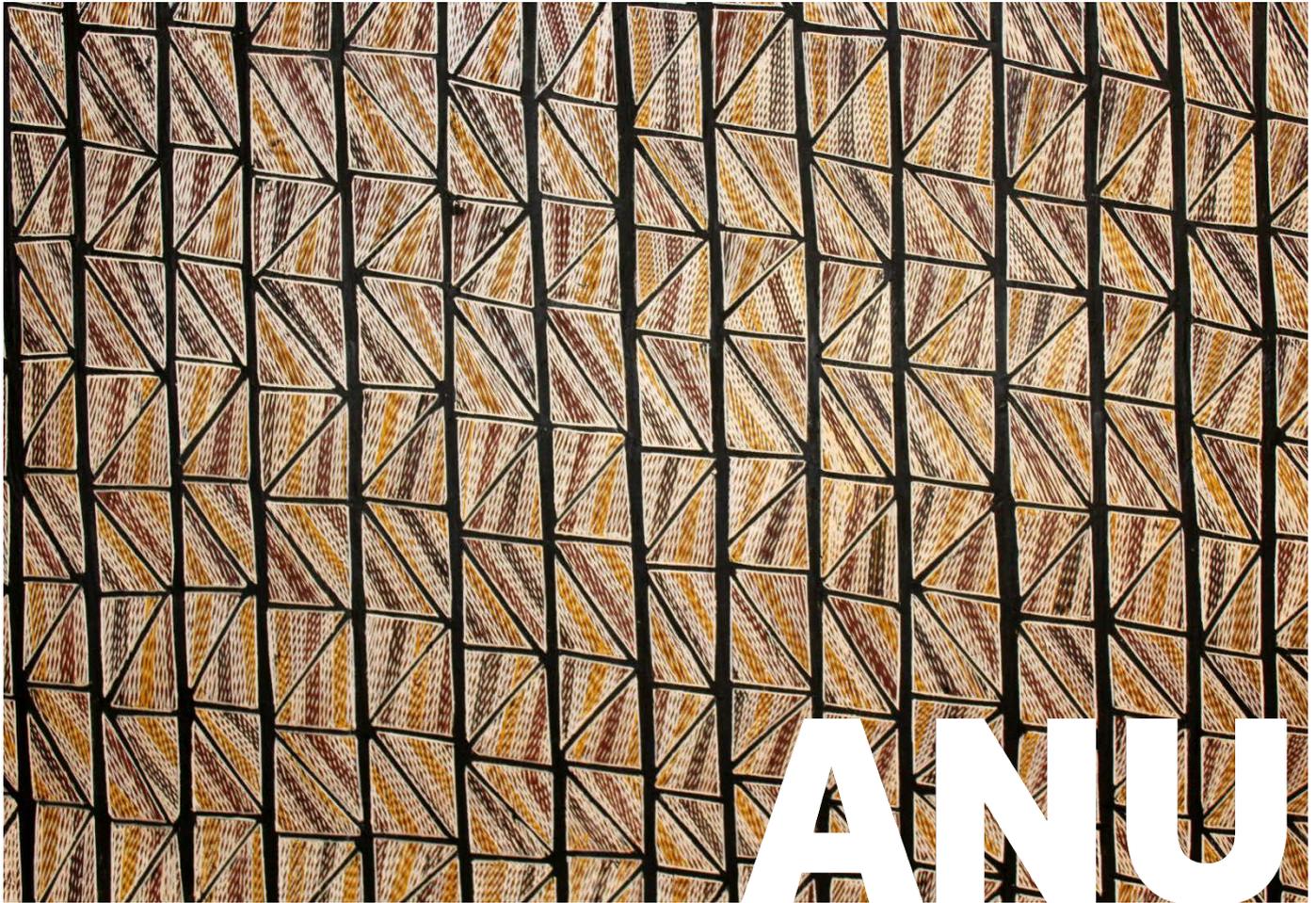




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JOINT RESPONSE TO THE DELOITTE REVIEW  
OF THE IMPLEMENTATION OF THE  
RECOMMENDATIONS OF THE ROYAL  
COMMISSION INTO ABORIGINAL DEATHS IN  
CUSTODY

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December 2018


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# Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody

K Jordan, T Anthony, T Walsh and F Markham

This joint statement includes contributions from a number of additional academic colleagues, and is endorsed by 33 individuals across 12 academic institutions. **The full list of contributors and signatories is provided at the end of this document.** **Kirrily Jordan** is a Research Fellow at the Centre for Aboriginal Economic Policy Research (CAEPR), Research School of Social Sciences, College of Arts & Social Sciences, Australian National University. **Thalia Anthony** is an Associate Professor at the Faculty of Law, University of Technology Sydney. **Tamara Walsh** is a Professor at the TC Beirne School of Law, University of Queensland. **Francis Markham** is a Research Fellow at CAEPR.

