A SUMMARY OF PUBLIC HEALTH LAWS OF RELEVANCE TO REMOTE AND ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES

National Public Health Partnership

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Further copies: National Public Health Partnership
12/589 Collins St, Melbourne 3000, Victoria, Australia
Tel: 03 9616 1515
Fax: 03 9616 1500
Email: nphp@dhs.vic.gov.au
Website: www.nphp.gov.au

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List of Abbreviations

ACTEW -	ACT Energy and Water
ALRA -	Aboriginal Land Rights (Northern Territory) Act
ALT -	Aboriginal Land Trust (Western Australia)
ANZECC -	Australian and New Zealand Environment and Conservation Council
ARMCANZ -	Agricultural and Resource Management Council of Australia and New Zealand
ATSIC -	Aboriginal and Torres Strait Islander Commission
ATSIIP -	Queensland Aboriginal and Torres Strait Islander Infrastructure Program
DOGIT -	Deed of Grant in Trust (Queensland)
EHO -	Environmental Health Officer
HAHU -	Heads of Aboriginal Health Units
HDWA -	Health Department of Western Australia
IDAS -	Integrated Development Assessment (Queensland)
IHANT -	Indigenous Housing Authority of the Northern Territory
LALC -	Local Aboriginal Land Councils (New South Wales)
LRWG -	NPHP Legislative Reform Working Group
MAV -	Municipal Association of Victoria
NACCHO -	National Aboriginal Community Controlled Health Organisation
NAHS -	National Aboriginal Health Strategy
NHMRC -	National Health and Medical Research Council
NPHP -	National Public Health Partnership
NPHPG -	NPHP Group
PAWA -	Power and Water Authority (Northern Territory)
PHLIHP -	Public Health Laws and Indigenous Health Project
THS -	Territory Health Services
WAWA -	Water Authority of Western Australia

Executive Summary

This report for the National Public Health Partnership describes legislation in Australia which relates to water, waste and hazards in the built environment- public health issues of fundamental relevance to Aboriginal and Torres Strait Islander communities in remote areas.

The report indicates application and enforcement issues in relation to remote communities in each jurisdiction and identifies some positive local initiatives taken in each State or Territory.

Chapter 13 of the Report is particularly significant in highlighting the following **Key Issues in Application and Enforcement.** **Page 65**

- The lack of clarity in some jurisdictions as to the application of public health and related laws to remote communities and the responsibility for monitoring standards and granting of necessary approval, particularly where remote communities are on Crown land or land vested in instrumentalities of the Crown.
- The lack of clarity as to the role of local government in relation to remote communities in some cases.
- The role of remote area guidelines in filling gaps left by the laws, and their use as conditions of funding.
- The opportunities being created by modernisation of public health laws to clarify the application of public health and related laws to remote communities.
- The need for greater clarity with regard to the powers and responsibilities of Aboriginal Community Councils in relation to local government type functions and maintaining public health standards, together with appropriate responses for these functions.

It also makes the following conclusions with respect to each jurisdiction.

National Standards and Initiatives **Page 12**

There are a number of national initiatives in terms of guidelines, codes, frameworks and funding which have significant influence in the areas of water, waste and the built environment and in meeting the needs of remote communities in those areas.

Commonwealth **Page 18**

While the Commonwealth does not have public health laws dealing directly with water, waste and the built environment, it does have a number of important framework laws which assist in meeting the needs of remote communities.

Northern Territory **Page 22**

Priorities for the Northern Territory include the development of modern public health laws, which bind the Crown, and hence clearly apply to Aboriginal land. Challenges remain to ensure building works for communities meet proper standards. This includes

addressing issues around builders' registration and indemnity requirements that lend greater protection to remote communities. It may also require reconsideration of the application of the Building Act. However, the Environmental Health Standards for Remote Communities in the Northern Territory is a significant document in bringing both mainstream and special standards to remote communities.

Western Australia **Page 30**

There have been longstanding efforts to clarify the application of public health laws to remote communities in Western Australia, and the role of local government in relation to those communities. However, there are several issues that create uncertainties and anomalies in relation to the application of relevant public health and related legislation to remote communities. They include:

- except where specifically expressed as binding the Crown, the *Health Act 1911* is currently held not to apply to land held by the Aboriginal Lands Trust, which is an agency or instrumentality of the Crown. This throws doubt over the role of local government in enforcing the Act with respect to most Aboriginal communities;
- land held by the ALT is not rateable under the *Local Government Act* and funding by the Grants Commission to local government for remote areas is seen as insufficient without top up from HDWA;
- building controls and approval processes also do not apply to most Aboriginal communities, because the buildings are in most cases owned or controlled by the ALT, and the Crown is not expressly bound under the *Building Regulations.*
- portions of the Shire of Derby-West Kimberley and the Shire of Halls Creek (with large Aboriginal communities) are also excluded from buildings requirements by order of the Governor.

