

UNCOMFORTABLE TRUTHS: PROTECTING THE INDEPENDENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS TO INQUIRE

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I INTRODUCTION

In February 2015, the report of the Australian Human Rights Commission's National Inquiry into Children in Immigration Detention ('Forgotten Children National Inquiry') was tabled in the Federal Parliament.¹ The *Forgotten Children Report* detailed through first-hand and expert accounts the profound negative impact of prolonged immigration detention on children and their families. It called for the immediate release of the children remaining in immigration detention, as well as an amendment to the *Migration Act 1958* (Cth) to ensure strict limits are imposed on the duration of detention for minors.²

The Government rejected the findings and recommendations of the Inquiry and launched blistering attacks on the integrity and independence of the Australian Human Rights Commission. During parliamentary question time, the Prime Minister stated that '[i]t would be a lot easier to respect the Human Rights Commission if it did not engage in what are transparent stitch-ups'.³ Other ministers supported the Prime Minister's claims of bias and backbenchers called for the removal of the President of the Commission, Gillian Triggs.⁴ Triggs testified before the Senate Estimates Committee that the Attorney-General's

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1 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) ('*Forgotten Children Report*').

2 Ibid 37.

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2015, 714 (Tony Abbott, Prime Minister).

4 Stephanie Balogh, 'MPs Push To Oust "Partisan" Triggs', *The Australian* (Sydney), 13 February 2015, 7.

office had pressured her to resign, including making an offer of another legal role in return for that resignation.⁵

This is not the first time that a national inquiry conducted by the Australian Human Rights Commission has provoked government ire. In 1993, the first Australian Federal Human Rights Commissioner, Brian Burdekin, experienced a similar attempt to procure his resignation. The then Attorney-General, on behalf of the Government, offered Burdekin a senior ambassadorial position in return for his resignation following the tabling of the report of the National Inquiry into Human Rights and Mental Illness ('Mental Illness National Inquiry').⁶ Burdekin declined.⁷ In 2004, on the day the report of the Commission's first National Inquiry into Children in Immigration Detention⁸ was tabled in Parliament, the Minister for Immigration immediately criticised the Commission, disputing the Inquiry's findings and accusing the Commission of encouraging people smugglers.⁹ In 1997, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families ('Bringing Them Home National Inquiry')¹⁰ was quickly politicised. The Government questioned the

5 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 33 (Penny Wong and Gillian Triggs):

Senator WONG: I want to be very clear because this is a very serious allegation. Is it that your resignation was sought and it was linked to the offer of some unspecified further work with the Commonwealth?

Prof Triggs: Yes. There is no doubt in my mind that the two were connected.

Media reports about the alleged pressure to resign began to circulate earlier. See, eg, Lenore Taylor and Shalailah Medhora, 'Brandis Asked Gillian Triggs To Resign before Critical Child Detention Report', *The Guardian* (online), 13 February 2015 <<http://www.theguardian.com/australia-news/2015/feb/13/brandis-asked-gillian-triggs-to-resign-before-critical-child-detention-report>>. The Australian Senate (without the support of the Government) censured the Attorney-General for his treatment of Triggs and the Commission: Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 719 ff (Penny Wong). The Secretary of the Attorney-General's Department, Chris Moraitis, denied that an offer was specifically made in return for the President's resignation. He testified:

Mr Moraitis: I did not use the word 'resign'.

Senator WONG: No, all right. I am asking you: what were the words?

Mr Moraitis: I said what I said in my statement and what I just said now. There were essentially three points that I was asked to make. One was that the Attorney had lost confidence in Professor Triggs as chairperson. He retained significant goodwill towards her and had high regard for her legal skills. In that respect, he was asking me to formally put on the table or mention that there would be a senior legal role, a specific senior role, that her skills could be used for.

Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 69–70 (Penny Wong and Chris Moraitis).

6 Human Rights and Equal Opportunity Commission (Cth), *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) ('*Mental Illness Report*').

7 Interview with Brian Burdekin (Phone Interview, 23 April 2015).

8 Human Rights and Equal Opportunity Commission (Cth), *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

9 ABC Radio National, 'Vanstone Critical of Human Rights Commission Report', *PM*, 13 May 2004 (Louise Yaxley) <<http://www.abc.net.au/pm/content/2004/s1107800.htm>>.

10 Human Rights and Equal Opportunity Commission (Cth), *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('*Bringing Them Home Report*').

major findings of the *Bringing Them Home Report*,¹¹ and made it clear it would only take minimal action on the recommendations.¹²

National inquiries conducted by national human rights institutions are non-judicial inquiries into widespread or systemic human rights violations.¹³ In Australia, the Human Rights Commission relies on the functions and powers granted to it by the *Australian Human Rights Commission Act 1986* (Cth) to conduct such inquiries.¹⁴ National human rights institutions ('NHRIs') are independent statutory bodies set up by a state to monitor human rights in that jurisdiction. These institutions are specifically mandated to promote and protect human rights, and are regarded as significant domestic actors supporting and encouraging the implementation of international human rights standards at the local level.

There is an inherent tension in the concept of an NHRI: states which establish an NHRI may not want to be held to account by an independent, powerful and well-resourced entity,¹⁵ or indeed may actually create the institution as a smokescreen in order to deflect international criticism of its rights record.¹⁶ As a result, NHRIs' formal powers and resources are often circumscribed, limited, or

11 See, eg, John Herron, Federal Government, Submission to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Stolen Generation*, March 2000, ii–iii:

There was never a 'generation' of stolen children. ... the methodology adopted by [Human Rights and Equal Opportunity Commission] in assembling its evidence concerning the so-called 'stolen generation' did not involve a critical appraisal or testing of the claims put before it, and failed to elicit or reflect the views and experience of those involved in administering the policies and practices in question.

12 John Herron, 'Bringing Them Home: Commonwealth Initiatives' (Media Release, 16 December 1997).

13 Brian Burdekin, *National Human Rights Institutions in the Asia-Pacific Region* (Martinus Nijhoff Publishers, 2007) 112–16.

14 Since its 2004 inquiry into children in detention, the Australian Human Rights Commission has explicitly set out in its reports and cover letters to the Attorney-General the formal powers on which it has relied in the conduct of the inquiry. See, eg, Letter from Gillian Triggs, President, Australian Human Rights Commission, to George Brandis, Attorney-General, November 2014 in *Forgotten Children Report*, above n 1, 1.

15 See, eg, Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014) 61; Linda C Reif, 'Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection' (2000) 13 *Harvard Human Rights Journal* 1, 23. A significant compilation of NHRIs' experiences around the world may be found in Kamal Hossain et al (eds), *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International, 2000).

16 Sonia Cardenas, 'Emerging Global Actors: The United Nations and National Human Rights Institutions' (2003) 9 *Global Governance* 23.

In 1981, parliamentary debates on the merits of the establishment of the forerunner to the Australian Human Rights Commission demonstrated the opposition party's concern that, as the proposed legislation stood, the government was engaged in a hypocritical window dressing exercise:

One does not have to be much of a cynic to discern two clear motives for this legislation. The first is to enable Australia to be seen internationally as doing something about human rights, but without the Government having to actually, in practice, do anything at all to improve the local situation. The second motive is undoubtedly to suppress the hitherto all too irrepressible Mr Grassby [the Commissioner for Community Relations responsible for race-related matters] who has long been a very embarrassing thorn in the Government's side ...

Commonwealth, *Parliamentary Debates*, Senate, 8 November 1979, 2090 (Gareth Evans).

influenced by state actors,¹⁷ and this has led to criticisms that NHRIs are weak, or incapable of creating real change.¹⁸ In light of the Government's sustained attacks on the integrity of the Australian Human Rights Commission and its refusal to acknowledge or respond to the substantive findings of the *Forgotten Children Report*, these criticisms have merit. However, previous national inquiries, both in Australia and around the Asia-Pacific region, demonstrate the potential of the inquiry methodology to challenge systemic and widespread human rights violations and ultimately contribute to a state's progressive internalisation of human rights norms.¹⁹

By their very nature, the findings of national inquiries often reveal uncomfortable truths. They tell us stories of violation, discrimination and loss. Governments may use national inquiry reports as an opportunity to engage in dialogue with affected communities about needed change. However, this is not always politically palatable. Publicly held to account, governments may reject being positioned as perpetrators of human rights abuses, and the integrity of an NHRI will be most under threat when a government seeks to discredit the institution and its findings. My research on the experiences of the Australian Human Rights Commission and other NHRIs from the Asia-Pacific region evidences that national inquiries can and do produce positive human rights change. In order to continue to do this effectively, the independence of NHRIs must be respected and safeguarded.

In this article, I provide first a brief background on NHRIs, the establishment of the Australian Human Rights Commission, and the global spread of NHRIs, particularly in the Asia-Pacific region. Secondly, I describe the development and use of national inquiries by NHRIs. I consider how national inquiries as developed in the Australian context became an important strategy promoted and used by other NHRIs across the Asia-Pacific region. I discuss the situations which necessitate a national inquiry being called. I review the statutory mandate, functions and powers on which NHRIs rely in order to conduct national inquiries. I also set out the anatomy of a national inquiry, looking in depth at the preparation, conduct and follow-up components found in each inquiry process.

17 See, eg, Renshaw and Fitzpatrick who note that '[t]here are other effective pressure points through which government control can be exercised, such as the reduction of an NHRI's funding ... and the appointment of commissioners who are believed to be sympathetic to government positions on human rights': Catherine Renshaw and Kieran Fitzpatrick, 'National Human Rights Institutions in the Asia Pacific Region: Change Agents under Conditions of Uncertainty' in Ryan Goodman and Thomas Pagram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012) 150, 177.

18 See, eg, Rosenblum who sceptically reviews the NHRI project, criticising in particular the tendency to put the aspirational vision for NHRIs ahead of the political reality of their effectiveness in local contexts: Peter Rosenblum, 'Tainted Origins and Uncertain Outcomes: Evaluating NHRIs' in Ryan Goodman and Thomas Pagram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012) 297.

19 On internalisation of human rights norms, see, eg, Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1.

Thirdly, I examine the change that national inquiries have precipitated. I look at three inquiries conducted by the Australian Human Rights Commission on homeless children ('Homeless Children National Inquiry'),²⁰ indigenous rights (the Bringing Them Home National Inquiry),²¹ and same-sex entitlements ('Same Sex: Same Entitlements National Inquiry'),²² and draw on my own empirical research to examine a national inquiry conducted by the National Human Rights Commission of Mongolia. Fourthly, in light of the significant contribution made by NHRIs utilising national inquiries to address systemic rights violations, I contend that the independence of NHRIs must be defended fiercely in order to ensure they are able to fulfil their role effectively as accountability institutions.

At the centre of national inquiries conducted by NHRIs are grievous human rights violations. While the specific aims of each inquiry will differ, all national inquiries seek to create change: to stop systemic or widespread abuse, and to encourage the internalisation of human rights norms. As part of the process, NHRIs provide a platform for the voices of victims to be heard, gather evidence and stories to educate the community, and facilitate dialogue with violators. The Australian Human Rights Commission's Forgotten Children National Inquiry has sparked two distinct but linked conversations in the public sphere. The first is our collective response to this new detailed first-hand and expert evidence of the harm suffered by children in immigration detention. The second is about respect for the independence and integrity of the Commission itself, and goes to the very heart of how accountability institutions function within a democratic system. Both of these conversations must be had: to protect vulnerable children in immigration detention from further abuse, and to safeguard the institution and inquiry process which revealed it.

II WHAT ARE NHRIS?

National human rights institutions are state-created domestic human rights mechanisms. Whether constitutionally entrenched or established by legislation or decree, NHRIs are intended to have a legal foundation independent of the state that created them, and should be granted formal powers sufficient to undertake

20 Human Rights and Equal Opportunity Commission (Cth), *Our Homeless Children: Report of the National Inquiry into Homeless Children* (1989) ('*Our Homeless Children Report*').

21 *Bringing Them Home Report*, above n 10.

22 Human Rights and Equal Opportunity Commission (Cth), *Same-Sex: Same Entitlements – National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007) ('*Same Sex: Same Entitlements Report*').

their promotion and protection mandate. National human rights commissions and human rights ombudsmen are both broadly considered as NHRIs.²³

The historical genesis and development of NHRIs is well documented.²⁴ Rapid global growth in the number of NHRIs followed the First International Workshop on National Human Rights Institutions convened in 1991 in Paris by the United Nations Centre for Human Rights. The recommendations agreed to at that meeting²⁵ are largely recognised as the turning point in the global diffusion of national human rights institutions.²⁶ The *Principles Relating to the Status of National Institutions*,²⁷ which became known as the *Paris Principles*, laid the groundwork for common understanding and, eventually, a set of standards for

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- 23 For further definitions and typologies of NHRIs, see, eg, Linda C Reif, 'The Shifting Boundaries of NHRI Definition in the International System' in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012) 52, 72; Centre for Human Rights, United Nations, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, UN Doc HR/P/PT/4 (1995) 6–9; Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions: The Role of the United Nations* (Danish Institute for Human Rights, 2006) 20; Reif, 'Building Democratic Institutions', above n 15.
- 24 For detailed historical accounts and reflections on the development and expansion of NHRIs, see, eg, Birgit Lindsnaes and Lone Lindholt, 'National Human Rights Institutions: Standard-setting and Achievements' in Birgit Lindsnaes, Lone Lindholt and Kristine Yigen (eds), *National Human Rights Institutions: Articles and Working Papers: Input to the Discussions on the Establishment and Development of the Functions of National Human Rights Institutions* (Danish Human Rights Commission, 1st revised ed, 2001) 1; Brian Burdekin, 'National Human Rights Institutions' in Gudmundur Alfredsson et al (eds) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Möller* (Martinus Nijhoff Publishers, 2nd revised ed, 2009) 659, 660; Cardenas, *Chains of Justice*, above n 15, 19–32; Pohjolainen, above n 23, 43, 91, 93; Dominique Allen, *Reforming Australia's Anti-discrimination Legislation: Individual Complaints, the Equality Commission and Tackling Discrimination* (PhD Thesis, University of Melbourne, 2009).
- 25 The then Australian Federal Human Rights Commissioner, Brian Burdekin, played a key role in drafting the recommendations which became the *Paris Principles*: Interview with Brian Burdekin (Phone Interview, 23 April 2015).
- 26 See, eg, Thomas Pegram, 'Diffusion across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32 *Human Rights Quarterly* 729; Jeong-Woo Koo and Francisco O Ramirez, 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions, 1966–2004' (2009) 87 *Social Forces* 1321.
- 27 *National Institutions for the Promotion and Protection of Human Rights*, GA Res 48/134, 48th sess, 85th plen mtg, Agenda Item 114(b), UN Doc A/RES/48/134 (4 March 1994, adopted 20 December 1993) annex ('*Paris Principles*'). The *Paris Principles* were earlier endorsed by the United Nations Commission on Human Rights and the United Nations General Assembly in 1992: *National Institutions for the Promotion and Protection of Human Rights*, CHR Resolution 1992/54 (3 March 1992).

independent, broadly mandated human rights institutions.²⁸ The central elements of the *Paris Principles* include: that the NHRI is established with a broad human rights mandate; that independence from government is guaranteed by the constitution or statute; that membership of the institution is composed of pluralist representation and secured by official appointment; that the NHRI works closely and appropriately with civil society; that the NHRI is endowed with sufficient resources; and that the NHRI is granted a range of monitoring and advisory functions, supported by powers to operationalise them.