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## Abstract

This statement outlines concerns with the 2018 Deloitte Access Economics review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The statement is endorsed by 33 academic and professional experts in the policy areas examined by RCIADIC. It suggests that the scope and methodology of the Deloitte review mean that it misrepresents governments' responses to RCIADIC, and has the potential to misinform policy and practice responses to Aboriginal deaths in custody. It is also evidence of a more widespread problem in Indigenous Affairs policy-making in Australia. In particular, current approaches too often ignore the principles of self-determination and the realities of policy as experienced by Aboriginal and Torres Strait Islander peoples. This statement calls for the development of national independent monitoring of the implementation of the recommendations of RCIADIC, for the Federal Government to fully embrace and enact the intent of the RCIADIC recommendations, and for the Federal Government to provide a response to the Australian Law Reform Commission's 2017 Inquiry on Indigenous Incarceration Rates.

**Acronyms**

ANU	Australian National University
CAEPR	Centre for Aboriginal Economic Policy Research
CDC	Cashless Debit Card
CDP	Community Development Program
NACCHO	National Aboriginal Community Controlled Health Organisation
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RJCP	Remote Jobs and Communities Program
SEAM	Improving School Enrolment and Attendance through Welfare Reform Measure
UN	United Nations

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## Introduction

As academic and professional experts in the policy areas examined by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) – including policy responses to Aboriginal deaths in custody – we make this statement to express serious concerns with the Deloitte Access Economics review of the implementation of the RCIADIC recommendations tabled in the Australian Senate on 24 October 2018. We have concerns with the scope of the review, the methodology engaged and the substantive findings of the review.

As the Federal Government would be aware, Aboriginal people now die in custody at a greater rate than before the RCIADIC handed down its report in 1991. RCIADIC investigated 99 of the 105 Aboriginal deaths in custody that occurred between 1980 and 1989, at a rate of 10.5 deaths per year. Since the report, there have been 409 Aboriginal deaths in custody, at a rate of 15.1 deaths per year, excluding deaths in police chases that have not been captured in official data – notwithstanding the RCIADIC recommendation that such data be included in statistical reporting.

We have formulated our response because the Deloitte review has the potential to misinform policy and practice responses to Aboriginal deaths in custody and across the spectrum of policy areas considered by RCIADIC. We believe that using the Deloitte review to inform policy decisions will risk increasing Aboriginal deaths in custody because it misinterprets the recommendations of RCIADIC and misapprehends what is needed to reduce the incidence of Aboriginal deaths in custody. Our research demonstrates that very few of the RCIADIC recommendations have been implemented, and some policy positions directly contravene the recommendations. In the interests of sound policy-making into the future we therefore make this statement on the public record.

Many outcomes central to the concern of RCIADIC have continued to worsen. In particular, the commitments of RCIADIC to reduce the number of Aboriginal people in custody (Recommendation 148); maintain a watching brief on deaths in custody through transparent reporting and annual monitoring (Recommendations 15, 40); and extensively consult with Aboriginal people throughout the process of implementation, have not been realised in a substantive sense (Recommendation 1). It is well documented that rates of Aboriginal people in prison have increased over the past two decades and Indigenous Australians are the most incarcerated people in the world (Anthony 2017). Yet the Deloitte review gives a misleadingly positive view with its questionable finding that 78 per cent of the 339 recommendations have been fully or mostly implemented.

At the time of writing this response, in December 2018, there are 14 Aboriginal deaths in custody awaiting a coronial hearing or findings in Victoria, South Australia, New South Wales, Western Australia, Queensland and the Northern Territory. These include deaths that occurred where Aboriginal women were incarcerated due to intoxication, Aboriginal men were denied adequate health care, and Aboriginal young people were on remand. All these circumstances are contrary to the recommendations of RCIADIC and reflect the failures of government implementation. The Deloitte review is another indication that state and territory governments will not account for their failures in implementation of RCIADIC and their duties to Indigenous people in custody and the broader Aboriginal and Torres Strait Islander community.

