC to the United Nations Committee on the Elimination of Racial Discrimination*, February 1999.

Regional Councils

The Commission's representative branch is composed of regional councils of indigenous representatives elected every three years and spread across Australia. Elections are held every three years. These regional councils are independent bodies. They hold consultations with the local communities, whose interests they represent. A president and a vice-president are elected. Their mission is mainly to design a regional plan to improve the social, economic and cultural life of Aboriginal and Torres Strait Islander and to take decisions relating to Commission expenditures in their regions.

Office of Indigenous Policy

The Office of Indigenous Policy, which answers to the Prime Minister, was founded in July 2002 and provides general policy as well as strategic advice, particularly concerning the reconciliation process, and coordinates a number of Commonwealth policy programs in favor of the Indigenous people, whilst upholding the Commonwealth's general interests.

Indigenous Program Funding

The Australian Government's (Commonwealth) funding of programs for the Indigenous people involves approximately seventy of the priority areas, such as housing, health or employment. The Aboriginal and Torres Strait Islander Commission represents fifty-five percent of total Commonwealth funding, which it uses to fund a broad network of governmental and non-governmental organizations who provide services to Aboriginal and Torres Strait Islander.

This funding is provided either directly in the form of grants to community organizations structured as companies and, less often, in the form of assistance to individuals; or in the form of grants to the State and Territory Governments. The State and Territory Governments also finance programs for the indigenous peoples, be they special projects or activities included in the services provided to the general community. These mainly relate to community services over which they have jurisdiction, such as health care, education and infrastructure development.

Furthermore, almost three thousand Aboriginal and Torres Strait Islander organisations have been incorporated (health services, legal services, housing cooperatives, land councils, social, cultural and sport organisations) and carry out activities within their communities. These activities are essentially funded by governmental bodies, particularly the Aboriginal and Torres Strait Islander Commission. While most of these organizations are relatively small and only service the local community, others operate at the State or Territory level, or even nationally. These incorporated organisations are the main beneficiaries of Commission funding and are the main instruments for self-management of indigenous peoples.

Pursuant to the *Aboriginal and Torres Strait Islander Commission Act*, the Commission is responsible for monitoring the effectiveness of the Aboriginal and Torres Strait Islander programs, including programs conducted by bodies other than the Commission, and for drafting general policy proposals aimed at meeting the needs and priorities of the Australian indigenous population at a national, State and regional level.

The Council for Multicultural Australia

Multiculturalism has given birth to a number of institutions, often characterized by subsequent reformulation or ultimate abolition. The major post-war overseeing body on immigration matters, the Australian Population and Immigration Council (APIC) was reformed and a new organisation, the Australian Ethnic Affairs Council (AEAC), established in March 1977. In April 1981, the APIC, AEAC and the Australian Refugee Advisory Council were collapsed into one body, the Australian Council on Population and Ethnic Affairs (ACPEA). To facilitate the development of ethnic media in Australia, the Special Broadcasting Service (SBS) was established in August 1977, the Ethnic Television Review Panel in May 1978, and the Independent and Multicultural Broadcasting Corporation (IMBC) Implementation Committee in 1980. The Australian Institute of Multicultural Affairs (AIMA), established in 1979 by the Fraser Government after the Galbally Report, was disbanded in 1987 by the Hawke Government and replaced by the Office of Multicultural Affairs (OMA).

The Council for Multicultural Australia (CMA), first implemented in conjunction with the *A New Agenda for Multicultural Australia 1999* for a period of three years*,* from 2000-2003. It promotes a range of projects that promote respect for cultural differences, and the social, economic, and cultural benefits of multiculturalism though the Living in Harmony initiative and Diversity Management. The CMA has been renewed for another term, 2003-2006 and will continue to implement and promote the current policy statement: *Multicultural Australia: United in Diversity- Updating the 1999 New Agenda for Multicultural Australia: Strategic Directions for 2003-2006,* which reaffirms the governments commitment to the1999 New Agenda, and articulates the strategic direction for policy over the next three years.

E/ Appendix E. Statistical categorization of ethnicity (ABS)

Country of birth of the person

Definition: The place of birth of the person is defined by the country[199] which the respondent indicates is the country in which he/she was born.

Standard questions: Two standard questions can be used, the first being more detailed.

- In which country[200] [were you] [was the person] [was (name)] born?