The *Health Act* and building laws need to be amended to resolve the situation.

Queensland **Page 37**

Priorities in Queensland include a modern *Public Health Act* which clarifies the role of local government in public health, responsibility for monitoring water quality, and the application of the Act to all people, including remote communities.

The powers and responsibilities of Community Councils of DOGIT land under the *Health Act*, the *Building Act*, and the *Integrated Planning Act* need to be clarified. Community Councils also need increased clarity as to the extent of their powers and adequately resourced to carry out powers vested in them.

If it is inappropriate for the Community Councils to have the powers of local government, it should be made clear that mainstream local government should exercise these powers. At this stage the role of mainstream local government in relation to DOGIT communities would seem problematic.

South Australia **Page 43**

Most remote communities in SA live outside council areas, which means a challenge for the provision of services and the monitoring and enforcement of standards and guidelines. South Australian legislation is clear as to the application of laws and the administrative processes to be followed by remote communities and those assisting them. There has also been cooperation between government and local communities

which has influenced national policy relating to health infrastructure. However, there are some problems created by the fact that the certificate of occupancy requirements of the *Development Act 1993* do not apply to most remote communities, because they are outside council areas. In addition, there is a need for greater clarity (in practice) with respect to responsibility for monitoring water quality in remote communities.

New South Wales **Page 48**

New South Wales has modern public health and related legislation which applies to its remote communities. This legislation includes special Safety of Drinking Water requirements which would be a useful model for other States.

However, in practice, there seems to be a need to clarify the role of local government in relation to remote communities, and to understand the barriers, including rateability, to their involvement.

There are also complex provisions relating to development (including building works) and formal legal advice would be useful to clarify their application to remote communities around the State. This is particularly the case when work is done in the name of a Crown agency or instrumentality.

Victoria **Page 53**

Victoria does not have the same structural application and enforcement issues as other States. This is not to say that its Aboriginal communities, whether discrete or otherwise, do not have environmental or other health needs, which require addressing.

Victoria's plans to adopt the most relevant sections of the *Australian Drinking Water Guidelines 1996* is an important initiative and model for elsewhere. The proposed Local Government Indigenous Network could also be useful in other States.

Tasmania **Page 57**

It is only recently that Tasmania has recognised land claims of its Aboriginal people. However, its modern public health laws and comprehensive local government structure, do assist in ensuring that mainstream standards apply to its remote communities.

ACT **Page 61**

Through somewhat complex arrangements, the ACT has extensive provisions dealing with water, waste and the built environment which apply to the Wreck Bay Aboriginal Community at Jervis Bay, while the Federal Government ensures service delivery.

1. Introduction and Background

1.1 PURPOSE AND OBJECTIVES

This report has been prepared to assist the work of the National Public Health Partnership (NPHP) Group and its Legislation Reform Working Group (LRWG). The intention of this project is to map or describe legislation at National, State/Territory and Local Government levels which relates to water, waste, and hazards in the built environment - public health issues of fundamental relevance to remote communities and specifically, Aboriginal and Torres Strait Islander communities in remote areas (referred to collectively in this report as remote communities).

It is intended that the report will inform work the Partnership undertakes in the application and enforcement of public health laws and the development of best practice models. It will highlight any legislation of specific relevance or reference in these areas to remote communities.

1.2 SCOPE

The scope of the project is to summarise the legislative framework at the National, State/Territory and Local Government levels in all relevant jurisdictions relating to water, waste, and hazards in the built environment, and highlight provisions of specific relevance or reference to remote communities.

In summarising the legislative framework and identifying relevant legislation, the project will be guided by:

- The entitlements of remote communities to local health authority services;
- The responsibilities of local health authorities, Federal and State governments and agencies to remote communities.

It will indicate relevant issues and initiatives, identified through examination of the relevant legislation and during consultation, relating to the application and enforcement of these laws in relation to these remote communities. It will also indicate where further investigation or analysis is required.