## Scope of the review and methodological shortcomings

The scope and methods of the Deloitte review are such that the findings substantially overstate the progress made towards implementing the RCIADIC recommendations. The scope of the review was limited to ‘assessing the actions taken to respond to each recommendation’ and excluded ‘commentary on whether the intended outcomes from each recommendation have been achieved’ (Deloitte Access Economics 2018: 3). The report’s

authors further limited the scope, from ‘*assessing* the actions taken’ to ‘*whether* actions had been taken to respond to each recommendation’ (Deloitte Access Economics 2018: 701, our emphasis).

Further, the methodology presents summaries of government actions either from a desktop review of previous reports (some of which describe government actions taken toward meeting the RCIADIC recommendations that have since been reversed) or provided by government agencies – with little apparent analysis of the relevance of these government actions to the RCIADIC recommendations, the legitimacy of government claims to relevance, or whether the claims about meeting recommendations are correct. In particular, the scope and methodology of the Deloitte report do not interrogate whether government actions have implemented RCIADIC recommendations consistent with three key features: reducing rates of Indigenous incarceration, increasing the safety of Indigenous people in custody, and advancing Indigenous self-determination (Recommendations 48–59, 188–204).

Overall, the scope and methodology of the review enable governments to hide behind the veneer of simply having introduced policies and programs which they claim have addressed RCIADIC recommendations, rather than come to terms with the real-world impacts of these policies or programs, or their overall approach to Indigenous Affairs and Indigenous people in the criminal justice system. Several key policy areas illustrate this point.

## Substantive findings of the review

### Self-determination

A major body of RCIADIC recommendations identifies the need to recognise the ongoing impacts of colonisation and initiate action towards self-determination. Recommendation 188 provides:

That governments negotiate with appropriate Aboriginal organisations and communities to determine guidelines as to the procedures and processes which should be followed to ensure that the self determination principle is applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people.

The Deloitte review claims that Recommendation 188 is ‘fully implemented’ across all jurisdictions. The RCIADIC National Report defines self-determination to include ‘Aboriginal [and Torres Strait Islander] control over the decision-making process as well as control over the ultimate decision about a wide range of matters including political status, and economic, social and cultural development’<sup>1</sup> (Johnson 1991: volume 2, section 20.2.17). The evidence cited in the Deloitte review for the claim that Recommendation 188 is fully implemented does not stand up to scrutiny and is a fundamental misrepresentation of the nature of self-determination for Aboriginal and Torres Strait Islander peoples.

Despite endorsing the United Nations (UN) Declaration on the Rights of Indigenous Peoples in 2009, Federal governments since at least the early 2000s have tended to reject the principle of self-determination in favour of centralised policy development and decision-making that substantively excludes Indigenous peoples affected by the policy. Evidence in scholarly research, findings of the UN Committee on the Elimination of Racial Discrimination and reports by the UN Special Rapporteur on the Rights Indigenous Peoples all support this point. In 2017, the UN Special Rapporteur described Australia’s failure to respect the rights of Indigenous peoples to self-determination as ‘alarming’ (Special Rapporteur on the Rights of Indigenous Peoples 2017).

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<sup>1</sup> While the RCIADIC National Report refers to ‘Aboriginal people’ the recommendations are understood to also include Torres Strait Islanders.

In 2004–05 the Federal Government abolished the national Indigenous representative body – the Aboriginal and Torres Strait Islander Commission – whose functions included the local delivery of Indigenous-specific services related to the justice system. The Federal Government also invoked a policy of mainstreaming the services for Aboriginal and Torres Strait Islander people, initially as part of a platform of ‘practical reconciliation’. A prominent legislative agenda of the Federal Government has been in relation to the control of Aboriginal communities in the Northern Territory, which was enacted through the Northern Territory National Emergency Response Act (2007) and the Stronger Futures in the Northern Territory Act (2012) with minimal input from the Indigenous communities themselves. Furthermore, state governments (except for Victoria) have disbanded their Aboriginal Justice Agreements that enabled Aboriginal organisations to have a stake in decisions on access to justice, justice services and criminal justice processes. Most recently, the Federal Government has reduced funding to the National Congress of Australia’s First Peoples and rejected calls for a First Nations Voice to parliament. These developments demonstrate the failure to uphold the principle of self-determination and the further principle supported by RCIADIC that ‘Aboriginal people should decide for themselves what they see as the scope of their demand for self-determination’ (Johnson 1991: Volume 2, Section 20.2.20).