In the Asia Pacific, both international and regional influences were important factors in promoting the establishment of NHRIs.²⁹ In 1996 a regional network, the Asia Pacific Forum of National Human Rights Institutions, was formed.³⁰ This network of institutions has played a critical role in guiding and supporting NHRI establishment and effective operation across the region.³¹ Australia has also taken a lead in the region, hosting the Asia Pacific Forum secretariat, as well as supporting, mentoring and providing financial assistance for NHRI-related capacity building.³²

28 The *Paris Principles* are the criteria by which the independence and credibility of NHRIs are assessed and form the basis of NHRI membership in international and regional networks, as well as participation in United Nations fora, such as the Human Rights Council. The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights ('ICC') has developed a set of General Observations which serve as interpretative tools to guide institutions and governments in the establishment and operation of *Paris Principles*-compliant NHRIs and assist the ICC with its accreditation determinations: International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *General Observations* (May 2013) <<http://nhri.ohchr.org/EN/AboutUs/ICC/Accreditation/Documents/SCA%20GENERAL%20OBSERVATIONS%20ENGLISH.pdf>> ('*ICC General Observations*'). See also Meg Brodie, 'Progressing Norm Socialisation: Why Membership Matters – The Impact of the Accreditation Process of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights' (2011) 80 *Nordic Journal of International Law* 143; Andrew Byrnes, Andrea Durbach and Catherine Renshaw, 'Joining the Club: The Asia Pacific Forum of National Human Rights Institutions, the *Paris Principles*, and the Advancement of Human Rights Protection in the Region' (2008) 14 *Australian Journal of Human Rights* 87.

When an NHRI's adherence to these standards is threatened it may jeopardise its international standing, a point the President of the Australian Human Rights Commission made in her evidence to the Senate Legal and Constitutional Affairs Legislation Committee in light of the inappropriate request from the Attorney-General's office for her to resign: see below n 224.

29 Renshaw and Fitzpatrick, above n 17, 177; Sonia Cardenas, 'National Human Rights Commissions in Asia' (2002) 4 *Human Rights Review* 30; Philip Eldridge, 'Emerging Roles of National Human Rights Institutions in Southeast Asia' (2002) 14 *Pacific Review* 209; Abul Hasnat Monjurul Kabir, 'Establishing National Human Rights Commissions in South Asia: A Critical Analysis of the Processes and the Prospects' (2001) 2(1) *Asia-Pacific Journal on Human Rights and the Law* 1.

30 Asia Pacific Forum, *History* (2011) <<http://www.asiapacificforum.net/about/history>>.

31 See Catherine Renshaw, 'The Role of Networks in the Implementation of Human Rights in the Asia Pacific Region' in Hitoshi Nasu and Ben Saul (eds), *Human Rights in the Asia-Pacific Region: Towards Institution Building* (Routledge, 2011) 185.

32 Australian Human Rights Commission, *International Engagement* <<https://www.humanrights.gov.au/our-work/international-engagement>>.

The Australian Human Rights Commission was founded in 1986 as the Human Rights and Equal Opportunity Commission.³³ It replaced the previous part-time body which had been in operation since 1981.³⁴ Three full-time commissioners with responsibility for human rights, race discrimination and sex discrimination, along with a part-time president were appointed, and the institution was given a mandate, functions and powers under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).³⁵ Over time, the Australian Human Rights Commission's functions have generally expanded,³⁶ although it has endured several political attempts to restrict its influence.³⁷

Scholarship on the Australian Human Rights Commission has addressed the breadth of the institution's functions and powers, but not how these have been utilised in the context of the national inquiry strategy. For example, research on the early operation and powers of the Australian Commission indicated that the Commission successfully used its power to conciliate and to promote attitudinal change.³⁸ More recently, reform of the Commission's conciliation powers was called for to facilitate the Commission playing a greater advocacy role in resolving individual complaints.³⁹ Further research points to the limits on the Commission's capacity to promote and protect human rights, including the lack of enforceability of decisions, inadequate funding and delay in processing

33 The Commission's establishing legislation and formal name changed to the Australian Human Rights Commission on 5 August 2009: *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 3 pt 1, amending *Human Rights and Equal Opportunity Commission Act 1986* (Cth); Australian Human Rights Commission, *Frequently Asked Questions about the Australian Human Rights Commission's New Name and Logo* (5 August 2009) <<https://www.humanrights.gov.au/frequently-asked-questions-about-australian-human-rights-commission-s-new-name-and-logo>>.

34 For a history of the establishment of the 1981 and 1986 Commissions, including the controversial passage of legislation through the federal Parliament, see Peter Bailey, *Human Rights: Australia in an International Context* (Butterworths, 1990) 117–47; Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (LexisNexis, 2009) 327–95.

35 For an analysis of the operation and powers of the 1986 Commission at the time of establishment, see Peter Bailey, 'The Human Rights Commission – Tame Cat or Wild Cat?' (1986) 60 *Australian Law Journal* 123. See also Australian Human Rights Commission, *History of the Commission* <<https://www.humanrights.gov.au/about/what-are-human-rights/history-commission>>.

36 See the Australian Commission's timeline of important legislative milestones for when it accrued jurisdiction over new areas and increased the number and thematic focus of Commissioners, as well as its interaction and interrelationship with the courts regarding complaints and appearances: Australian Human Rights Commission, *History of the Commission*, above n 35.

37 Eg, in 1997 the government cut the Commission's budget by 43 per cent and proposed changes that would all but abolish the institution: Dorne Boniface, 'Does Anyone Really Know Where We're Going? Changes to the Human Rights and Equal Opportunity Commission' (1997) 4(1) *Australian Journal of Human Rights* 206. In 2013, a vociferous critic of the Human Rights Commission was appointed as a Commissioner to, in the words of the Attorney-General, 'help restore balance to the Australian Human Rights Commission': Tony Wright and Dan Harrison, 'Tim Wilson Appointment to Human Rights Commission Stirs Controversy', *Sydney Morning Herald* (online), 18 December 2013 <<http://www.smh.com.au/federal-politics/political-news/tim-wilson-appointment-to-human-rights-commission-stirs-controversy-20131217-2zjbk.html>>.

38 Annemarie Devereux, 'Human Rights by Agreement? A Case Study of the Human Rights and Equal Opportunity Commission's Use of Conciliation' (1996) 7 *Australian Dispute Resolution Journal* 280.

39 Dominique Allen, 'Voices in the Human Rights Dialogue: The Individual Victim and the Australian Human Rights Commission' (2010) 35 *Alternative Law Journal* 159.

complaints, low caps on compensation awards deterring pursuit of claims, and the constraints imposed by the local context, in particular the lack of political and judicial receptiveness to human rights claims and arguments.⁴⁰ Amid the current government concerns of the Commission's bias, the Commission's record as an intervener in court proceedings illustrates its even-handedness in dealing with asylum seeker issues. A detailed study of the cases found that while the interests of the Commission and government converged less frequently when conservatives were in power (such as in cases on the ability of transsexuals to marry and access by single women to IVF services), it was determined that 'in every case concerning asylum seekers ... [the Commission] and the government appeared in opposition to one another, irrespective of the party in power'.⁴¹

While Australia enjoys a stable, established democracy, formal protection or avenues for seeking redress for human rights violations are limited.⁴² In this context, the importance of the Commission's work as 'a public and courageous advocate'⁴³ has been recognised, including the role of the Commission's national inquiries in keeping human rights on the public agenda.⁴⁴ National inquiry methodologies were developed as the Australian Commission sought innovative ways to address systemic human rights violations and fulfil its protection and promotion mandate.

III WHAT ARE NATIONAL INQUIRIES CONDUCTED BY NHRIS?

A The Development and Use of National Inquiries by NHRIs

The utility of public inquiries and their effect on government action, societal attitudinal change and relational interaction has long been recognised.⁴⁵

40 Beth Gaze, 'The Costs of Equal Opportunity' (2000) 25 *Alternative Law Journal* 125.

41 Rhonda Evans Case, 'Friends or Foes? The Commonwealth and the Human Rights and Equal Opportunity Commission in the Courts' (2009) 44 *Australian Journal of Political Science* 57, 73. Evans Case also finds that the Australian Human Rights Commission's interventions in the courts have limited effect on transnational jurisprudence: Rhonda Evans Case, 'Spreading the Word: Australia's National Human Rights and Equal Opportunity Commission as Transnational Legal Entrepreneur' in Donald W Jackson, Michael C Tolley and Mary L Volcansek (eds), *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-border Migration of Legal Norms* (State University of New York Press, 2010) 235. See also Julie O'Brien, 'Intervention Powers of the Human Rights Commission' (2006) 44(1) *Law Society Journal* 39.

42 See generally Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009); and specifically in relation to the Human Rights Commission: at 38–40; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010).

43 Beth Gaze, 'The Sex Discrimination Act after Twenty Years: Achievements, Disappointments, Disillusionment and Alternatives' (2004) 27 *University of New South Wales Law Journal* 914, 917.

44 Beth Gaze, 'Has the Racial Discrimination Act Contributed to Eliminating Racial Discrimination? Analysing the Litigation Track Record 2000–2004' (2005) 11(1) *Australian Journal of Human Rights* 6.

45 See, eg, Gerald E Le Dain, 'The Role of the Public Inquiry in Our Constitutional System' in Jacob S Ziegel (ed), *Law and Social Change* (Osgoode Hall Law School, 1973) 79.

In Australia, public inquiries, as well as formal inquiries with legislative backing (such as royal commissions) have ‘served to resolve a contentious issue, explain a catastrophic event, uncover corruption or provide the substance of new public policy’.⁴⁶ Generally these types of inquiries are temporary and ad hoc, appointed at the direction of the executive, and any coercive powers they enjoy are established by legislation.⁴⁷

The Australian Human Rights Commission, granted powers to initiate inquiries in its enabling legislation, took an innovative and at the time controversial approach to interpreting its inquiry powers. In the late 1980s the Commission leveraged its inquiry powers and other functions, to instigate a national inquiry to address evidence of systemic violations. As such, the Australian Commission is credited as the NHRI which developed ‘a profound tradition of convening public inquiries focussing on vulnerable groups’.⁴⁸ Australia’s first Federal Human Rights Commissioner, Brian Burdekin, spearheaded the Australian Human Rights Commission’s first national inquiries on child homelessness⁴⁹ and mental illness,⁵⁰ which together took six years and involved thousands of witnesses and submissions.

Since this initiative, the strategy of the national inquiry has taken on increasing prominence, particularly in the Asia-Pacific region.⁵¹ National inquiries are now widely promoted by the Asia Pacific Forum and through specific projects of the Raoul Wallenberg Institute of Human Rights and

46 Scott Prasser and Helen Tracey, ‘History, Trends and Key Issues – The Story So Far’ in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential* (Connor Court Publishing, 2014) 2.

47 Scott Prasser and Helen Tracey, ‘An Inquiry by Any Other Name: Types of Public Inquiry’ in Scott Prasser and Helen Tracey (eds), *Royal Commissions and Public Inquiries: Practice and Potential* (Connor Court Publishing, 2014) 37.

48 Lindsnaes and Lindholt, above n 24, 34. See also Bailey, *The Human Rights Enterprise*, above n 34, 369–70.

49 *Our Homeless Children Report*, above n 20.

50 *Mental Illness Report*, above n 6. The Commission also conducted a national inquiry on racist violence during this time: Human Rights and Equal Opportunity Commission (Cth), *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) (*‘Racist Violence Report’*).

51 National inquiries have also been utilised by African NHRIs, particularly to deal with human rights violations arising out of private sector mining: see, eg, Commission on Human Rights and Administrative Justice (Ghana), *The State of Human Rights in Mining Communities in Ghana* (2008); also discussed in Meg Brodie, ‘Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the “Protect, Respect and Remedy” Framework’ in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff, 2011) 245; Kenya National Commission on Human Rights, *The Malindi Inquiry Report 2006: Report of a Public Inquiry into Allegations of Human Rights Violations in Magarini, Malindi* (2006).

Humanitarian Law ('RWI').⁵² The Human Rights Commissions in India,⁵³ New Zealand,⁵⁴ Mongolia,⁵⁵ and recently, Malaysia,⁵⁶ Afghanistan,⁵⁷ Indonesia⁵⁸ and the Maldives⁵⁹ have all now conducted national inquiries.⁶⁰ NHRIs around the region have also held 'inquiries of national importance' which NHRI actors sometimes refer to as national inquiries. 'Inquiries of national importance' differ from national inquiries in that they are generally a case study of the experiences of a particular group in a particular location. The findings of such an inquiry may

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- 52 *Going Public: Strategies for an Effective National Inquiry* (Directed by Pip Dargan, Asia Pacific Forum, 2007); Asia Pacific Forum and Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *Manual on Conducting a National Inquiry into Systemic Patterns of Human Rights Violation* (2012) <<http://www.asiapacificforum.net/support/training/national-inquiries/downloads/resources/manual-on-conducting-a-national-inquiry-into-systemic-patterns-of-human-rights-violation-2012>>. The Asia Pacific Forum and RWI have conducted numerous sub-regional and bilateral training programs across the Asia Pacific focused on equipping institutions to conduct inquiries: Asia Pacific Forum, *National Inquiries* (2011) <<http://www.asiapacificforum.net/support/training/national-inquiries>>. The Asia Pacific Forum also uses national inquiry experiences to build the capacity of NHRIs to address particular human rights issues: see, eg, Asia Pacific Forum, Association for the Prevention of Torture and the Office of the United Nations High Commissioner for Human Rights, *Preventing Torture: An Operational Guide for National Human Rights Institutions* (2010) 106–10.
- 53 National Human Rights Commission (India), *NHRC Recommendations for a National Action Plan To Operationalise the Right to Health Care within the Broader Framework of the Right to Health* (2004) ('*Right to Health Care Recommendations Report*'); National Human Rights Commission (India), *Annual Report 2004–2005* (2005) 102–3, 226–55 ('*Annual Report 2004/05*').
- 54 Human Rights Commission (NZ), *The Accessible Journey: Report of the Inquiry into Accessible Public Land Transport* (2005) ('*Accessible Journey Report*'); Human Rights Commission (NZ), *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (2007); Human Rights Commission (NZ), *Caring Counts* (2012); Human Rights Commission (NZ), *A New Era in the Right To Sign: Report of the New Zealand Sign Language Inquiry* (2013).
- 55 National Human Rights Commission of Mongolia, *Report on Human Rights and Freedoms in Mongolia* (2006) ('*National Inquiry on Torture Report*').
- 56 Human Rights Commission of Malaysia (SUHAKAM), *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (2013) ('*Land Rights Inquiry Report*').
- 57 Afghanistan Independent Human Rights Commission, *National Inquiry Report on Factors and Causes of Rape and Honor Killing in Afghanistan* (2013).
- 58 Asia Pacific Forum, *Indonesia: National Inquiry Highlights Violations against Indigenous Peoples* (18 March 2015) <<http://www.asiapacificforum.net/news/indonesia-national-inquiry-highlights-violations-against-indigenous-peoples>>.
- 59 Human Rights Commission of the Maldives, *National Inquiry on Access to Education for Children with Disabilities* <http://www.hrcm.org.mv/National_Inquiry/EducationForDisabledChildren/EducationForDisabledChildren.aspx>.
- 60 NHRIs that have conducted national inquiries in the Asia Pacific come from the human rights commission model and they have utilised their *suo motu* inquiry and other related powers to convene and conduct national inquiries. Human rights ombudsmen from other regions may need to review and creatively interpret the specific inquiry functions and powers granted in their enabling legislation. In Part III(C) below, I argue that it is open to any *Paris Principles*-compliant NHRI to creatively interpret the powers they do have to instigate inquiries into systemic and widespread violations.

be significant for others experiencing similar human rights violations, making the inquiry of national importance.⁶¹

National inquiries are often regarded by the commissioners conducting them as one of the most effective ways to fulfil an NHRI's mandate to promote and protect human rights.⁶² This view partly rests on their belief that national inquiries lead to tangible progressive human rights change. National inquiries are credited with producing 'important legislative and policy reforms ... educat[ing] public opinion on important human rights issues and ... mobilis[ing] hundreds of millions of dollars for programmes to improve the plight of particularly vulnerable groups'.⁶³ This change is evidenced across multiple inquiries and jurisdictions as the examples from Australia and the Asia Pacific discussed below show.