1.3 BACKGROUND

The project has been undertaken following:

- the Bidmeade/Reynolds report in 1997 which identified the need to consider a national review of the application of public and environmental health laws to Aboriginal and Torres Strait Islander communities to summarise both the problems and the responses taken in different jurisdictions, particularly to identify best practice models;[1]

[1] Public Health Law in Australia; Its current state and future directions, at p.76

- strong support by the National Aboriginal Community Controlled Health Organisation (NACCHO) and the enHealth Council for such work, including basic information on which public health laws are relevant to Aboriginal and Torres Strait Islander communities;

- the broader Public Health Laws and Indigenous Health Project (PHLIHP), with Queensland as the lead agency, which is examining both determinants of priority health issues of Aboriginal and Torres Strait Islander communities and the impact of laws in dealing with these issues; and

- recognition by the National Public Health Partnership Group that as a complementary activity to PHLIHP, LRWG should undertake this national mapping exercise.

Preparation of this report has involved identification of relevant legislation in each jurisdiction, and issues and initiatives, both through a document/ literature search and consultation with jurisdictional representatives and other stakeholders. In particular, consultation has included LRWG representatives, and both public health and Aboriginal and Torres Strait Islander health administrators, including the Chairs of both NACCHO and the Heads of Aboriginal Health Units (HAHU), as well as the Aboriginal and Torres Strait Islander Commission (ATSIC). There has also been particular liaison with the PHLIHP project.

1.4 Aims of Report

The report brings together the information obtained through the literature review and the consultation process and attempts to:

- indicate some of the concerns facing remote communities in the areas of water, waste and the built environment in the context of international rights of relevance to these areas;
- identify relevant national standards and initiatives;
- outline the law relating to water, waste and the built environment in each State or Territory, indicating how national standards or guidelines come into play, roles of government agencies, including local government, and mechanisms for ensuring standards are met (for example, monitoring water quality, approval of the installation of septic tanks, and building works approvals);
- briefly refer to relevant land holding arrangements for remote communities in each State or Territory;
- indicate application and enforcement issues in relation to remote communities in each jurisdiction; and
- identify some local initiatives taken in each State or Territory and referred to during consultation.

It has not been possible in the time available to cover all issues and initiatives but it is hoped that the report reflects the information obtained and provided, and indicates the major concerns.

One crucial issue worth mentioning at the outset relates to the issue of “binding the Crown”.

In several jurisdictions, remote communities are often located on Crown (Government) land, or on land which is held by an Aboriginal body, which is an agency or instrumentality of the Crown. Traditionally, legislation has not been expressed to 'bind the Crown' which leads to uncertainty about whether such legislation can be enforced against the 'Crown' or government agencies.

As is discussed frequently in this Report, this has raised uncertainties about the application of public health and other related laws, which do not expressly bind the Crown, to many remote communities. The issue can be resolved either by declaring that the public health and other related laws do bind the Crown, or by clarifying that the Aboriginal agency holding the land is not an agency of the Crown (as has been done in New South Wales and South Australia).

2. Context

The Federal Race Discrimination Commissioner in the 1994 report 'Water' looks at the provision of water and sanitation to remote communities from a human rights perspective[2]*. The report confirms that people's rights to water are contained within their right to adequate living conditions, adequate standards of living and satisfactory health, as contained in Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, Article 14(1) of the Convention on the Elimination of Discrimination against Women, and Article 5(e)(iv) of the Convention on the Elimination of Racial Discrimination.*[3]

The report went on to stress that these broad principles needed to be implemented in domestic law and practice and that achieving this, was not just a matter of technical comparisons, and top down special measures to reduce the differences.

The report recognises community control as a vital element in the effective provision of services and recommended the establishment of local Aboriginal and Torres Strait Islander service provision authorities to achieve this.[4]

In its 1999 Community Housing and Infrastructure Needs Survey, the ABS identified 1291 discrete Aboriginal and Torres Strait Islander communities – 1210 of those being geographically separate from other population centres.[5] (Generally speaking, this report uses "remote" in this sense of discrete and geographically separate.)

As NACCHO and later the National Environmental Health Strategy (1999) has indicated: "Some communities lack basic environmental health infrastructure, such as adequate sanitation, water supplies and appropriate housing. This is especially true for remote communities, in particular isolated indigenous communities"[6].

As the Environmental Health Strategy document goes on to state, in 1989, 54,000 Aboriginal and Torres Strait Islander people were served by reticulated water systems designed to supply less than 1000 people. Additionally, the capacity of water schemes provided to 19,000 people were insufficient to meet the reasonable water demands of their communities. A significant number of Aboriginal and Torres Strait Islander communities use water of a quality less than the accepted Australian standard. 17% (14,616) of people living in discrete communities rely on water which does not comply with National Health and Medical Research Council (NHMRC) guidelines on water quality.