## **Criminalisation**

A key finding of RCIADIC was that Aboriginal people are not more likely to die in custody than non-Aboriginal people but, rather, Aboriginal people are more likely to be in custody in the first place. RCIADIC concluded: ‘A major reason for Aboriginal deaths in custody remains: the grossly disproportionate rates at which Aboriginal people are taken into custody...Too many Aboriginal people are in custody too often’ (Johnson 1991: volume 1). Many of RCIADIC’s recommendations were therefore directed towards addressing the high rate of Aboriginal people in custody. The main recommendations relating to criminalisation include the following.

### **Refrain from arrest and charges**

RCIADIC Recommendation 87 referred to arrest being used as a sanction of last resort to avoid unnecessary policy custodies<sup>2</sup>:

All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.

The Deloitte review suggests that Recommendation 87 is partially or fully implemented in most jurisdictions. However, the use of arrest has risen for Aboriginal people and, in the Northern Territory, legislative amendments titled ‘Paperless Arrests’ have made it easier for police to arrest persons without a charge. The Northern Territory Aboriginal Justice Agency found that almost 90 per cent of people who were arrested under these laws were Aboriginal (Hunyor 2016). Furthermore, Recommendation 240 provided that government, in conjunction with Police Services, should consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution, especially for young offenders. However, despite the decline in non-Indigenous youth incarceration, rates of Indigenous youth incarceration continue to climb.

### **Decriminalise offensive language**

RCIADIC Recommendation 86 stated that:

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<sup>2</sup> See also Recommendations 239 and 240, in respect of young people.

- a. The use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge; and
- b. Police Services should examine and monitor the use of offensive language charges.

Again, the Deloitte review considers Recommendation 86 to be partially or fully implemented in all jurisdictions – however the existence of isolated precedents in relation to the application of offensive language offences in some jurisdictions does not reflect current practice. Offensive language remains an offence in all Australian states and territories. Aboriginal people, especially Aboriginal women (the fastest growing prison demographic), remain disproportionately vulnerable to offensive language charges, primarily for offensive language against police officers. In Queensland, Indigenous people receive around one third of all charges related to offensive language against police officers (Walsh 2017). There has been an expansion of offensive language offences due to the roll out of criminal infringement notices for this offence in most jurisdictions. The issuing of such notices supplements the ongoing practice of charges being laid for offensive language and ensuing prison sentences.

### **Amnesty on the execution of long outstanding warrants for unpaid fines**

RCIADIC Recommendations 120–121 stated that governments consider introducing an ongoing amnesty on the execution of long outstanding warrants of commitment for unpaid fines, and that sentences of imprisonment not be automatically imposed for default of payment of a fine. Sentencers should also consider the defendant's capacity to pay in assessing appropriate penalties. The Deloitte review considers these recommendations to be partially or fully implemented in all jurisdictions (except recommendation 120 in the ACT). However, in Western Australia and Queensland, fine default remains grounds for imprisonment. In 2014, this led to the tragic death of young Aboriginal woman Ms Dhu in Port Headland Police watchhouse.

### **Uphold the right to bail**

RCIADIC Recommendation 89 provided that governments should monitor legislation and criminal justice practice to ensure that defendants are entitled to bail. The Deloitte review considers this recommendation to be partially or fully implemented in all jurisdictions except Tasmania. However, bail laws have withered away the right to bail across states and territories through the provisions of presumptions against bail for a growing number of offences, and in certain circumstances including homelessness. Accordingly, remand rates have continued to grow, often outpacing the growth in sentenced offenders in prison. Many of those on remand will not be convicted or sentenced. Rates of deaths in custody for people on remand are slightly higher than for sentenced prisoners (Sarre et al. 2006).

### **Imprisonment as a sanction of last resort**

RCIADIC Recommendation 92 held that community service work and programs in a range of forms should be promoted, including where they provide skills, knowledge and experience to reduce risk of reoffending. Recommendations 94, 109, 111–13 noted that governments should review the range of non-custodial sentencing options, especially in remote and regional communities, with a view to ensuring that an appropriate range of such options was available, and in doing so consult with Aboriginal communities and groups and ensure their involvement in community work and development orders. However, prison continues to be used as a key sentencing option. There are few specialised Indigenous sentencing orders, post-release supports or Indigenous sentencing courts. This is particularly the case in remote and regional areas. Mainstream services fail to provide relevant and culturally safe options for Indigenous people or address underlying issues of inter-generational trauma. The Deloitte review considers these recommendations to be at least partially implemented. Yet, it is well-established that Aboriginal people remain substantially over-represented in police and prison

custody rates: Indigenous people now comprise 28 per cent of the prisoner population, up from 14 per cent in 1991.