There are three elements which have come to characterise national inquiries conducted by NHRIs. First, national inquiries are a public process. In addition to the involvement of stakeholders directly connected to the human rights violations under investigation, the general population is engaged in awareness raising as the issue is placed prominently on the public agenda. Secondly, national inquiries are relational in nature. NHRIs generally aim to bring together and seek input from all stakeholders affected by the issue, including both perpetrators and victims of violations. Dialogue is often central to the inquiry process and NHRIs have strenuously refuted any attempts to position national inquiries as adversarial.⁶⁴ Thirdly, national inquiries are change-oriented. While individual victims may not receive specific redress through the inquiry itself, the national inquiry process aims to reach solutions that deal with the systemic causes of violations and progress the internalisation of human rights. A national inquiry can be the start of a national conversation. Even when governments refuse to take cognisance of a national inquiry's findings, or when, over time, there is regression in the

61 Eg, the National Human Rights Commission of India describes its localised work from 1998–2004 on starvation deaths in Orissa as a national inquiry: *Annual Report 2004/05*, above n 53. The National Human Rights Commission of Thailand held an inquiry of national importance into the erasing of the identities of the Mae Ai people: Pip Dargan, Interview with Commissioner Ambhorn Meesook (Suva, Fiji, 2 August 2006) in *Going Public: Strategies for an Effective National Inquiry*, above n 52. Inquiries of national importance conducted by NHRIs are outside the scope of this article.

62 Interview with Rosslyn Noonan, Chief Commissioner, New Zealand Human Rights Commission (Wellington, New Zealand, 30 June 2009); Interview with Oyunchimeg, Commissioner, National Human Rights Commission of Mongolia (Amman, Jordan, 5 September 2009); Burdekin, *National Human Rights Institutions in the Asia-Pacific Region*, above n 13, 113.

63 Burdekin, 'National Human Rights Institutions', above n 24, 659, 662.

64 See, eg, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 80 (Linda Reynolds and Gillian Triggs, President, Australian Human Rights Commission):

Senator REYNOLDS: ...what made you think that the department of immigration was going to withhold information so much that you needed to initiative [sic] an adversarial inquiry with the power to compel evidence? It seems to be a big jump from that relationship. ...

Prof Triggs: I think, firstly, we are concerned at your use of the word 'adversarial'. That is not the position at all. It is totally misunderstanding our role. We are not there in an adversarial role. We are there in a non-partisan role to inquire into the impact on the children, and that was really our objective.

attainment of human rights compliance, the report of a national inquiry remains an important marker: it documents violations, recommends a way forward to human rights compliance, and provides civil society with evidence to continue to advocate for change. The decision to convene a national inquiry is therefore one with implications for the immediate and future handling of the rights issues it seeks to address.

B Situations That Necessitate a National Inquiry Being Called

National inquiries have been held on a diverse range of human rights issues, including civil and political rights (such as torture; racism; same-sex, disability and transgender discrimination; and the detention of children) and economic, social and cultural rights (such as homelessness, rural education, land rights and the right to health care). Frequently, national inquiries demonstrate the indivisibility of human rights, often addressing a number of interrelated rights issues within the one inquiry.⁶⁵ The decision to conduct a national inquiry is generally at the discretion of the NHRI, although in some jurisdictions, such as Australia, the government may have the power to refer an issue to an NHRI for inquiry.⁶⁶ In this Sub-part, I detail how individual complaints, media reports and cases before the judiciary may motivate an NHRI to initiate a national inquiry process. I also discuss the contribution of other, often unstated, rationale for convening an inquiry, as well as how the decision to conduct an inquiry may in and of itself become contested in a hostile political environment.

NHRIs must strategically steward their often limited resources by creatively exercising their statutory functions and powers to address human rights violations. This is particularly so when NHRIs are overwhelmed by individual complaints and have limited recourse in the context of resolving those complaints to address the underlying causes of widespread violations. Reviewing the work of Eastern European Ombudsmen, Carver notes that ‘the best institutions ... are the ones that have succeeded in managing a creative tension between the complaints they receive and a systemic approach to human rights issues’.⁶⁷ The national inquiry strategy allows an NHRI to look at patterns in the receipt of individual complaints and then move to deal with the systemic causes of the violations. For this reason a trend in individual complaints is one of the key factors which will prompt an NHRI to instigate a national inquiry. For example, Commissioner

65 Burdekin, *National Human Rights Institutions in the Asia-Pacific Region*, above n 13, 114.

66 Eg, the *Australian Human Rights Commission Act 1986* (Cth) provides that the relevant Minister may request the Commission to undertake some of its functions, see ss 11(1)(e), (j)–(k). The Australian Attorney-General has relied on these provisions to instruct the Commission to undertake national inquiries such as the Bringing Them Home National Inquiry, and in 2015, the National Inquiry into Employment Discrimination against Older Australians and Australians with Disability: Australian Human Rights Commission, *Willing To Work – Terms of Reference for the Inquiry* <<https://www.humanrights.gov.au/willing-work-terms-reference-inquiry>>.

67 Richard Carver, ‘National Human Rights Institutions in Central and Eastern Europe: The Ombudsman as Agent of International Law’ in Ryan Goodman and Thomas Pegram (eds), *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (Cambridge University Press, 2012) 181, 183.

Oyunchimeg of the National Human Rights Commission of Mongolia confirmed that

the first [reason for conducting an inquiry] was an increased number of complaints about the situation or environment in detention centres or pre-trial detention centres. It was in response to that, that the Commission decided to hold such a public inquiry [on torture].⁶⁸

The report of the Mongolian Commission's National Inquiry also indicates that both media stories and publicised court cases prompted the Commission to act.⁶⁹

In addition to these stated rationale, it is clear that at least four other factors contributed to the Mongolian Commission's decision to undertake a national inquiry on torture. First, the National Inquiry took place in a political context where torture and associated issues had gained traction: the government had acceded to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*;⁷⁰ torture was one focus of the National Human Rights Action Plan under the auspices of a United Nations Development Programme human rights strengthening project which included support for the Commission;⁷¹ and there had been a substantial restructuring of the control of places of detention, shifting responsibility from the police to another government department, the Court Decision Enforcement Agency.⁷² Secondly, these government actions had, at least in part, been facilitated by substantial civil society and non-governmental organisation ('NGO') advocacy on torture issues, notably by Amnesty International Mongolia since 2000. Amnesty's extensive public awareness campaign included training of prisoners, prison officials, judges, prosecutors, lawyers and the police; publication of educational brochures; documentation of instances of torture; and media outreach.⁷³ Other NGOs conducted research,⁷⁴ training,⁷⁵ and indirectly worked against torture by supporting or carrying out upgrades to detention facilities.⁷⁶ Thirdly, the Mongolian Commission had already conducted extensive activities on torture prior to the instigation of the National Inquiry including training for police,

68 Interview with Oyunchimeg (Ulaanbaatar, Mongolia, 21 September 2007).

69 *National Inquiry on Torture Report*, above n 55, 4.

70 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

71 William G O'Neill and Gerelmaa Sandui, *Report on Mongolia* (22 December 2005) United Nations Development Programme <<http://erc.undp.org/evaluationadmin/manageplans/viewplandetail.html?sessionid=07AA945140A2B7525A95CD5B9CFDF9F7?planid=434>>; Interview with Tsogt Natsagdorj, Defence Advocate, Partner, Bona Lex Mongolian Law Firm (Ulaanbaatar, Mongolia, 5 December 2006); Interview with Altantuya Batdorj Sarta-Uul, Executive Director, Amnesty International Mongolia (Ulaanbaatar, Mongolia, 30 November 2006).

72 Interview with Baasan Agvaan, Senior Investigator, Police Colonel, Mongolian National Police Agency Criminal Case Registration Department (Ulaanbaatar, Mongolia, 14 December 2006).

73 Interview with Altantuya Batdorj Sarta-Uul, Executive Director, Amnesty International Mongolia (Ulaanbaatar, Mongolia, 30 November 2006).

74 Interview with Tsend-Ayush, Defence Advocate (Ulaanbaatar, Mongolia, 8 December 2006).

75 Interview with Mrs Badamsuvd, Human Rights Information Centre (Ulaanbaatar, Mongolia, 5 December 2006).

76 Interview with Margaret Currie, Executive Director, Prison Fellowship Mongolia (Ulaanbaatar, Mongolia, 6 December 2006).

public seminars, production of promotional materials and handbooks, and investigation of conditions in detention facilities.⁷⁷ This work had sensitised stakeholders, and also developed the knowledge and expertise on torture inside the Commission. Fourthly, significant international support built the capacity of Commissioners and staff, preparing them to undertake a national inquiry.⁷⁸

Each of these four factors – the political environment's receptiveness to dealing with torture, NGOs' active and influential engagement, the Mongolian Commission's prior work on the issue, and international support – contributed to a climate where the Commission had the opportunity to successfully promote change utilising a national inquiry. While the specific contextual factors will be different for each institution and for each issue it contemplates tackling, what the Mongolian experience demonstrates is that the external climate must be part of any strategic decision-making process when convening a national inquiry. Some inquiries may be designed and instigated to take a public stand in a hostile environment such as the Australian Human Rights Commission's recent National Inquiry into Children in Immigration Detention. Others may be deliberately targeted to pursue achievable wins; that is, an NHRI may choose not to engage in some issues where there is no perceived chance of success, and do so in order to safeguard the success of change in other areas. This was the case in the Australian Human Rights Commission's national inquiry on discrimination against same-sex couples which I discuss in Part IV below.⁷⁹

Conducting a national inquiry may be a defining activity for an NHRI to undertake, solidifying its role as a human rights actor and building awareness of its capabilities. Developing the NHRI's profile and credibility is characteristic of an institution's first national inquiry process. Reflecting on the Australian Human Rights Commission's first national inquiry on child homelessness, the Commissioner who led the Inquiry, Burdekin, said that 'in terms of public awareness and credibility this national inquiry put us on the map'.⁸⁰ This experience is shared by other institutions. Of the Mongolian Commission's first national inquiry on torture, one Mongolian legal professional noted that '[the Inquiry] makes people more aware of their rights ... it activates the Commission's role in society and also it becomes a baseline for the next steps of the Commission'.⁸¹

An NHRI's credibility may be affected by the decisions made about the subject matter, scope and timing of an inquiry. The institution must be able to justify why it has taken a particular course of action. This has been starkly illustrated by the contentiousness of the timing of the Forgotten Children

77 *National Inquiry on Torture Report*, above n 55; National Human Rights Commission of Mongolia, *Annual Activity Report 2004–2005* (August 2005) <<http://www.asiapacificforum.net/about/annual-meetings/10th-mongolia-2005/downloads/apf-member-reports/mongolia.pdf>>.

78 See below n 141.

79 *Same Sex: Same Entitlements Report*, above n 22.

80 Brian Burdekin, 'National Inquiry on Child Homelessness' (Speech delivered at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law and Asia Pacific Forum Sub-regional Workshop on National Inquiries, Delhi, 29 October 2007).

81 Interview with Sangaasuren, Advocate (Ulaanbaatar, Mongolia, 12 December 2006).

National Inquiry. The stated primary concern of those criticising Gillian Triggs and the Australian Human Rights Commission relates to the President's alleged partisan decision to delay conducting the Inquiry until the conservative Liberal National Government came to power, sparing the Labor Government embarrassment. The claim is erroneous: the report carefully outlines the rationale for the timing of the Inquiry and details violations committed under both Governments. Nevertheless, Triggs and senior staff of the Commission have been subjected to hours of questioning before the Senate Legal and Constitutional Affairs Legislation Committee to establish a detailed timeline of the internal decision-making process of the Commission. The Commission's best defence has been that it is, in fact, able to clearly articulate the situation that necessitated convening an inquiry and provide evidence of the extensive work it undertook on the issue before calling the Inquiry. Despite the best efforts of the Government to discredit Triggs and her staff, there is ample evidence of strong support for the Commission, from the general public, the legal profession, and even the Parliament.⁸²

Maintaining credibility also relies on an NHRI managing the expectations of the stakeholders it engages in the inquiry process. For example, an evaluation of the Australian Human Rights Commission's National Inquiry into Rural and Remote Education⁸³ revealed the disparity between what stakeholders expected of the Commission and what its mandate allowed it to do.⁸⁴ When an NHRI's mandate is misunderstood – for example, when stakeholders believe that it will implement the recommendations it makes – the institution's credibility may suffer a setback, or the desire of particular stakeholders to engage or re-engage with the institution may diminish.

In convening national inquiries, NHRIs both respond to evidence of systemic human rights violations as well as set agendas for change. Holding a national inquiry is therefore a strategic decision of an NHRI to utilise its full mandate, functions and powers.

C The Mandate, Functions and Powers of NHRIs

The mandate, functions and powers granted to an NHRI determine the scope of the operation of an institution, including its capacity to undertake a national inquiry. In this Sub-part, I describe the mandate, functions and powers of NHRIs

82 Australian Associated Press, 'Grandmothers against Detention of Refugee Children Rally for Gillian Triggs', *The Guardian* (online), 28 February 2015 <<http://www.theguardian.com/australia-news/2015/feb/28/grandmothers-against-detention-of-refugee-children-rally-for-gillian-triggs>>; Amanda Meade, 'Academics and Law Bodies Warn Attack on Gillian Triggs Threatens Democracy', *The Guardian* (online), 15 February 2015 <<http://www.theguardian.com/australia-news/2015/feb/15/academics-and-law-bodies-warn-attack-on-gillian-triggs-threatens-democracy>>. The Senate censured the Attorney-General: Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 719 ff (Penny Wong).

83 Human Rights and Equal Opportunity Commission (Cth), *Recommendations: National Inquiry into Rural and Remote Education* (2000) ('*Rural and Remote Education Report*').

84 Tim Turpin et al, *The Impact of a National Human Rights Inquiry on Attitudes, Research, Policy and Community Development: Assessment of the Outcomes and Impact of the National Inquiry into Remote and Rural Education* (Report, May 2006).

by reference to the minimum international standards outlined in the *Paris Principles*, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights ('ICC') General Observations which assist with interpretation of the *Paris Principles*, and examples from the domestic legislation establishing NHRIs across the Asia Pacific. I specify the inquiry powers available to NHRIs seeking to address systemic human rights violations.

1 Mandate

The *Paris Principles*⁸⁵ require that NHRIs be granted a broad and clear mandate, namely that 'a national institution shall be vested with competence to protect and promote human rights'.⁸⁶ The ICC's General Observations specify that an NHRI's protection mandate should include the capacity to inquire into human rights violations.⁸⁷ There are three dimensions to an NHRI's sphere of competence.

First, the extent of an NHRI's jurisdiction will be set out in its establishing legislation. There may be restrictions on whether the NHRI can consider violations committed by or against specified groups including, but not limited to, citizens, foreign nationals in the state's territory, public and government representatives, private entities and individuals, and intelligence and military personnel.⁸⁸ Specifications which exclude particular groups narrow an NHRI's mandate and may be contrary to *Paris Principles* requirements.⁸⁹

Secondly, the sphere of competence of an NHRI is determined by the definition of 'human rights' in its establishing legislation. For NHRIs in the Asia Pacific these definitions differ widely.⁹⁰ For example, the Australian Human Rights Commission's legislation defines human rights more narrowly than some other institutions, confining its consideration of human rights violations to a limited list of international instruments.⁹¹ A restrictive definition of human rights

85 See above nn 27–8 for details of the status of the *Paris Principles* and the role that the standards play in the international accreditation of NHRIs.