Australia / England New Zealand / Italy Vietnam / Scotland / Greece / Germany / Philippines / Netherlands / Other—please specify:

- In which country [were you] [was the person] [was (name)] born?

Australia / Other—please specify:

This second question is restricted to statistical and administrative collections which do not require detailed data and which only determine whether a person is an immigrant or not.

Question for Minimum Data

- In which country [were you] [was the person] [was (name)] born?

Australia/ Other country

Country of birth of Father/Mother

Definition: The country of birth of the father/mother is defined as the country which the respondent identifies as being that in which his/her father/mother was born. Here again, and for the same reasons as with 'country of birth', the item 'place of birth' of the father/mother has been replaced by 'country of birth' of the father and/or the mother. Because the variable concerning the country of birth of the father is closely linked to the variable concerning the country of birth of the mother, the two questions are usually asked together in the surveys.

Question for Detailed Data

- In which country was [your] [the person's] [(name)'s] father born?

Australia / England / Italy / New Zealand / Scotland / Greece / Netherlands / Germany / Vietnam / Lebanon / Other—please specify:

Or :

- In which country was [your] [the person's] [(name)'s] father born?

Australia / Other—please specify:

Question for Minimum Data

- In which country was [your] [the person's] [(name)'s] father born?

Australia / Other country

Main Language other than English Spoken at Home

Definition: The main language other than English spoken is the main language other than English that is usually spoken by a person in the home to communicate with other residents or regular visitors. If

[199] The ABS recently changed the standard name of the variable from place of birth to country of birth of the person in order to better describe the geographic units (countries) for which answers have been received, the term "place of birth" also meaning sub-sets of countries, such as states, regions or cities.

[200] These countries represent approximately 85% of registered answers in the 1996 Census.

more than one language is spoken, the respondent is asked to indicate the language other than English that the person speaks most frequently in the home.

Standard questions:

As with the country of birth, two standards have been developed, the second being less detailed.

- [Do you] [Does the person] [Does (name)] speak a language other than English at home? (If more than one language, indicate the one that is spoken most often.)

No, English only Yes, Italian / Yes, Greek / Yes, Cantonese / Yes, Mandarin / Yes, Arabic / Yes, Vietnamese / Yes, German / Yes, Spanish / Yes, Tagalog (Filipino) / Yes, other—please specify:

- [Do you] [Does the person] [Does (name)] speak a language other than English at home? (If more than one language, indicate the one that is spoken most often.)

No, English only / Yes, other—please specify:

Proficiency in spoken English

Definition: Proficiency in spoken English is defined as the ability to speak English in daily situations. In practice, the variable measures the self-assessed level of the ability to speak English of persons who speak a language other than English.

Standard questions:

Question for Self-Enumerated Collections

- How well [do you] [does the person] speak English?

Very well / Well / Not well / Not at all

Question for Interview-Based Collections

- Do you consider [you speak] [(name) speaks] English very well,

well, or not well? / Very well / Well / Not well / Not at all

The standard classification for coding, stocking and distributing the data concerning proficiency in spoken English includes six codes[201].

Indigenous status

Definition:

An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Straight Islander ancestry who perceives himself/herself as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he/she lives.

Standard question:

- [Are you] [Is the person] [Is (name)] of Aboriginal or Torres Strait Islander origin?

(For persons of both Aboriginal and Torres Strait Islander origin, mark both 'Yes' boxes.)

No / Yes, Aboriginal / Yes, Torres Strait Islander

Classification :

The classification includes two hierarchical levels:

Indigenous

Aboriginal but not Torres Strait Islander Origin

Torres Strait Islander but not Aboriginal Origin

[201] 1 Very well, 2 Well, 3 Not well, 4 Not at all, 0 Not stated, 9 Not applicable

Both Aboriginal and Torres Strait Islander Origin

Non-Indigenous

Neither Aboriginal nor Torres Strait Islander Origin

Not Stated

Ancestry

Standard question:

- What is [your] [the person's] [(name)'s] Ancestry?

(For example: Hmong, Kurdish, Australian South Sea Islander, Maori.) ; (Provide more than one ancestry if necessary.)

English / Irish / Italian / German / Greek / Chinese / Vietnamese / Dutch / Filipino / Australian / Other—please specify:

Religious Affiliation

Standard questions:

- What is [your] [the person's] [(name)'s] religion?