## **Additional measures**

RCIADIC recognised the significance of many policy areas within and beyond Indigenous Affairs portfolios as underlying issues in the disproportionately high rate of Aboriginal imprisonment. While not all of these can be dealt with here, we focus on several areas to further illustrate the limitations of the Deloitte review. At the Commonwealth level, these include reference to the Cashless Debit Card (CDC) trials (among other measures) as evidence that RCIADIC Recommendation 63 is ‘fully implemented,’ reference to the Improving School Enrolment and Attendance through Welfare Reform Measure (SEAM) as part of the evidence that Recommendation 72 is ‘mostly complete,’ and reference to the Community Development Programme (CDP) and Stronger Futures as evidence that Recommendation 203 is ‘partially complete.’

### **National task force on social and health problems as a consequence of alcohol use**

RCIADIC Recommendation 63 stated:

That having regard to the desirability of Aboriginal people deciding for themselves what courses of action should be pursued to advance their well-being, ATSIC consider...the establishment of a National Task Force to focus on:

- a. The examination of the social and health problems which Aboriginal people experience as a consequence of alcohol use;
- b. The assessment of the needs in this area and the means to fulfil these needs; and
- c. The representation of Aboriginal Health Services and other medical resources in such a project.

The Deloitte review suggests that Recommendation 63 is ‘fully implemented,’ citing (among other measures) the CDC trials. However, the clear intent of this recommendation is that a response to problems associated with alcohol use should be guided by the principle of self-determination and informed by evidence including from Aboriginal Health Services. Using the CDC as evidence for having implemented Recommendation 63 is a cause for concern as research has shown that the CDC trials were not community led, the card makes it harder for some people to manage money, and limits the ability of some people to meet basic needs (e.g. Klein and Razi 2018). Further, as the CDC is a blanket measure applied to all people in the trial sites on welfare payments (except veteran and aged pension payments), it does not distinguish between people with or without alcohol use issues, and has been implemented without adequate therapeutic support. In addition, the government’s commissioned CDC evaluation showed the majority of card holders reported that alcohol consumption had either increased or stayed the same since the CDC was introduced (Department of Social Services 2017: 47; Bielefeld 2018: 762). To date, there is no compelling evidence to suggest that the CDC achieves the alcohol related policy objectives outlined by government.

It is not reasonable to suggest that the CDC trials have been informed by representation from Aboriginal Health Services. The National Aboriginal Community Controlled Health Organisation (NACCHO) – the peak body representing Aboriginal Community Controlled Health Services throughout Australia – has stated that it is strongly opposed to the trials on the basis that they are discriminatory, that ‘there are significantly better, more cost efficient, alternative approaches that support improvements in Aboriginal wellbeing and positive decision making’ and that ‘addressing the ill health of Aboriginal people, including the impacts of alcohol, drug and gambling related harm, can only be achieved by local Aboriginal people controlling health care delivery’ (NACCHO 2018). To be effective the Deloitte review would need to have assessed the actions the government

claimed it had taken in response to Recommendation 63, including with reference to the views of Aboriginal and Torres Strait Islander peoples and health organisations.

### **School enrolment and participation**

RCIADIC Recommendation 72 identified the significance of diminished educational opportunity as a factor in the disproportionately high rate of Aboriginal imprisonment. It recommended an approach to schooling attendance and participation that recognised failings of the schooling system and focused on the needs of the child:

*That in responding to truancy the primary principle to be followed by government agencies be to provide support, in collaboration with appropriate Aboriginal individuals and organisations, to the juvenile and to those responsible for the care of the juvenile. (our emphasis)*

The Deloitte review should be clearer that SEAM (which operated 2009-2017) ran counter to Recommendation 72. It aimed to increase school enrolment and attendance by placing conditions on the parents' receipt of social security payments. Parents who did not comply with requirements under SEAM could have their payments suspended. Although families who had their social security payments suspended under SEAM could later receive backpay if they complied with the program requirements, suspension periods could result in serious economic hardship for families (Bielefeld 2014: 24). Reviews of SEAM found that it limited a range of rights (including to equality and non-discrimination; social security; an adequate standard of living; privacy; and culture) and did not appear to be effective in addressing low school enrolment and attendance (Parliamentary Joint Committee on Human Rights 2016: 66, 75). In addition, it did not appear 'to have been established to provide support to Indigenous juveniles or their carers, or to address relevant cultural and social factors identified as being the cause of the truancy' (Amnesty International and Clayton Utz 2015: 204). Instead, it relied on a punitive approach that was explicitly rejected by RCIADIC, which noted that 'to impose fines on the parents of Aboriginal children will only exacerbate their poverty and extent of social disadvantage' (Johnston 2018: volume 2, section 16.6.16).