86 *Paris Principles*, UN Doc A/RES/48/134, annex 'Competence and Responsibilities' art 1.

87 *ICC General Observations*, above n 28, [1.2].

88 Eg, the Australian Human Rights Commission cannot inquire 'into an act or practice of an intelligence agency': *Australian Human Rights Commission Act 1986* (Cth) ss 11(3), (4).

89 The body responsible for determining the international accreditation of the NHRIs, the ICC Subcommittee on Accreditation, has demonstrated limited appetite for awarding NHRIs with such jurisdictional restrictions on their mandate a less than fully compliant accreditation status. This is despite the fact that the *ICC General Observations* specify that broad human rights mandates should include both public and private acts and omissions, and investigation of military, police and security officers: *ICC General Observations*, above n 28, [1.2]. Eg, while its establishing legislation prevents it from investigating intelligence agencies, the Australian Human Rights Commission holds an A accreditation status; ie, the Commission is regarded as fully compliant with the *Paris Principles*: International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Chart of the Status of National Institutions* (29 May 2015) <<http://nhri.ohchr.org/EN/Documents/Status%20Accreditation%20Chart.pdf>>.

90 For an analysis of the definitions of human rights in NHRI establishing legislation, see Burdekin, *National Human Rights Institutions in the Asia-Pacific Region*, above n 13, 31–41.

91 *Australian Human Rights Commission Act 1986* (Cth) s 3(1).

may require an NHRI to creatively interpret the rights over which it has jurisdiction, in order to give effect to a broad mandate to promote and protect human rights.⁹²

Thirdly, the sphere of competence may also include responsibilities in addition to the general mandate to promote and protect human rights. For example, NHRIs may be required to act on administrative justice,⁹³ anti-corruption issues,⁹⁴ or transitional justice.⁹⁵ These additional responsibilities may present both opportunities and challenges for institutions depending on whether commensurate powers and sufficient resources are allocated to an NHRI to meet these expectations. Irrespective of any limitation placed on the mandate of an NHRI, it must be meaningfully activated by the enumeration of its functions and powers.

2 Functions and Powers

The functions and powers granted to NHRIs give effect to their promotion and protection mandate. The *Paris Principles* require that NHRIs have conferred on them a range of functions including the capacity to submit opinions, recommendations, proposals and reports to state authorities in an advisory capacity or on request, as well as the ability to decide whether or not to make such submissions public.⁹⁶ Specifically, submissions may include advice on legislative and administrative provisions, both proposed and in force;⁹⁷ any violation of human rights including general or specific matters;⁹⁸ and proposals for solutions to human rights violations.⁹⁹ Further functions include promotion of the harmonisation of national legislation with international human rights standards,¹⁰⁰ encouraging ratification and effective implementation of international human rights instruments,¹⁰¹ contributing to state reports to United

92 Eg, the Australian Commission relied on the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) in order to conduct an inquiry on access to education, as it does not have competence over the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) which specifies the right to education: *Rural and Remote Education Report*, above n 83.

93 International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (Report, 2nd ed, 2004) 67.

94 Eg, the East Timorese Provedor was given anti-corruption functions under the *Statute of the Office of the Ombudsman for Human Rights and Justice 2004* (Timor-Leste) art 5(3). However, note that in February 2010 a separate Anti-Corruption Commission was established: see, eg, 'Timor-Leste Independent Anti-Corruption Commission Under Way' on *East Timor Law and Justice Bulletin* (15 February 2010) <<http://easttimorlegal.blogspot.com/2010/02/timor-leste-independent-anti-corruption.html>>.

95 See, eg, *Law on the Structure, Duties and Mandate of the Afghan Independent Human Rights Commission 2005* (Afghanistan) art 21(12); and generally Tazreena Sajjad, 'These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice' (2009) 3 *International Journal of Transitional Justice* 424.

96 *Paris Principles*, UN Doc A/RES/48/134, annex 'Competence and Responsibilities', art 3(a).

97 *Ibid* art 3(a)(i).

98 *Ibid* arts 3(a)(ii)–(iii).

99 *Ibid* art 3(a)(iv).

100 *Ibid* art 3(b).

101 *Ibid* art 3(c).

Nations and regional bodies and cooperating with these entities,¹⁰² supporting human rights education,¹⁰³ and publicising human rights.¹⁰⁴

In addition, the *Paris Principles* set out the ‘methods of operation’ which an NHRI must be able to utilise in order to fulfil its responsibilities, including freely considering any questions falling within its competence;¹⁰⁵ hearing any person and obtaining any information or documents necessary for assessing situations falling within its competence;¹⁰⁶ making any of its work public;¹⁰⁷ meeting together as an institution;¹⁰⁸ establishing working groups among the members;¹⁰⁹ consulting with similar bodies responsible for human rights promotion or protection;¹¹⁰ and developing relations with NGOs.¹¹¹ The *Paris Principles* also identify further functions for those NHRIs that have individual complaints mechanisms including the ability to: settle, conciliate, or make binding decisions on complaints;¹¹² provide information for complainants particularly regarding remedies;¹¹³ hear the complaints or transmit them to other competent authorities;¹¹⁴ and make recommendations in relation to complaints received.¹¹⁵

The functions of an NHRI provide clarity about the actions that a state accepts as legitimate for an NHRI to undertake, as well as the tasks the public can expect the institution to perform. Depending on domestic rules of statutory interpretation the very enumeration of a function in the establishing legislation may imply that the NHRI has commensurate powers to undertake it. In the *Australian Human Rights Commission Act 1986* (Cth), the Commission’s functions are explicitly supported by section 13, which provides, ‘[t]he Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions’. Nevertheless some functions, such as the ability to conduct inquiries, may require further formal powers to give effect to those functions, including authorising the NHRI to compel cooperation from government and other actors. Such formal powers solidify the legal authority of an NHRI to activate its functions and distinguish it from other non-state actors.

The two common elements of inquiry functions found in the establishing legislation of NHRIs across the Asia Pacific are the ability to initiate inquiries,

102 Ibid art 3(d).

103 Ibid art 3(f).

104 Ibid art 3(g).

105 Ibid, ‘Methods of operation’, art (a).

106 Ibid art (b).

107 Ibid art (c).

108 Ibid art (d).

109 Ibid art (e).

110 Ibid art (f).

111 Ibid art (g).

112 Ibid, ‘Additional Principles Concerning the Status of Commissions with Quasi-judicial Competence’, art (a).

113 Ibid art (b).

114 Ibid art (c).

115 Ibid art (d).

and discretion over how inquiries are conducted. The capacity to inquire *suo motu* gives an NHRI the authority to identify and then investigate widespread and systemic human rights violations. NHRIs are not therefore reliant on the receipt of an individual complaint or a government reference in order to initiate an inquiry. It also distinguishes NHRIs from other statutory bodies which may only be able to act on government direction. With the exception of Afghanistan,¹¹⁶ all *Paris Principles*-compliant Asia-Pacific NHRIs are granted, either by way of implication in their functions or specifically, the power to conduct investigations on their own initiative. In addition to the wide discretion institutions have to conduct inquiries, NHRIs also may have specific powers which support the inquiry function. These may include powers to obtain information and documents, compel witness testimony, access places of detention, and to sanction non-compliance or interference with its operations.

Absent a specific description of national inquiries as a function of NHRIs in international standards or domestic legislation, the innovative use of a range of NHRI functions and powers exercised together is what led to the development of the national inquiry strategy. The NHRIs in the Asia Pacific which have conducted national inquiries each has inquiry and investigation functions, and related formal powers of inquiry. The statutory powers on which these NHRIs rely in order to conduct national inquiries are compiled in Table 1 below.

116 However, the Afghanistan Commission could argue that it has investigation powers on the grounds of the *Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission 2005* (Afghanistan) arts 5(4), 21(7), (21). The Commission explicitly relied on ‘its legal mandate enshrined in Article 58 of the *Constitution*, and Article[s] 5 and 21 of the [establishing] Law’ to conduct its first national inquiry: Afghanistan Independent Human Rights Commission, above n 57, 3.

Table 1. Inquiry provisions of Asia-Pacific NHRIs which have conducted national inquiries

Jurisdiction	Legislation	Inquiry Function	Relevant Powers Facilitating Inquiries
Afghanistan	<i>Law on the Structure, Duties and Mandate of the Afghanistan Independent Human Rights Commission 2005</i> (Afghanistan)	'Investigating and verifying cases of human rights violations' (art 5(4)) 'Investigation of cases of human rights violations' (art 21(7))	'Conducting public consultations and surveys' (art 21(21)) 'Collecting documents, evidence and testimonies of witnesses on cases of human rights violations' (art 21(8)) 'During the investigation of complaints, the Commission may request individuals or relevant responsible officials to provide documents and testimonies' (art 24) 'Demanding officials to explain the causes of non-observance of human rights principles' (art 21(25)) 'Judicial and prosecutorial organs, ministries, governmental organizations, civil society groups, Non-Governmental organizations and all citizens are obliged to cooperate with the Commission in achieving the objectives set up by this law' (art 6) 'Visiting detention centers to monitor the implementation laws on the treatment of prisoners' (art 21(6))
Australia	<i>Australian Human Rights Commission Act 1986</i> (Cth)	'[I]nquire into any act or practice that may be inconsistent with or contrary to any human right' (s 11(1)(f))	'[D]o anything incidental or conducive to the performance of any of the preceding functions' (s 11(1)(p)) '[D]o all things that are necessary or convenient to be done for or in connection with the performance of its functions' (s 13) '[H]old an inquiry in such manner as it thinks fit and, in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence' (s 14(1)) Obtain information and documents (s 21) Examine witnesses (s 22) Failure to comply with requirement to provide information and documents prohibited (s 23) Further offences relating to administration of the Act (s 26)

Jurisdiction	Legislation	Inquiry Function	Relevant Powers Facilitating Inquiries
India	<i>Protection of Human Rights Act 1993</i> (India)	'[I]nquire, <i>suo motu</i> or on a petition presented to it by a victim or any person on his behalf, ... into complaint of (i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such a violation, by a public servant' (s 12(a))	Powers relating to inquiries (while inquiring into complaints under the Act) include: ¹¹⁷ Summon and enforce attendance of witnesses under oath (s 13(1)(a)) Compel discovery and production of any document (s 13(1)(b)) Enter buildings to seize documents (s 13(3)) Visit detention facilities (s 12(c))
Indonesia	<i>Act Concerning Human Rights 1999</i> (Indonesia)	'[I]nvestigate and examine incidents occurring in society which either by their nature or scope likely constitute violations of human rights' (art 89(3)(b))	Call on complainants, victims, accused and witnesses to hear their statements (arts 89(3)(c)–(d)) Call on related parties to submit written statements and authenticated documents (art 89(3)(f)) Survey locations, and particular dwellings with Court approval (arts 89(3)(e), (g)) The Commission may ask the Head of Court to enforce its requests (arts 94–5)
Malaysia	<i>Human Rights Commission of Malaysia Act 1999</i> (Malaysia)	'The Commission may, on its own motion or on a complaint made to it ... inquire into an allegation of the infringement of human rights' (s 12(1))	Procure and receive written and oral evidence and examine witnesses under oath (ss 14(1)(a)–(b)) Summon witnesses to give evidence or produce documents (s 14(1)(c)) Visit places of detention (ss 4(2)(d), (3))

117 For a complete list of each of the powers granted relating to inquiries, see *Protection of Human Rights Act 1993* (India) s 13. Note, in contrast to the other institutions examined here, proceedings before the Indian Commission are deemed to be judicial in nature and the Commission is deemed to be a civil court. The Indian Commission's national inquiry on health care did not however take a judicial approach to dealing with evidence of right to health care violations.

Jurisdiction	Legislation	Inquiry Function	Relevant Powers Facilitating Inquiries
Maldives ¹¹⁸	<i>Human Rights Commission Act 2006</i> (Maldives)	'When the Commission deems an infringement of human rights was committed or should the Commission have reason to believe a person or a party has abetted such an act, and should the Commission deem negligence has occurred in taking appropriate measures to check and prevent such an infringement the Commission shall inquire into and investigate the matter as per this Act' (s 21(b))	'Undertake additional tasks from those mentioned above to protect human rights' (s 20(m)) 'Take necessary actions to undertake and facilitate the responsibilities of the Commission' (s 21(j)) May inspect without notice detention facilities, review the well-being of detainees, and make recommendations (ss 21(c), (d)) Powers relating to inquiries (while inquiring into complaints under the Act) include: Summon and take statements from witnesses and other relevant persons (ss 22(b)(1)–(2)) Procure documents (s 22(b)(3)) Request information in writing (s 22(b)(4)) Inquire in its own capacity when a government authority fails to respond within a given time frame (s 22(b)(5)) Instruct a person being questioned in an ongoing inquiry not to leave the Maldives (s 22(b)(6)) Failing to obey an order of the Commission to appear, give information, or provide a document carries a penalty of three months house arrest and dismissal for government employees (s 26(b)) The Commission can submit special reports to the President and Parliament (s 32(d))

118 The Human Rights Commission of the Maldives is not considered to be fully *Paris Principles*-compliant. The ICC has currently granted it 'B' status accreditation: International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Chart of the Status of National Institutions*, above n 89. It is also subject to significant domestic attacks on its independence, including a Supreme Court ruling handed down on 16 June 2015 against five members of the Commission, which was viewed internationally as a reprisal for the Commission's criticism of the judiciary in its written submission to the Maldives' second Universal Periodic Review before the United National Human Rights Council: Asia Pacific Forum, *Maldives: Supreme Court Decision Undermines Human Rights Protections* (19 June 2015) <<http://www.asiapacificforum.net/news/maldives-supreme-court-decision-undermines-human-rights-protections>>.

Jurisdiction	Legislation	Inquiry Function	Relevant Powers Facilitating Inquiries
Mongolia	<i>National Human Rights Commission of Mongolia Act 2000</i> (Mongolia)	'Commissioners may conduct inquiries at his/her own initiative on the basis of information with regard to violations of human rights and freedoms or at the request of business entities, organisations or officials' (art 18.2)	Unrestricted access to any entity or organisation (art 16.1.3) Obtain evidence, documents and information (art 16.1.4) Obtain necessary confidential data/secrets of the state (art 16.1.8) Interference with the activities of the Commission prohibited (art 3.4) Liability for violation of the law on the Commission (art 26)
New Zealand	<i>Human Rights Act 1993</i> (NZ)	'[I]nquire generally into any matter, including any enactment or law, or any practice, or any procedure, whether governmental or non-governmental, if it appears to the Commission that the matter involves, or may involve, the infringement of human rights'. (s 5(2)(h))	'[T]he members of the Commission acting together determine the strategic direction and the general nature of activities undertaken in the performance of the Commission's functions' (s 7(1)) Compel via evidence order, the production of information or documents (s 126A) Offences against the Act including obstruction, failure to comply and false statements (s 143) Inspection and monitoring of places of detention (under <i>Crimes of Torture Act 1989</i> (NZ)) ¹¹⁹

The Australian, New Zealand, Malaysian and Afghanistan Commissions have explicitly relied on formal inquiry powers to defend their authority to conduct national inquiries. The Australian Commission has drawn attention to its specific formal powers in the body of national inquiry reports,¹²⁰ and a reference to its formal powers to conduct national inquiries now appears to be part of the Australian Commission's standard language when submitting reports to government arising from a national inquiry.¹²¹ The New Zealand Commission has

119 In June 2007, the New Zealand Human Rights Commission was designated by the Minister for Justice as the central National Preventive Mechanism for monitoring and meeting New Zealand's obligations under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2735 UNTS 237 (entered into force on 22 June 2006) ('*Optional Protocol to the Convention against Torture*'): Human Rights Commission (NZ), *OPCAT in New Zealand 2007–2012: A Review of OPCAT Implementation by New Zealand's National Preventive Mechanisms* (July 2013) 7. Accordingly, under the *Crimes of Torture Act 1989* (NZ) s 26, the Commission was granted the power to access any place of detention or person in detention.