(Answering this question is optional), (For example: Salvation Army, Hinduism, Judaism or Humanism.), (If no religion, mark last box.)

Catholic (not Eastern Churches) / Anglican (Church of England) / Uniting Church / Presbyterian / Greek Orthodox / Baptist / Lutheran / Islam / Buddhism / Other—please specify: / No religion

- What is [your] [the person's] [(name)'s] religion?

(Answering this question is optional), (For example: Judaism, Humanism, Islam, Greek Orthodox, Baptist, Church of England.); (Please write in your religion or mark the box if no religion.)

…/ No religion

F/ Appendix F. Questions Relating to Handicap in the Australian Census

September 1998, Test Form type 5: Scaled response

For developing health policies and community-based programs, there is a need to measure the extent of disability existing in Australia

18. How much difficulty does the person have in:

	None	A little	A lot
• doing everyday activities such as eating, showering or dressing?	o	o	o
• hearing?	o	o	o
• learning, understanding or remembering things?	o	o	o
• reading or seeing even with glasses?	o	o	o
• walking, kneeling or climbing stairs?	o	o	o
• living independently?	o	o	o
• doing any other things people of the same age usually do (for example working, studying, etc.)?	o	o	o

19. What causes the difficulty shown in Q18 for the person?

- o Short-term health condition (lasting less than six months)
- o Long-term health condition
- o Disability
- o Age
- o Difficulty with English language
- o Other cause - please specify
- o No difficulty

Census and Survey Disability Definitions

Census definition 1 (broadest)

Disability is identified if any of the following apply:

- response to Q19 is 'disability' or 'long-term condition'
- positive (yes/a little/a lot) response to Q18, Q19 is 'age', and age >60
- positive response to Q18 'hearing', conditional on age (>40) and no difficulty with English language
- positive response to Q18 'everyday activities', ' learning or understanding', or ' doing things people of the same age do', and age >9
- positive response to Q18 'reading or seeing', or 'walking, kneeling, etc.', Q19 response is 'age', and age >40
- 3 or more positive responses to Q18, and Q19 response is 'short-term condition'.

Census definition 2

Disability is identified if any of the following apply:

- response to Q19 is 'disability' or 'long-term condition'
- positive (yes/a little/a lot) response to Q18, Q19 is 'age', and age >60
- positive response to Q18 'hearing', and no difficulty with English language
- positive response to Q18 ' learning or understanding', and age >9.

Census definition 3

Disability is identified if any of the following apply:

- response to Q19 is 'disability' or 'long-term condition'
- positive (yes/a little/a lot) response to Q18, Q19 is 'age', and age >60.

Census definition 4 **(most restricted)**

As for 2, but only for Form type 5, and using only 'a lot' responses to Q18.

Survey definitions

Any restriction

A person has a **disability** if he/she has one of the following:

- loss of sight (not corrected by glasses)
- loss of hearing, with difficulty communicating or use of aids
- loss of speech
- chronic or recurring pain that restricts everyday activities
- breathing difficulties that restrict everyday activities
- blackouts, fits or loss of consciousness
- difficulty learning or understanding
- incomplete use of arms or fingers
- difficulty gripping
- incomplete use of feet or legs
- a nervous or emotional condition that restricts everyday activities
- restriction in physical activities or physical work
- disfigurement or deformity
- needing help or supervision because of a mental illness or condition
- head injury, stroke or other brain damage, with long-term effects that restrict everyday activities
- treatment for any other long-term condition, and still restricted in everyday activities
- any other long-term condition that restricts everyday activities.

Moderate activity restriction

A person with a **disability** (as defined under **any restriction** above) who **needed assistance,** or **had difficulty** with:

- self care - bathing or showering, dressing, eating, using the toilet and managing incontinence
- mobility - moving around at home and away from home, getting into or out of a bed or chair, and using public transport
- communication - understanding and being understood by others: strangers, family and friends; and/or
- daily activities, such as health care, housework, home/garden maintenance, meal preparation, managing money/correspondence, and transport; and/or
- were restricted in schooling or employment.

Severe activity restriction

A person with a **disability** (as defined under **any restriction** above) who **needed assistance** with:

- self-care mobility, communication; and/or
- a range of daily activities; and/or

were restricted in schooling or employment (as specified in **moderate activity restriction** above).