### **Social, economic and cultural development plans**

RCIADIC Recommendation 203 stipulated:

*That the highest priority be accorded to the facilitation of social, economic and cultural development plans by Aboriginal communities.*

The Deloitte review states that this recommendation is 'partially complete' at the Commonwealth level, citing both CDP and the Stronger Futures policy as evidence. Prior to the introduction of CDP, the Community Development Employment Projects (CDEP) scheme and the Remote Jobs and Communities Programme (RJCP) required providers of these schemes to develop Community Action Plans for the Aboriginal and Torres Strait Islander communities they serviced. Although these often required further development to be genuinely Aboriginal and Torres Strait Islander led, they were intended to give communities a central role in establishing a strategic vision for their social, economic and cultural development as facilitated by CDEP and then RJCP. Further, providers of both programs had some flexibility to tailor the programs to local needs. Under CDP, the Community Action Plans have been abandoned rather than reformed, flexibility has been limited, and centralised bureaucratic control has increased (Fowkes 2016). Some providers have stated that program rules limit their capacity for effective service delivery, and there is significant evidence that the wellbeing of many CDP participants has declined (Jordan and Fowkes 2016).

Stronger Futures was introduced to extend the substance of the Northern Territory Emergency Response intervention from 2012 to 2022. The Deloitte review states that Stronger Futures ‘included directives which were aimed at improving government engagement with Aboriginal and Torres Strait Islander communities and improving the coordination of funding and services for Aboriginal and Torres Strait Islander communities’ (Deloitte Access Economics 2018: 407). However, Stronger Futures continued and expanded a number of the punitive elements of the Northern Territory Emergency Response (Bielefeld 2017) and, although there was some consultation with Aboriginal and Torres Strait Islander peoples, a report into this consultation found that the process fell short ‘of Australia’s obligation to consult with Indigenous peoples in relation to initiatives that affect them’ (Nicholson et al. 2012). In this context, including both CDP and Stronger Futures as evidence, with no assessment of their contribution in practice, significantly overstates government progress towards meeting RCIADIC Recommendation 203.

## Conclusion

The scope and methodology of the Deloitte review mean that it misrepresents governments’ responses to RCIADIC, and has the potential to misinform policy and practice responses to Aboriginal deaths in custody. It widens the gap between policy rhetoric and reality across many of the policy areas covered by RCIADIC, including policy areas not discussed in this response, and in doing so is evidence of a more widespread problem in Indigenous Affairs policy-making in Australia. In particular, current approaches to policy-making and reporting too often ignore the principles of self-determination and the realities of policy as experienced by Aboriginal and Torres Strait Islander peoples. Our concern is that unless these approaches are called out, outcomes will continue to deteriorate and the policy-making process itself will continue to repeat the trauma for First Nations people.

Instead of a report that systematically misrepresents governments’ responses to RCIADIC, we support the development of national independent monitoring of the implementation of the recommendations of RCIADIC. There must be strong terms of reference drawing on Aboriginal and Torres Strait Islander community concerns, and a rigorous methodology centred on input from Aboriginal and Torres Strait Islander peoples, organisations and peak bodies to establish whether governments are making progress towards meeting the recommendations. Despite a commitment by the Commonwealth for increased use of evaluation in Indigenous Affairs, this commissioned review – which according to records published by AusTender cost \$350,000 – is not alone in being of such poor quality as to render its findings largely worthless. For example, similar criticisms have been made by academics and the Australian National Audit Office of the evaluation of the Cashless Debit Card trial (Australian National Audit Office 2018; Hunt 2017). A commitment to increased evaluation means little if such work is not undertaken independently and with transparency. In the case of the RCIADIC recommendations, it is no exaggeration to suggest that this a matter of life and death.

We urge the Federal Government to fully embrace and enact the intent of the RCIADIC recommendations including the need to support action towards self-determination. Finally, we urge the Federal Government to provide a response to the Australian Law Reform Commission’s Inquiry on Indigenous Incarceration Rates (2017), which emerged from the legal profession’s sense of despair with the unprecedented rates of Indigenous incarceration in Australia. The inquiry demonstrated the lack of government action towards implementing the recommendations of RCIADIC and is a sobering reminder of the tragic implications of this failure.

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