120 See, eg, *Racist Violence Report*, above n 50, 25.

121 Covering letters to the Attorneys-General receiving national inquiry reports since 2004 have included a reference to the powers and functions on which the Australian Commission relies to conduct each national inquiry: see above n 14.

noted as a matter of course the formal powers it relied on to conduct inquiries in its reports.¹²² The Commissions in Malaysia and Afghanistan both set out the powers on which they relied in the introduction to their national inquiry reports.¹²³ The Indian and Mongolian Commissions did not explicitly refer to their formal inquiry powers in the documentation arising from their national inquiries.

In answering questions from the Senate Legal and Constitutional Affairs Legislation Committee, the Australian Human Rights Commission's Director of Legal, Julie O'Brien, outlined how the Commission draws on a range of its powers in order to conduct an inquiry:

If we are going to investigate an issue, there are a number of powers the commission could use under its act. We could use a range of powers set out in section 11(1) of the commission's act to promote the public discussion of human rights in Australia, examine enactments. One of those powers which, within the commission, we call the inquiry power, gives us the power to compel the production of documents. We have used all the powers – whether we called it a review or an inquiry, we use a range of those powers. The range of different reasons as to why we might do this project, for example, is different to why we might use the inquiry power. And that is about compelling the production of documents and witnesses.¹²⁴

In her testimony, O'Brien continues by asserting that, in the conduct of the Forgotten Children National Inquiry, it became necessary to exercise the Commission's formal powers compelling production of documents and witnesses in order to gather information about the condition of children in immigration detention from the Department of Immigration and Border Protection. Her response demonstrates the importance of an NHRI being granted sufficient investigatory powers (even if there is not an explicit inquiry power) to conduct an effective inquiry.

A *Paris Principles*-compliant NHRI could conduct a national inquiry without an explicit 'inquiry power' by relying on a composite of its general functions and powers, including investigatory powers enabling it to compel the production of information. While the *Paris Principles* do not specifically refer to inquiry powers, they do clearly establish the core elements which an inquiry requires, namely, that NHRIs must be free to consider any questions falling within their competence, as well as hear any person and obtain any evidence relevant to their human rights mandate.¹²⁵ In order to avoid doubt, it is preferable that establishing legislation provides clarity about inquiry powers. Even when inquiry powers are formally specified, as O'Brien's testimony excerpted above illustrates, NHRIs will still rely on their other functions and powers in the process of undertaking a

122 See, eg, *Accessible Journey Report*, above n 54, 6.

123 On Malaysia, see *Land Rights Inquiry Report*, above n 56, 3. On Afghanistan, see above n 116.

124 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 56 (Julie O'Brien).

125 *Paris Principles*, UN Doc A/RES/48/134 annex 'Methods of Operation' arts (a)–(b). See also ICC *General Observations*, above n 28, [1.2], [1.6], [2.10]; Gauthier de Beco and Rachel Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge University Press, 2015) 94–5.

national inquiry. These may include research and education, advisory and recommendation powers, the power to make information public, the power to collaborate and use experts, the power to receive and investigate individual complaints, and the power to refer matters to the judiciary.

Incidental powers are also crucial mechanisms for institutions undertaking inquiries where specific powers may not exist. A number of institutions in the Asia Pacific have the authority to do anything incidental to their functions or powers which may be required to fulfil their mandate. The Australian Commission may ‘do anything incidental or conducive to the performance of any of the preceding functions’.¹²⁶ The Indian Commission may perform ‘such other functions as it may consider necessary for the protection of human rights’.¹²⁷ The New Zealand Commission was stripped of its incidental power in the year the *Accessible Journey Report* was released following the National Inquiry.¹²⁸ Other Commissions with an incidental power include Korea,¹²⁹ Nepal,¹³⁰ Sri Lanka,¹³¹ and Malaysia.¹³² Within the limits of the object and purpose of the legislation establishing an institution, an incidental power grants NHRI staff the discretion to interpret their legislation in meaningful ways to facilitate important inquiry functions. For example, the Australian Commission has no specific statutory power to enter detention facilities and instead it relies on its incidental powers in conjunction with its other powers of inquiry.¹³³

The mandate, functions and powers of NHRIs provide the legal foundation for institutions to protect and promote human rights. The NHRIs in the Asia Pacific, following Australia’s lead, have been prepared to interpret their powers to facilitate the development of strategies for addressing widespread and systemic human rights violations. I will now consider how these national inquiries function in practice.

D Anatomy of an Inquiry

Across diverse legal and cultural contexts, national inquiries conducted by NHRIs follow a similar structure. There are three identifiable stages to any national inquiry: preparation for the inquiry, conduct of the inquiry itself, and follow-up at the conclusion of the inquiry. While all stages of an inquiry are interrelated, a linear conceptualisation of the national inquiry process is a useful way to document its separate components.

126 *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(p).

127 *Protection of Human Rights Act 1993* (India) s 12(j).

128 *Human Rights Act 1993* (NZ) s 5(2)(n) originally provided that the Commission may ‘do anything incidental or conducive to the performance of any of the functions’. This section was repealed by *Crown Entities Act 2004* (NZ) s 200.

129 *National Human Rights Commission Act 2001* (Korea) s 19(10).

130 *Human Rights Commission Act 1997* (Nepal) s 9(2)(m).

131 *Human Rights Commission of Sri Lanka Act 1996* (Sri Lanka) s 11(h).

132 *Human Rights Commission of Malaysia Act 1999* (Malaysia) s 4(2)(f).

133 Australian Human Rights Commission, ‘2008 Immigration Detention Report: Summary of Observations Following Visits to Australia’s Immigration Detention Facilities’ (Report, December 2008) 18 <https://www.humanrights.gov.au/sites/default/files/content/human_rights/immigration/idc2008.pdf>.

1 Preparation

All national inquiries begin with staff and commissioners *developing a rationale for the inquiry*. Generally the process takes place over a period of time as the NHRI begins to document or notice patterns in human rights violations, or respond to information being brought to the attention of the institution. For example, Gillian Triggs noted that prior to the instigation of the Australian Human Rights Commission's Forgotten Children National Inquiry, there had been '180 pieces of work completed by the commission on immigration detention over the last five years'.¹³⁴

As Part III(C) on functions and powers makes clear, an NHRI must *establish the legal framework* for conducting an inquiry. This includes confirming jurisdiction over target groups, as well as being able to clearly articulate and defend the functions and powers on which the NHRI will rely in order to conduct the inquiry. Questions of jurisdiction were important in the Forgotten Children National Inquiry as the Government disputed the Commission's jurisdiction to investigate the conditions of children in detention on Nauru.¹³⁵

An NHRI will consult on and establish the *terms of reference* for the national inquiry which form the publicly stated aims of an inquiry, as well as providing direction and transparency. This will include *determining the parameters of the national inquiry* such as the time frame for the inquiry, its geographical reach and target audiences. Development of the terms of reference also provides an opportunity to bring key stakeholders on board from the beginning through consultation about the scope of an inquiry. At this point, an NHRI may also be *activating domestic and international resources and fostering donor relationships* to facilitate the inquiry. For example, the Australian Human Rights Commission's Bringing Them Home National Inquiry was instigated at the request of the Government, which also set the terms of reference for the inquiry and granted a budget for its conduct. In Mongolia, the Commission secured a funding contribution towards its national inquiry from an international donor impressed with the Commission's credibility and previous human rights work.¹³⁶

Credibility may also be established by *garnering expert support* for the inquiry. In Mongolia, a 'torture project team' of prominent academics, judges and others contributed towards the direction and planning for the National Inquiry. In Australia, experts have regularly contributed as leading figures in national inquiries. The NHRI may also seek to *build a consensus* around the need to take action on an issue by drawing on the work of civil society and other engaged stakeholders. In some instances an NHRI may formally *partner with another entity* to conduct the inquiry. The Australian Commission was requested by the Attorney-General to formally partner with another statutory body, the

134 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 8 (Gillian Triggs, President, Australian Human Rights Commission).

135 Ibid 35 (Sarah Hanson-Young, Senator, Gillian Triggs, President, Australian Human Rights Commission and Julie O'Brien, Director, Legal, Australian Human Rights Commission).

136 Interview with Ariunaa Ulziitogtohin, Executive Director, Canada Fund, Mongolian Office (Ulaanbaatar, Mongolia, 28 November 2006).

Australian Law Reform Commission, to undertake a national inquiry on the marginalisation and mistreatment of children in the legal system.¹³⁷ The Indian Commission broke new ground in the way it conducted its national inquiry on the right to health care.¹³⁸ A large peak network of several hundred health related NGOs, Jan Swasthya Abhiyan ('JSA') or People's Health Movement India, approached the Commission with a proposal for collaboration. From JSA's perspective, health rights 'needed to be brought into the public domain to build momentum for change'.¹³⁹ So JSA asked the Indian Commission to conduct a series of public hearings on the right to health care. This proposed partnership with the support and initiative of the Indian Commission ultimately became a national inquiry.

Developing relationships with and sensitising key stakeholders is central to preparation for a national inquiry. In Mongolia, the Commission embarked on training programs with law enforcement and judicial officials. This educative process proved crucial in engaging officials in the Inquiry who were previously hostile to conversations about torture.¹⁴⁰ Staff at the Commission itself also needed to *develop relevant skills* and, in a series of missions proceeding the Inquiry, international experts provided training on the inquiry process including 'strategies for collecting evidence, conducting hearings, inspecting detention facilities, working with NGOs, obtaining evidence from government departments, [and] providing appropriate briefings for the media'.¹⁴¹

2 Conduct

The conduct of national inquiries will depend largely on the subject matter of the inquiry as different violations will require different approaches. Broadly, however, there are four aspects to conducting an inquiry: data collection, ongoing stakeholder engagement, public outreach, and presentation of the inquiry's findings.

Data collection may involve a range of different mechanisms for gathering information and evidence for the inquiry. In some instances, an NHRI will travel and seek out information from those affected, but it will also provide opportunities for people to come forward and approach the NHRI themselves. In

137 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (Cth), *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 3–4 ('*Seen and Heard Inquiry Report*').

138 *Right to Health Care Recommendations Report*, above n 53.

139 Abhay Shukla, 'National Inquiry on the Right to Health Care in India' (Speech delivered at the Raoul Wallenberg Institute for Human Rights and Humanitarian Law and Asia Pacific Forum Sub-regional Workshop on National Inquiries, Delhi, 1 November 2007).

140 Interview with Soyolmaa, former National Human Rights Commission of Mongolia Representative, Darkhan-Uul (Darkhan-Uul, Mongolia, 13 September 2007).

141 Some 12 missions were led by Brian Burdekin to train and prepare the Mongolian Commission to undertake a national inquiry: Brian Burdekin and Ulrike Schuermann, 'Evaluation of the National Inquiry on Torture Conducted by the National Human Rights Commission of Mongolia' (Report, Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Swedish International Development Cooperation Agency, 2006) 4.

addition to listening to those who have experienced human rights violations, NHRIs will also seek contributions from advocates or groups working with affected people. The NHRI may implement special measures to ensure vulnerable or disadvantaged people are able to make submissions. For example, the New Zealand Commission's National Inquiry into Accessible Public Land Transport for disabled people facilitated a series of separate focus groups for people with specific disabilities. The Commission also invited submissions in a range of formats which were sensitive to the particular needs of disabled people.¹⁴²

Data collection may involve, for example: monitoring and inspections of facilities, places of detention or other relevant locations; surveys, questionnaires or interviews to gather first-hand accounts from affected people; receipt of individual complaints; public hearings, or private hearings when witnesses (such as minors) need protection; roundtables and workshops; written submissions; discovery of official documents and information; review of legislation and enactments; and expert-led research. The collection of data will also take into account the research sample, including geographic representation where relevant.¹⁴³ As national inquiries are not judicial in nature, NHRIs tend not to be bound by the rules of evidence.¹⁴⁴ This gives NHRIs greater flexibility in the collection of information during the inquiry process.

Ongoing stakeholder management during the conduct of a national inquiry is vital to progressing the data collection process. This may include regularly briefing or providing training for government officials, media, NGOs and civil society, and other relevant non-state actors. NHRIs also sometimes give government the opportunity to comment on a draft version of the report, enabling the state to provide additional information. In some instances, an NHRI has also published the state's response as an appendix to an inquiry report.¹⁴⁵

Public outreach is a crucial part of the publicity strategy during a national inquiry. This serves two key objectives. First, to inform the public about the conduct of the inquiry and in so doing solicit relevant submissions and information for the inquiry. Secondly, to inform and educate the wider public, building a constituency for change. This process will involve a sophisticated media strategy, as well as the dissemination of targeted education materials.

At the conclusion of the inquiry process, the NHRI will *prepare a report* for presentation to government, tabling in Parliament, and ultimately public release. The report serves five crucial functions: first, it documents evidence of human

142 *Accessible Journey Report*, above n 54, 128–9.

143 Eg, the Australian Commission's Homeless Children and Mental Illness National Inquiries visited all major cities and selected regional centres in all states and territories.

144 See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 14(1):

For the purpose of the performance of its functions, the Commission may make an examination or hold an inquiry in such manner as it thinks fit and, in informing itself in the course of an examination or inquiry, is not bound by the rules of evidence.

145 See, eg, Department of Immigration and Border Protection (Cth), 'Departmental Responses to Findings and Recommendations of the Inquiry' in *Forgotten Children Report*, above n 1, app 8.

rights violations; secondly, it provides a platform for the voices of victims to be heard and their stories told; thirdly, it is the mechanism through which the NHRI makes its recommendations for change and redress; fourthly, it is an educative tool informing the general public about the issues and the case for change; and fifthly, it provides advocates with credible data to continue to lobby for change beyond the work of the NHRI.

3 Follow-Up

In order to be effective, NHRIs must plan and execute a detailed follow-up process once the report from a national inquiry has been tabled in Parliament and made public. NHRIs will seek to maximise publicity generated by the report to press for the *adoption of recommendations*. One way of measuring and targeting its response is to establish *success indicators* and to *monitor government and other stakeholder responses* to the findings and recommendations. Some national inquiries have catalogued these responses from the time the inquiry was launched,¹⁴⁶ while others have built in periodic review of findings following the inquiry.¹⁴⁷ Some recommendations may require the Commission to actively liaise with other agencies or investigatory bodies. For example, the Australian Commission's Forgotten Children National Inquiry finds that some of the reported incidences of sexual assault 'may come within the scope of the terms of reference of the Royal Commission into Institutional Responses to Child Sexual Abuse'.¹⁴⁸ The Royal Commission is reportedly examining the *Forgotten Children Report* to determine if it should take any action under its mandate which allows it to investigate any allegations of abuse occurring in institutional contexts. The Australian Human Rights Commission has confirmed that preliminary meetings about the same issue have been held.¹⁴⁹

The NHRI may also choose to *support ongoing advocacy* undertaken by civil society on the basis of the national inquiry report. For example, the New Zealand Commission's Inquiry into Discrimination Experienced by Transgender People, mobilised and brought together the trans community in new ways. Following the Inquiry, the Commission provided support through initiatives such as a quarterly newsletter update for trans people, transgender cultural events aimed at raising public awareness,¹⁵⁰ and development of resources for

146 *Mental Illness Report*, above n 6, vol 1 ch 7.

147 National Human Rights Commission (India), *Responses on the Recommendations of the National Review Meeting on Health Held on 6th March 2007* (Annex to Workshop Material, 2007) (copy on file with author).

148 *Forgotten Children Report*, above n 1, 62.

149 Alex McKinnon, 'Could the Royal Commission into Child Sexual Abuse Get Kids Out of Immigration Detention?', *Junkee* (online), 27 February 2015 <<http://junkee.com/could-the-royal-commission-into-child-sexual-abuse-get-kids-out-of-immigration-detention/51424>>. See also James Bennett, 'Child Sex Abuse Royal Commission Weighs Allegations in Australian Immigration Detention Centre', *ABC News* (online), 21 May 2015 <<http://www.abc.net.au/news/2015-05-21/child-sex-abuse-commission-weighs-allegations/6486144>>.

150 See, eg, Rosslyn Noonan, 'Assume Nothing Exhibition' (Speech delivered at the Assume Nothing Exhibition, Auckland, 23 January 2009).

schools.¹⁵¹ In 2005, 12 years after its landmark Mental Illness National Inquiry, the Australian Commission gave its support to the Mental Health Council of Australia and the Brain and Mind Research Institute to conduct a major national review on mental health care.¹⁵² These initiatives demonstrate how important it is that national inquiries are not viewed as isolated events, but as part of long-term efforts to see the progressive realisation of human rights.

Finally, the NHRI should conduct an *evaluation of the inquiry* and ensure key lessons from the inquiry process are taken on board for subsequent inquiries and ongoing engagement with stakeholders. Commissions in the Asia Pacific have facilitated internal reviews by senior staff,¹⁵³ as well as external reviews carried out by international aid donors¹⁵⁴ and academics.¹⁵⁵

While each national inquiry is unique, NHRI networks and practitioners have begun to develop best practice in the way institutions are trained to prepare for, conduct and follow up national inquiries. The sharing of expertise and resources across the Asia-Pacific region has supported NHRIs like those in Mongolia and Malaysia to conduct their first national inquiries. Australian experiences have featured prominently as examples of the kind of change it is possible to pursue utilising the national inquiry strategy.

IV SEEKING CHANGE: THE IMPACT OF NATIONAL INQUIRIES

National inquiries conducted by NHRIs are part of a complex range of social and political factors which contribute to a state's gradual internalisation of human rights norms. They cannot act alone and the impact of national inquiries may only be viewed in the context of the efforts of multiple stakeholders. Even with these caveats in place, it is clear that national inquiries do prompt change: laws are reviewed, new policies are implemented, funding is allocated, training occurs, and attitudes shift. Inevitably when governments find their actions the target of a national inquiry investigation they may be reluctant to attribute to the inquiry any changes they make for political reasons. For example, the Australian Attorney-General emphatically denied that the Forgotten Children National Inquiry had any impact on the government's efforts to remove children from immigration detention during the course of the Inquiry: 'I am sorry to disappoint Professor Triggs and those who worked on this inquiry, but the inquiry has

151 See Human Rights Commission (NZ), *Trans People: Facts and Information* <<http://hrc.co.nz/your-rights/social-equality/our-work/trans-people-facts-information/>>.

152 Mental Health Council of Australia, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (Report, 2005) iii.

153 Human Rights Commission, New Zealand, *Transgender Inquiry Process Review* (2008) (unpublished, copy on file with author). See especially the inquiry participants' survey responses.

154 Burdekin and Schuermann, above n 141.

155 Turpin et al, above n 84, 37.

played absolutely no role whatsoever in influencing the government's thinking'.¹⁵⁶

However, the *Forgotten Children Report* documents the changes in law and government policy since the Inquiry was launched.¹⁵⁷ These changes include the release of children, including some just prior to the Minister for Immigration and Border Protection giving evidence before the Inquiry; the establishment of a school on Christmas Island where children are detained; and some children with physical and mental illness being brought to the Australian mainland for medical care or released into the community on humanitarian grounds. In contrast to the Attorney-General's assessment, Gillian Triggs, President of the Commission, noted:

we had produced an even-handed and scientifically and medically creditable report. It is most disturbing to have the credibility of the commission's staff and me, personally, attacked when we were primarily concerned that the public should read the report. Now that that report is in the public arena, it is being read and it is having its effect. We are very pleased indeed that the public response has been as positive as it has been.¹⁵⁸

Triggs' assessment was accurate: public support was indeed overwhelming. Prominent Australians, academics, law bodies and the ICC lent their names to several open letters condemning the Government both for its attacks on Triggs and for ignoring the subject matter of the report, namely, the children.¹⁵⁹ The public united in their thousands on social media in support of the Commission and the *Forgotten Children Report*, with the hashtag '#IStandWithGillianTriggs' becoming a top trending Twitter topic.¹⁶⁰ Ultimately, the Government insisted following the report's publication that its policy priority was to 'release the children'.¹⁶¹ At the very least, this National Inquiry will play a role in holding the Government to account if it does not effect this change.

National inquiries conducted by NHRIs are often controversial. Inquiry reports are frequently met with government hostility and rejected by some sectors of the community. The findings of national inquiries make for uncomfortable reading because they call attention to widespread and systemic human rights violations. Changing the status quo, recognising past wrongs, and accepting

156 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 102 (George Brandis, Attorney-General).

157 *Forgotten Children Report*, above n 1, 13–14.

158 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 34 (Gillian Triggs).

159 'Open Letter to PM Expresses Dismay at Personal Attacks on HRC President Gillian Triggs', *ABC News* (online), 20 February 2015 <<http://www.abc.net.au/news/2015-02-20/open-letter-to-pm-expresses-dismay-at-personal-attacks-triggs/6163918>>; Meade, above n 82; Letter from Mabelde Lourence Mushwana, Chairperson of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, to Tony Abbott, Prime Minister of Australia, 23 February 2015 <<http://nhri.ohchr.org/EN/News/Documents/The%20Prime%20Minister%20of%20Australia.pdf>>.

160 Amy McNeilage, 'Twitter Rallies against Abbott with #IStandWithGillianTriggs', *Daily Life* (online), 25 February 2015 <<http://www.dailylife.com.au/news-and-views/dl-culture/twitter-rallies-against-abbott-with-istandwithgilliantriggs-20150225-13o09d.html>>.

161 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 101 (George Brandis, Attorney-General).

movement towards cultural and attitudinal shifts is disruptive. This kind of change requires the powerful to accede ground to the vulnerable, and is one of the reasons why the impact of national inquiries is often incremental. The following four case studies of national inquiries conducted by the Australian and Mongolian Commissions exemplify this dynamic, which is also evidenced by the impact of national inquiries held by other commissions in the Asia-Pacific region.¹⁶² I begin with the very first national inquiry held by the Australian Human Rights Commission on homeless children, and then look at two very different national inquiries conducted by the Australian Commission on the forcible removal of indigenous children from their families and on same-sex discrimination. I then examine the Mongolian Commission's experience of conducting its first national inquiry on torture, outlining the change the Inquiry provoked and the subsequent challenges the Commission faced.

A Starting a Dialogue: Homeless Children National Inquiry

In 1987, the Australian Human Rights and Equal Opportunity Commission launched the first national inquiry conducted by an NHRI. The *Our Homeless Children Report* was a clarion call to action on youth homelessness: 'The fact is that there are homeless children and young people dying in Australia ... That is not something our nation can ignore'.¹⁶³ The report told of the harrowing experiences of homelessness, family breakdown, poverty and isolation, and evidenced the inadequacy of accommodation, employment and support service options for young homeless people.

Change was immediate. The Australian Commission began documenting responses to the Inquiry while it was on foot and included a chapter in the report detailing the developments in homelessness policy. The report also provoked an

162 My fieldwork examining national inquiries conducted by the National Human Rights Commissions in India and New Zealand confirms the experiences of the Australian and Mongolian Commissions discussed in detail here, namely, that NHRIs creatively use national inquiries to push for and achieve change. Eg, following the Indian Commission's national inquiry on the right to health care, a detailed monitoring document setting out the inquiry recommendations and corresponding actions taken by responsible government departments catalogues what progress has been made: National Human Rights Commission (India), *Responses on the Recommendations*, above n 147. The Indian Commission's ongoing review following the National Inquiry suggests a number of significant changes, including, eg, changes to the training of nurse practitioners for provision of essential services in rural areas, allocation of related funds, and the opening of new nursing colleges: National Human Rights Commission (India), 'Impact of NHRC Recommendations on Health' (Media Release, 24 September 2007). The New Zealand Commission's National Inquiry into Accessible Public Land Transport for disabled people had significant impact. Key changes prompted by the Inquiry include new vehicle quality standards for urban buses; the development of a New Zealand Transport Strategy; the enactment of the *Public Transport Management Act 2008* (NZ) which regulates commercial public transport operators (including with respect to the needs of disabled people) and requires disabled people to be consulted in transport planning; and new regulations for taxi and bus drivers requiring that they complete special needs awareness training in order to receive a licence: see details of legislation and policy developments in Human Rights Commission (NZ), *The Accessible Journey* <<http://www.hrc.co.nz/your-rights/people-disabilities/our-work/accessible-journey/>>.

163 Brian Burdekin's opening address at the final hearings of the Inquiry, quoted in *Our Homeless Children Report*, above n 20, 3.

immense public reaction: years later it was still recognised that the National Inquiry had 'brought youth homelessness to a broad community audience'.¹⁶⁴ A review of responses to the National Inquiry conducted by the National Clearinghouse for Youth Studies nine months after the Inquiry took place found that it had destroyed the myths that surrounded youth homelessness:

Public awareness and perception of the extent, causes and consequences of youth homelessness have changed ... The change in public perceptions provides the basis for innovative responses to homelessness and public support for the injection of substantial financial resources by government.¹⁶⁵

A 'media frenzy'¹⁶⁶ helped to generate support for the establishment of government programs and the commitment of funds for solutions to youth homelessness.¹⁶⁷

Two decades later, the community sector continued its follow-up of the *Our Homeless Children Report*, by using it as a baseline and focal point for mobilisation. In 2008, the National Youth Commission, an NGO, launched the first public inquiry into current issues in youth homelessness since 1989.¹⁶⁸ The Inquiry received the support of Brian Burdekin, the Federal Human Rights Commissioner who had led the Australian Commission's National Inquiry. He explained that the need for a new investigation was in part about mobilising public opinion to create change: 'We mobilised public pressure through a public inquiry and that's why a public inquiry is happening again'.¹⁶⁹ The National Youth Commission's report examines the policy achievements on youth homelessness catalysed by the 1989 Australian Commission National Inquiry, and highlights the continuing need for advocacy to eliminate child homelessness.

The *Our Homeless Children Report* was the first example of an NHRI creatively interpreting its functions and powers in a way that facilitated a nation-wide inquiry into a systemic human rights violation. It mobilised a large network of actors including victims, carers, experts, the community sector and government agencies. This National Inquiry ultimately started a dialogue for change that has shaped the conversation around youth homelessness in the decades that have followed and continues to influence the way the issue is framed in Australian policy debates.

164 Chris Chamberlain and David MacKenzie, 'Youth Homelessness: Four Policy Proposals' (Final Report No 69, Australian Housing and Urban Research Institute, September 2004) 1.

165 National Clearinghouse for Youth Studies, *Responses to Burdekin: Selected Responses to 'Our Homeless Youth': The Report of the National Inquiry into Homeless Children by the Human Rights and Equal Opportunity Commission* (1989) iii.

166 Rodney Fopp, 'Press Coverage of the Burdekin Report' (1989) 8(4) *Youth Studies Australia* 10; Rodney Fopp, 'After Burdekin: A Brief Analysis 14 Years On' (2003) 16 *Parity* 1314.

167 Eg, on budget day 1989, the Treasurer announced a \$100 million social justice package for young Australians: Chamberlain and MacKenzie, above n 164, 1.

168 National Youth Commission, *Australia's Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness* (2008).

169 Richard Adie, Interview with Brian Burdekin (Radio Interview, Life Matters, ABC Radio National, 8 March 2007) <http://mpegmedia.abc.net.au/rn/podcast/2007/03/lms_20070308.mp3>.

B The Long Wait for Change: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

The Bringing Them Home National Inquiry was called to investigate the forcible removal of Indigenous children from their parents and the present day consequences of this policy.¹⁷⁰ More so than the other national inquiries conducted by the Commission, this inquiry explicitly set out to deal with historical human rights violations in addition to ongoing violations. The Inquiry found systemic human rights violations and discrimination, and argued that the forcible removal of children and associated state policies amounted to genocide.¹⁷¹ In sum, '[t]he Inquiry's recommendations [were] directed to healing and reconciliation for the benefit of all Australians',¹⁷² and included acknowledgement and apology as well as reparation as vital steps.

The findings and recommendations of the *Bringing Them Home Report* were provocative. The government and public responses (both Indigenous and non-Indigenous) to the report are well documented,¹⁷³ as are contemporaneous developments in the courts.¹⁷⁴ The report and its contents were rapidly politicised as the Government questioned the Commission's findings and rejected most of the recommendations.¹⁷⁵ There was a 'national outcry' over the Government's attempts at discrediting the *Bringing Them Home Report*.¹⁷⁶ The issue was indeed so politicised that Prime Minister John Howard's refusal to apologise became

170 *Bringing Them Home Report*, above n 10, 3.

171 Despite the rigorous legal argument presented by the Australian Human Rights Commission, the genocide finding remains controversial and is still used by a minority to attempt to discredit the Commission: see, eg, Paul Sheehan, 'Rudd's Electoral Cracks about to Open Further' *Sydney Morning Herald* (online), 10 June 2010 <<http://www.smh.com.au/federal-politics/political-opinion/rudds-electoral-cracks-about-to-open-further-20100609-xugc.html>>.

172 *Bringing Them Home Report*, above n 10, 4.

173 See, eg, Melissa Abrahams, 'Bringing Them Home or Taking Them Nowhere: The Federal Government's Response to the National Inquiry into the Stolen Generations' (1998) 4(9) *Indigenous Law Bulletin* 15; Coral Dow, 'Sorry: The Unfinished Business of the *Bringing Them Home Report*' (Background Note, Parliamentary Library, Parliament of Australia, 2008) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0708/BringingThemHomeReport>; Jens Korff, *Stolen Generations Timeline* (24 April 2014) Creative Spirits <<http://www.creativespirits.info/aboriginalculture/politics/stolen-generations-timeline#axzz3aNESYWGa>>.

174 See, eg, Andrea Durbach, "'The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation' (2008) 12(1) *Australian Indigenous Law Review* 22. The first successful Stolen Generations compensation claim in the Australian courts was *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331. See also David Nason, 'State To Negotiate on Stolen Generations', *The Australian* (online), 22 April 2010 <<http://www.theaustralian.com.au/national-affairs/state-politics/state-to-negotiate-on-stolen-generations/story-e6frgczx-1225856607813>>.

175 See above nn 11–12.

176 Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations – The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (2000) 292.

infamous.¹⁷⁷ Immediately following the 2007 federal election, the newly elected Prime Minister Kevin Rudd promised to ‘make a statement of apology “early” in the new Parliament’.¹⁷⁸ In 2008 the Australian Parliament finally chose to apologise. On behalf of Australia, the Prime Minister affirmed:

There is something terribly primal about these firsthand accounts [in the *Bringing Them Home Report*]. The pain is searing; it screams from the pages. ... These stories cry out to be heard; they cry out for an apology. Instead, from the nation’s parliament there has been a stony and stubborn and deafening silence for more than a decade; a view that somehow we, the parliament, should suspend our most basic instincts of what is right and what is wrong; a view that, instead, we should look for any pretext to push this great wrong to one side, to leave it languishing with the historians, the academics and the cultural warriors, as if the stolen generations are little more than an interesting sociological phenomenon. But the stolen generations are not intellectual curiosities. They are human beings; human beings who have been damaged deeply by the decisions of parliaments and governments. But, as of today, the time for denial, the time for delay, has at last come to an end. ...

To the stolen generations, I say the following: as Prime Minister of Australia, I am sorry. On behalf of the government of Australia, I am sorry. On behalf of the parliament of Australia, I am sorry. I offer you this apology without qualification.¹⁷⁹

This response, over 10 years after the release of the Australian Commission’s *Bringing Them Home Report*, was heralded by Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner, as ‘an historic day ... [t]oday’s actions enable every single one of us to move forward *together*’.¹⁸⁰ In his speech responding to the national apology, Calma reminded Australians that

there are many recommendations of the *Bringing them Home* report that have not been implemented.

In fact, there has been little attempt to even consider many of these recommendations at the federal or state level in recent years, or for them to be implemented systematically across all jurisdictions.¹⁸¹

Despite Calma’s reminder, and the inadequacy of government action in the years following the 2008 apology,¹⁸² the *Bringing Them Home National Inquiry* illustrates how the influence of a national inquiry is not limited to the period immediately following the report’s release. The political context in which a national inquiry is held strongly influences whether the findings of the inquiry

177 Anne Davies, ‘Nothing To Say Sorry for: Howard’, *Sydney Morning Herald* (online), 12 March 2008 <<http://www.smh.com.au/news/national/nothing-to-say-sorry-for-howard/2008/03/11/1205125911444.html>>.

178 Misha Shubert and Annabel Stafford, ‘“We Will Say Sorry”: Rudd’, *The Age* (Melbourne) 27 November 2007, 1.

179 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 169–70 (Kevin Rudd, Prime Minister).

180 Tom Calma, ‘Let the Healing Begin: Response to Government to the National Apology to the Stolen Generations’ (Speech delivered at the Members’ Hall, Parliament House, Canberra, 13 February 2008) (emphasis in original).

181 *Ibid.*

182 Christopher Bantick, ‘Inaction Means We Must Say Sorry Again’, *The Weekend Australian* (Sydney), 12 September 2009, 4.

will be accepted and the recommendations implemented by the government. Even if the sitting government is unmoved, a national inquiry may still influence subsequent governments by creating a constituency for change or mobilising an existing one.

C Legislative ‘Wins’: National Inquiry into Discrimination against People in Same-Sex Relationships

In 2006, the Australian Human Rights Commission launched a national inquiry examining systemic discrimination against same-sex couples and families in Australia. The *Same Sex: Same Entitlements Report* found that same-sex couples experienced discrimination in areas including employment, workers’ compensation, tax, social security, veterans’ entitlements, health care, family law, superannuation, aged care and migration. While the report remains squarely focused on the legal discrimination experienced by same-sex couples, the pain and trauma of the discrimination is an integral part of the case for change.¹⁸³

The *Same Sex: Same Entitlements Report* sought to emphasise the ease of change, perhaps in part to counteract resistance to that change: ‘It is simple to remove discrimination against same-sex couples in the area of financial and work-related entitlements ... There just needs to be some minor changes to a few definitions at the front of each relevant piece of legislation’.¹⁸⁴ This proved persuasive. In 2008, the federal ‘Government [acted] on the recommendations of [the Commission’s] report within a year of its publication’.¹⁸⁵ Not only did this constitute the fulfillment of the incoming Government’s election promise,¹⁸⁶ the Government viewed the reforms as ‘an essential step towards a fairer and more just society for all Australians’.¹⁸⁷ Ultimately, the reforms amended 85 federal laws.¹⁸⁸

The Same Sex: Same Entitlements National Inquiry is illustrative of how a national inquiry can provide the impetus (or even political cover) required for change which the government largely already accepts as necessary to take place. However, in choosing to focus on achievable legislative change to work and financial entitlements, the Commission did not make any recommendations

183 As one parent described it: ‘My son and his partner are not second class citizens but this is how the government treats them’: *Same Sex: Same Entitlements Report*, above n 22, 177.

184 Ibid 17.

185 Human Rights and Equal Opportunity Commission (Cth), ‘Government’s Move on Same Sex Discrimination Welcomed by HREOC’ (Media Release, 30 April 2008) <<https://www.humanrights.gov.au/news/media-releases/2008-media-release-government-s-move-same-sex-discrimination-welcomed-hreoc>>.

186 AAP, ‘Same-Sex Superannuation Discrimination Laws Reformed’, *Herald Sun* (online), 24 November 2008 <<http://www.heraldsun.com.au/news/gay-super-discrimination-axed/story-e6frf7jo-1111118127218>>.

187 Robert McClelland, Attorney-General (Cth), ‘Getting into Gear for the Next 60 Years’ (Speech delivered at the Evatt Annual Lecture, University of Sydney, 9 December 2008) <<http://evatt.org.au/papers/getting-gear-next-60-years.html>>.

188 Attorney-General’s Department (Cth), *Same-Sex Reforms: Overview of the Australian Government’s Same-Sex Law Reforms* <<http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx>>.

regarding same-sex marriage, despite receiving many submissions on this issue.¹⁸⁹ Pursuing the more socially and politically contentious reform on same-sex marriage may have jeopardised the other significant changes the Commission was able to persuade the Parliament to accept. However, in doing so, it also had to forego the opportunity to highlight another area of discrimination. This illustrates the complexity of the strategic decisions that an NHRI must make in its attempts to secure the best possible human rights outcomes through a national inquiry process.

D Establishing an NHRI's Credibility: Changing Attitudes in Mongolia's National Inquiry on Torture

In 2005, the National Human Rights Commission of Mongolia conducted a national inquiry on torture.¹⁹⁰ Stories of systemic violations were evidenced in the *National Inquiry on Torture Report* and core state agencies began to accept that torture and other cruel, inhuman and degrading treatment were widespread across Mongolia's justice system. In the months following the release of the report, the head of Amnesty International Mongolia summarised the response to the Inquiry:

The major impact [of the Inquiry] is that it is now very clear that there is torture in Mongolia. Before, you know the legal officers and some politicians and many people are thinking that there is not torture in Mongolia and after the public inquiry, it is very clear and all people are talking about torture. And they accept it. Attitudes of the people have changed.¹⁹¹

The response to the Inquiry was significant. For the first time, five years after the Commission's establishment, the Parliament debated a Human Rights Commission report,¹⁹² and it adopted a Parliamentary Resolution which addressed several of the key recommendations of the report.¹⁹³ Further government responses included the establishment of a working group to draft amendments to the criminal law;¹⁹⁴ the development of the first law enforcement cross-agency plan to tackle torture;¹⁹⁵ and the Court Decision Enforcement Agency, responsible for prisons, embarked on a 'year of construction' to update detention facilities

189 *Same Sex: Same Entitlements Report*, above n 22, 18.

190 *National Inquiry on Torture Report*, above n 55.

191 Interview with Altantuya Batdorj Sarta-Uul, Executive Director, Amnesty International Mongolia (Ulaanbaatar, Mongolia, 30 November 2006).

192 Interview with Oyunchimeg, Commissioner, National Human Rights Commission of Mongolia (Ulaanbaatar, Mongolia, 21 September 2007). Some actors saw the parliamentary debate as one of the most significant impacts of the inquiry: see, eg, Interview with Rinzaan, Chief of Darkhan-Uul Aimag Court (Darkhan-Uul, Mongolia, 12 September 2007).

193 *Resolution of the State Great Hural* (Mongolia), Parliamentary Resolution No 54, 15 June 2006 [Raoul Wallenberg Institute of Human Rights and Humanitarian Law trans] (copy on file with author).

194 Interview with J Byambaa, Professor, School of Law, National University of Mongolia (Ulaanbaatar, Mongolia, 24 September 2007).

195 Interview with Galdaa, Head of the Investigation Office of the General Prosecutor's Office of Mongolia (Ulaanbaatar, Mongolia, 5 December 2006).

and conditions.¹⁹⁶ Government departments also made changes to policy, training and methods of dealing with the general public.¹⁹⁷ The Mongolian Supreme Court, acting on a draft presented to it by the Commission, exercised its power to make declarations on the meaning of the law. The Court issued a resolution extending the criminal compensation law to victims of torture.¹⁹⁸ NGO experts reported an increase in public awareness both about torture and the Commission itself.¹⁹⁹

The Mongolian Commission's National Inquiry succeeded in putting the issue of torture firmly on the national agenda. Nevertheless, subsequent political events demonstrate how fragile progress can be. In July 2008, riots followed a general election in Mongolia.²⁰⁰ Violence in the streets ensued, and NGOs documented many cases of human rights violations, particularly in relation to those detained, where evidence of torture was manifest.²⁰¹ Following a visit to a detention centre, the then Chair of the Commission (a new government appointee installed following the National Inquiry on Torture) publicly stated that no human rights violations had occurred,²⁰² a fact contradicted even by other Human Rights Commissioners.²⁰³ According to the Asian NGOs Network on National Human Rights Institutions, '[a]s a result, Mongolian civil society ... lost its trust in the [Mongolian Commission] and [was] no longer willing to cooperate with it'.²⁰⁴

These events powerfully demonstrate how quickly an NHRI can lose its credibility when it fails to exercise its mandate to protect and promote human

196 Court Decision Enforcement Agency Mongolia, *The Creation and Renovation in the Frame of an Activity of the General Executive Department of Court Decision: The Construction – Historic Event: Process and Results* (2007); Interview with Damdintseren, Vice-Chief, Court Decision Enforcement Agency, Darkhan-Uul (Darkhan-Uul, Mongolia, 13 September 2007).

197 Interview with L Bold, Assistant Prosecutor of the General Prosecutor of Mongolia and Chief of the Supervision Department over Investigation (Ulaanbaatar, Mongolia, 13 December 2006); Interview with Baasan Agvaan, Senior Investigator, Police Colonel, Mongolian National Police Agency Criminal Case Registration Department (Ulaanbaatar, Mongolia, 14 December 2006).

198 *Interpretation of Some Articles of Criminal Procedural Code and Civil Code with Regard to Compensation for Harm Caused by Illegal Actions by Inquiry Officers, Investigators, Prosecutors and Judges During Criminal Proceedings*, Resolution No 45, 30 October 2006 (Supreme Court of Mongolia) [Raoul Wallenberg Institute of Human Rights and Humanitarian Law trans] (copy on file with author); Interview with Baatsaikhan, Judge, Head of the Criminal Division, Supreme Court of Mongolia (Ulaanbaatar, Mongolia, 12 December 2006).

199 Interview with Altantuya Batdorj Sarta-Uul, Executive Director, Amnesty International Mongolia (Ulaanbaatar, Mongolia, 30 November 2006).

200 See, eg, Jim Yardley, 'Mongolia Enforces Martial Law in Capital amid Political Unrest', *New York Times* (online), 3 July 2008 <http://www.nytimes.com/2008/07/03/world/asia/03mongolia.html?_r=0>; B Bulgamaa, 'Human Rights Seriously Violated', *The UB Post* (Ulaanbaatar, Mongolia), 9 July 2008.

201 See, eg, Asian NGOs Network on National Human Rights Institutions (ANNI), *2009 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia* (FORUM-ASIA, 2009) 14 ('2009 ANNI Report'); B Bulgamaa, 'NGOs Claim Mongolian Government Violating Human Rights', *The UB Post* (Ulaanbaatar), 4 December 2008.

202 *2009 ANNI Report*, above n 201, 14.

203 Interview with Oyunchimeg, Commissioner, National Human Rights Commission of Mongolia (Amman, Jordan, 5 September 2009).

204 *2009 ANNI Report*, above n 201, 135.

rights, particularly when it is an issue that the Commission has brought to national attention through an inquiry. In subsequent years, under new leadership, the Mongolian Commission has worked hard to re-establish its reputation and re-engage disaffected stakeholders,²⁰⁵ including specific work following up its National Inquiry on Torture. For example, in 2013, the Commission collaborated with the Association for the Prevention of Torture and the Asia Pacific Forum to conduct training for Commission staff, as well as over 100 law enforcement officials, social workers, psychiatrists, and teachers.²⁰⁶ Additionally, the Commission signed a new memorandum of understanding with the law enforcement and intelligence agencies on eliminating torture. While significant progress is claimed since the first cross-agency plan implemented after the National Inquiry, the memorandum acknowledges the work these agencies need to do to prevent torture from continuing to occur.²⁰⁷ To that end, progress on torture prevention is ongoing. In February 2015, following extensive advocacy,²⁰⁸ Mongolia ratified the *Optional Protocol to the Convention against Torture*. It is likely that the Mongolian Commission will be designated as the required National Preventive Mechanism.

National inquiries conducted by NHRIs have the potential to contribute to human rights change. As the experiences of the Australian and Mongolian Commissions show, national inquiries create spaces for the state and other actors to be held to account. National inquiries document wrongs, start dialogues and provide platforms for long-term change to be pursued. Inquiries also result in demonstrable immediate change: laws and policies are amended, government agencies coordinate responses, money is allocated for structural improvements and the implementation of new programs, and attitudes are changed through targeted training and awareness programs.

However, the change created by national inquiries can be confronting. Despite the fact that a state has chosen to restrain its power by the creation of a new institution with the fundamental purpose of holding government and other actors to account for human rights violations,²⁰⁹ when faced with the reality that NHRIs, particularly through the impact of their national inquiries, may in fact be a powerful check on state power, states have sought to limit NHRIs' influence. Following national inquiries, governments have sought to discredit NHRIs,

205 Asian NGO Network on National Human Rights Institutions (ANNI), *2014 ANNI Report on the Performance and Establishment of National Human Rights Institutions in Asia* (FORUM-ASIA, 2014) 182; Interview with Narantuya Ganbat, former Staff Director, National Human Rights Commission of Mongolia (Melbourne, 19 February 2014).

206 National Human Rights Commission of Mongolia, *NHRCM Has Reported about Its Activities Taken Last Month* (30 November 2013) <<http://mn-nhrc.org/eng/main3/22/92-nhrcm-has-reported-about-its-activities-taken-last-month.html>>.

207 Ibid.

208 Association for the Prevention of Torture, *Mongolia – OPCAT Ratification* <http://www.ap.t.ch/en/opcat_pages/opcat-ratification-42/>.

209 Cardenas argues that in democracies NHRIs are one horizontal accountability mechanism; ie, as a state agency, they have the power to regulate or act as a check on other state actors: Cardenas, *Chains of Justice*, above n 15, 6.

meddle with the independence of their members and defund them.²¹⁰ It is at these crucial junctures that the independence and integrity of NHRIs must be safeguarded.

V SAFEGUARDING THE INDEPENDENCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS

In the wake of the Forgotten Children National Inquiry, Australia's Attorney-General was censured by the Senate for his conduct towards Gillian Triggs and the Australian Human Rights Commission.²¹¹ In defending himself on the floor of Parliament, the Attorney-General called into question the nature of the independence which the Australian Human Rights Commission enjoys. He did this in two key ways. First, in reiterating his loss of confidence in Triggs' ability to provide nonpartisan leadership of the Commission, he argued that '[n]o institution of the executive government should be beyond criticism and beyond scrutiny'.²¹² It is unquestionable that NHRIs must be held accountable. Smith argues that NHRIs are open to multiple sites of accountability.²¹³ She contends that these accountabilities are "downwards" to their partners, beneficiaries, staff, and supporters; and "upwards": to their funders, parliament, and host governments'.²¹⁴ However, that accountability must rest on the NHRI's mandate: has it sought to fulfil its responsibility to promote and protect human rights? Had the Government held valid concerns about the President's stewardship of the Commission's mandate, it could have legitimately raised them. Absent

210 There are many examples beyond the Australian context where this has occurred. On independence, accountability and examples of state interference, see Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 *Human Rights Quarterly* 904. In February 2015, speaking to a censure motion against the Attorney-General, Senator Christine Milne catalogued the ways in which the current Government has sought to neuter the Australian Human Rights Commission:

This government's attack on the Human Rights Commission started virtually the day after it was elected. If you go through the period of time from the election in 2013 until now, you find endless attacks on the Human Rights Commission. You find it there in the denial of access to Nauru and Manus Island detention facilities. You see it when Professor Triggs stood up on section 18C of the *Racial Discrimination Act* and was vilified ... You also saw it with the refusal to reappoint the Disability Discrimination Commissioner. We have seen it with the funding cuts to the commission. And, of course, we have seen it in the children in detention inquiry.

Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 731 (Christine Milne).

For further examples, see above n 37.

211 Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 719 ff (Penny Wong).

212 Ibid 743–4 (George Brandis, Attorney-General).

213 Smith, above n 210, 937–44.

214 Ibid 906. I have argued elsewhere that these accountabilities have shifted and extended, first, beyond the state to the ICC, particularly through the strengthened accreditation process, and secondly, as NHRIs sanction and engage with other non-state actors such as business enterprises, where sector legitimacy is sought, but independence must be maintained: Brodie, 'Progressing Norm Socialisation', above n 28, 161; Brodie, 'Pushing the Boundaries', above n 51, 248–9.

evidence indicating misconduct or failure to exercise her statutory duties,²¹⁵ the Government instead launched a personal attack.²¹⁶ In a joint statement, the Presidents of the Australian Bar Association and the Law Council of Australia characterised the Government's personal criticisms as 'an attack upon the independence and integrity of the Commission ... undermin[ing] confidence in our system of justice and human rights protection'.²¹⁷ The Attorney-General rejected the suggestion that he or the Government had undermined the independence and integrity of the Commission, and his argument rested on the second way he sought to define the nature of the Commission's independence:

[There is] an elementary constitutional principle that an agency of the executive government is not a court and its members are not entitled to the protections from public scrutiny that judges quite properly are. ... If Senator Wong is right [that the Commission should be treated as a court] ... there could be no criticism of the leadership of any quasi-independent statutory agency. I use the term 'quasi-independent' because it is plain from the *Human Rights Commission Act* that it is not ... absolutely independent.²¹⁸

By implication, the Attorney-General asserted that because the Commission is not a court, it therefore must enjoy something less than full independence. During the Senate Committee hearings he explained his view that the Commission was subject to his direction:

You have read the statute yourself, Senator Wright, so you would know that there are certain features of the Human Rights Commission that make it perfectly plain that it is not independent of the executive government for all purposes – most obviously section 20, under which the commission is subject to ministerial direction.²¹⁹

215 The *Australian Human Rights Commission Act 1986* (Cth) s 41(1) provides that '[t]he Governor-General may terminate the appointment of a member by reason of misbehaviour or physical or mental incapacity'. Section 41(2) provides a number of other grounds for termination including bankruptcy, non-approved paid employment, absence, and non-disclosure of interests. Under s 8A(1), the Governor-General is responsible for the appointment of the President of the Commission. While further analysis of the appointment and removal procedures for NHRI members is outside the scope of this article, these mechanisms are crucial to ensuring the independence of NHRIs. For a discussion on independence and detailed analysis of the methods and criteria of appointment and termination for NHRIs in the Asia Pacific, see Burdekin, *National Human Rights Institutions in the Asia-Pacific Region*, above n 13, 43–4, 49–59.

216 The views articulated by the Government were supported by numerous reports in *The Australian* newspaper which continues to call for Triggs' resignation: see, eg, Chris Merritt, 'Gillian Triggs Must Know the Errors That Have Made Her Position Untenable', *The Australian* (online), 27 February 2015 <<http://www.theaustralian.com.au/business/opinion/gillian-triggs-must-know-errors-that-made-her-position-untenable/story-e6frg9uf-1227240583208>>.

217 Australian Bar Association and Law Council of Australia, 'Personal Attacks on Human Rights Commissioner Alarming Say the Legal Profession's Leaders' (Media Release, 14 February 2015) <http://www.lawcouncil.asn.au/lawcouncil/images/1505_--_Personal_attacks_on_Human_Rights_Commissioner_alarm_legal_profession_leaders_-_joint_statement_-_14_February_2015.pdf>.

218 Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 744 (George Brandis, Attorney-General). See also George Brandis, 'Human Rights Commission and Gillian Triggs Not above Reproach' *The Australian* (online), 27 February 2015 <<http://www.theaustralian.com.au/opinion/human-rights-commission-and-gillian-triggs-not-above-reproach/story-e6frg6zo-1227240618931>>.

219 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 59 (George Brandis, Attorney-General).

Section 20(1) of the *Australian Human Rights Commission Act 1986* (Cth) empowers the Minister to request that the Commission exercise its inquiry functions. However, this ministerial direction is subject to section 20(2), under which the Commission ‘may decide not to inquire into an act or practice’ in a range of circumstances provided for in the Act.²²⁰ Previous Attorneys-General have at times relied on this provision to direct the Commission to conduct national inquiries.²²¹ However, this section of the Act can hardly diminish the Commission’s claims to independence, particularly because the Commission may, even where there has been a ministerial direction, decide not to inquire if, among other things, it is satisfied there are no violations of human rights.²²² The justification put forward by Attorney-General Brandis for the Government’s actions, namely one based on an interpretation limiting the Australian Human Rights Commission’s independence, has been roundly rejected by the majority of the Senate,²²³ the Commission,²²⁴ former

220 *Australian Human Rights Commission Act 1986* (Cth) s 20:

Performance of functions relating to human rights

- (1) Subject to subsection (2), the Commission shall perform the functions referred to in paragraph 11(1)(f) when:
 - (a) the Commission is requested to do so by the Minister; or
 - (b) a complaint is made in writing to the Commission, by or on behalf of one or more persons aggrieved by an act or practice, alleging that the act or practice is inconsistent with or contrary to any human right; or
 - (c) it appears to the Commission to be desirable to do so.
- (2) The Commission may decide not to inquire into an act or practice, or, if the Commission has commenced to inquire into an act or practice, may decide not to continue to inquire into the act or practice, if
 - (a) the Commission is satisfied that the act or practice is not inconsistent with or contrary to any human right; or
 - (b) the Commission is satisfied that the person aggrieved by the act or practice does not want the Commission to inquire, or to continue to inquire, into the act or practice ...

221 See, eg, *Seen and Heard Inquiry Report*, above n 137; *Bringing Them Home Report*, above n 10.

222 Eg, the first Federal Human Rights Commissioner, Brian Burdekin, refused a request made by the Attorney-General to conduct a national inquiry into aboriginal deaths in custody, first, because the Commission did not have adequate resources to conduct such an inquiry thoroughly, and secondly, because the Government wanted to write the terms of reference: Interview with Brian Burdekin (Phone Interview, 23 April 2015). Ultimately, the issue became the subject of a full royal commission: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

223 Commonwealth, *Parliamentary Debates*, Senate, 2 March 2015, 719 ff (Penny Wong).

224 Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 24 February 2015, 23 (Penny Wong and Gillian Triggs, President, Australian Human Rights Commission):

Senator WONG: Does that remain your view – that a resignation at the Attorney’s request would impinge the independence of the commission?

Prof Triggs: Yes, I think it would. It is far more than me that is at risk here. It is the integrity and future independence of a very important statutory commission in Australia – one that has an A status within the *Paris [P]rinciples* in the United Nations. Were that status to be reduced in any way – that independence to be threatened – that would not only threaten the very important role that we play in Australia but it would threaten the capacity to perform at the A status level within the United Nations system and regionally.

commissioners,²²⁵ the legal profession,²²⁶ prominent Australians,²²⁷ academics,²²⁸ and by the ICC,²²⁹ which is responsible for the Commission's international accreditation. In an open letter to the Australian Prime Minister, the Chairperson of the ICC observed:

These public attacks seek to call into question the independence of the office which Professor Triggs holds and cause harm to her professional integrity. It further more [sic] undermines and intimidates the statutorily granted independence that is provided to the country's principal human rights body.²³⁰

225 The first Federal Human Rights Commissioner, Brian Burdekin, publicly commented: 'To be honest, I am deeply concerned that the Attorney-General we have at the minute simply doesn't understand what the remit of the Human Rights Commission is': AM, 'Gillian Triggs: Brian Burdekin Slams "Disgraceful" Attacks by Tony Abbott and George Brandis on Human Rights Commission President', *ABC News* (online), 28 February 2015 <<http://www.abc.net.au/news/2015-02-28/gillian-triggs-burdekin-says-abbott-brandis-made-political-error/6270658>>.

226 Australian Bar Association and Law Council of Australia, above n 217.

227 Xavier Smerdon, 'Australian Leaders Slam Abbott, Defend Gillian Triggs', *Pro Bono Australia News* (online), 20 February 2015 <<http://www.probonoaustralia.com.au/news/2015/02/australian-leaders-slam-abbott-defend-gillian-triggs#sthash.u9MDPPMb.dpuf>> (open letter signed by 50 prominent Australians, reprinted in full in article):

Vibrant and fair democracies rely on independent institutions like the Human Rights Commission to inform them when things go wrong, and what needs to change to ensure protections under international law. The role of the Australian Human Rights Commission is to give voice to the otherwise voiceless and most vulnerable in our society, and to ensure our human rights obligations are met. This is Professor Triggs' responsibility, and she has been scrupulous in meeting it.

228 Meade, above n 82 (open letter signed by 50 academics, reprinted in full in the article):

A well-functioning democracy requires that the executive respect the work of independent public institutions established by parliament to perform specific functions even if it does not agree with specific positions adopted by them. Where this independence is threatened by politicised attacks on the office holder, our democratic system is jeopardised.

Prior to the release of the report, the Government, including the Prime Minister, had engaged in 'unusually fierce criticism' of the President of the Commission for her recommendations regarding the continued immigration detention of Mr Basikbasik. Senior academics in human rights law wrote in defence of the President, including specifically on the Commission's independence: John Watson, 'Legal Scholars' Statement in Support of Gillian Triggs', *The Conversation* (online), 20 January 2015 <<https://theconversation.com/legal-scholars-statement-in-support-of-gillian-triggs-36476>> (open letter signed by 25 academics, reprinted in full in article):

Independent public office-holders are an important part of modern democratic societies. Their task is to ensure accountability for abuses of power by government. Their capacity to perform this role depends on their independence and ability to act impartially. Independence and impartiality are undermined when a political leader publicly attacks holders of public office and when the media presents inaccurate accounts of the work of public institutions.

See also Ben Saul, 'Attacks on Commission Unbefitting Our Government', *The Drum* (online), 16 February 2015 <<http://www.abc.net.au/news/2015-02-16/saul-attacks-on-commission-unbefitting-our-government/6115078>>:

If anyone should be seriously questioning their judgment and position, it is the Attorney-General. By pressuring Triggs to resign, on grounds not recognised in the Commission's statute, Senator Brandis sought to improperly interfere with the tenure of an independent statutory officer holder.

229 Letter from Mabelde Lourencia Mushwana, Chairperson of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights to Tony Abbott, Prime Minister of Australia, 23 February 2015 <<http://nhri.ohchr.org/EN/News/Documents/The%20Prime%20Minister%20of%20Australia.pdf>>.

230 Ibid.

In addition, the President of the United Nations Human Rights Council, Joachim R  cker, addressing the ICC's Annual Meeting in March 2015, expressed great concern about the recent reports of reprisals against NHRIs. He noted:

NHRIs and their respective members and staff should not face any form of reprisal or intimidation, including political pressure, physical intimidation, harassment or unjustifiable budgetary limitations, as a result of activities undertaken in accordance with their respective mandates.²³¹

This international condemnation, joining the chorus of domestic support for the Australian Human Rights Commission, is indicative of the credibility and respect Australia's NHRI commands and the near universal view that its independence has been threatened. The executive's response to the Commission's National Inquiry may belie the political threat this Government faces.²³² However, it also illustrates the subtle transformative effect NHRIs have in restraining the power of the state. Cardenas argues that '[b]y offering a critique of the state from within the state, national commissions are contributing to a noticeable if limited transformation of sovereignty'.²³³ On this view, national institutions contribute to a new domestic power dynamic. Following the release of the *Forgotten Children Report*, the Government, through the Attorney-General, has been quick to reassert that the Australian Commission is an executive agency under its direction. However, expert and popular opinion illustrates that, in performing its role as an accountability institution, the Human Rights Commission has 'create[d] a social space for public deliberation over wrongdoing'.²³⁴ This space, etched out in our democratic system, is clearly not one which Australians are willing to cede back to the state.

VI CONCLUSION

States embraced NHRIs, the evidence suggests, in the desire to localise and maintain control over how human rights standards are implemented.²³⁵ However, the creation of new accountability institutions has driven forward a gradual process of the internalisation of human rights standards, as states have been forced to engage, defend and ultimately accommodate human rights claims. National inquiries have been a crucial part of this accountability process:

231 Asia Pacific Forum, *Reprisals against NHRIs 'Unacceptable'* (23 March 2015) <<http://www.asiapacificforum.net/carousel/news/reprisals-against-nhris-unacceptable>>.

232 Government attacks on the Australian Human Rights Commission and its President have continued unabated. These ongoing attempts to discredit the Commission have been condemned: Michael Gordon, 'Revealed: How the UN Told Abbott Government To Back Off on Gillian Triggs', *The Age* (online), 9 June 2015 <<http://www.theage.com.au/federal-politics/political-news/revealed-how-the-un-told-abbott-government-to-back-off-on-gillian-triggs-20150609-ghk224.html>>; Daniel Hurst, 'Coalition Accused of Orchestrated Campaign To "Destroy" Gillian Triggs', *The Guardian* (online), 9 June 2015 <<http://www.theguardian.com/australia-news/2015/jun/09/coalition-accused-of-orchestrated-campaign-to-destroy-gillian-triggs>>.

233 Cardenas, 'National Human Rights Commissions in Asia', above n 29, 42.

234 Cardenas, *Chains of Justice*, above n 15, 317.

235 Ibid.

documenting wrongdoing, seeking remediation for violations, and aiming to facilitate the prevention of future harm.²³⁶

Australia's lead role in the historical development of the national inquiry strategy paved the way for NHRIs to creatively interpret their mandate, functions and powers in order to conduct wide-reaching inquiries into systemic human rights violations. *Paris Principles*-compliant NHRIs, even in the absence of specific inquiry powers, can and should interpret their promotion and protection of human rights mandate to convene and conduct national inquiries. The experiences of NHRIs in the Asia Pacific clearly evidence the positive and often immediate impact of national inquiries, as well as their long-term effect on the incremental attainment of progressive human rights change.

National inquiries conducted by NHRIs encourage participation in holding governments to account: they are public, relational and change-oriented. It is the same level of public participation that protects NHRIs when they are faced with political attempts to undermine their independence and integrity: NHRIs must rely on a hard-won constituency prepared to defend the credibility of the institution and its work. National inquiries conducted by an NHRI tell us uncomfortable truths about ourselves and our society. We must defend their independence to do so.

236 Cardenas considers there to be three stages to the accountability offered by NHRIs: *documentation* – ‘the means by which “accounts” of wrongdoing are collected, transcribed, represented, and disseminated’; *remediation* – the ‘accountability institution’s response to wrongdoing’; and *prevention* – ‘taking steps to address the likelihood of future wrongdoing’: *ibid* 318.