In the case of housing, Aboriginal and Torres Strait Islander people are 20 times more likely to live in a house with four or more people per bedroom. According to the 1998 census, they made up 90% of all Australian 2-3 bedroom households that accommodate

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2 Federal Race Discrimination Commissioner 1994, Water, A Report on the Provisions of Water and Sanitation in remote Aboriginal and Torres Strait Islander Communities.

3 Ibid, at p.164

4 Ibid, at p.169

5 See p.1 and 11 thereof.

6 NACCHO Issues Paper: 'The National Public Health Partnership and its relevance to improving Aboriginal Health', 1999

12 people or more, even though they represent 2% of the population. It has been estimated that one-third of Aboriginal and Torres Strait Islander people are either homeless or living in inadequate conditions.

The enHealth Council sees the domestic environment (housing and overcrowding), adequate safe water and food supplies and waste disposal as priorities if the health of remote communities is to improve.[7]

The 1999 ABS Housing and Infrastructure Needs Survey further indicates that:

- of the 20,424 dwellings owned or managed by Aboriginal and Torres Strait Islander Housing organisations, 29% were reported as needing major repairs or replacement. Stock in discrete communities were more likely to be in need of major repairs or replacement (33%) than that in towns or other locations (18%);
- water samples from 34% of the 169 communities tested, failed at least once in the 12 months prior to the survey; and
- of the 348 communities with a reported population of 50 or more, 204 (59%) reported overflows or leakages of their sewerage system in the 12 months prior to the survey.[8]

The recent Health is Life report of the House of Representatives Standing Committee on Family and Community Affairs also noted that during the course of their Inquiry, the Committee visited many communities and found that with a few exceptions:

- a significant proportion of the housing stock was in poor repair, with people sometimes living in rough shelters, directly beside the shells of uninhabitable houses;
- roads connecting communities to other centres were generally basic and poorly maintained. They were often simply dirt tracks. Even the few sealed roads seen by the Committee were generally in poor repair;
- water services were of mixed standards, and in some communities visited were considered to be a source of illness, rather than any benefit to the community; and
- waste disposal was problematic. In one rural community the local town rubbish tip had been moved so that it was now sited above and beside the Aboriginal community housing area. In another remote community the rubbish tip was just on the outskirts of town so that rubbish was simply blown back around the town.

Although there are significant problems with infrastructure in urban areas, the problems observed by the Committee were most prevalent in rural and remote communities.[9]

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7 enHealth Council 1999, The National Environmental Health Strategy, Commonwealth of Australia, at p.24.

8 See chapter 3 of the ABS Survey.

9 House of Representatives Standing Committee on Family and Community Affairs May 2000, Health is Life, Report in the Inquiry into Indigenous Health, Canberra.

3 National Standards and Initiatives

National Legislation, Standards and Guidelines:

- *National Water Quality Management Strategy*
- *Australian Drinking Water Guidelines*
- *Guidelines for Water Quality Monitoring and Reporting*
- *Building Code of Australia*
- *National Framework to improve Indigenous Housing*

3.1 Introduction

There are a number of national initiatives of significance in the areas of water, waste and built environment, which are of relevance to remote communities.

3.2 Water and Waste

The Commonwealth has a National Water Quality Management Strategy, the development of which involves cooperation between NHMRC, the Australian and New Zealand Environment and Conservation Council (ANZECC), and the Agricultural and Resource Management Council of Australia and New Zealand (ARMCANZ).

The strategy includes a number of guideline documents including:

- the Australian Drinking Water Guidelines;
- the Guidelines for Water Quality Monitoring and Reporting;
- the Australian Water Quality Guidelines for Fresh and Marine Waters (which include Guidelines for Recreational Water Quality and Aesthetics);
- Guidelines for Sewerage Systems – Effluent Management; and
- Guidelines for Sewerage Systems – Reclaimed Water.

These guidelines aim to provide detailed information to assist regulatory authorities and service providers such as water authorities and councils on microbiological, chemical and aesthetic quality, monitoring and sampling.

They are not mandatory and State and Territory authorities use them to varying levels. In some cases, States have developed their own codes or guidelines, influenced by these national guidelines.

3.3 Building Code of Australia

The Building Code of Australia is the national code which regulations in most jurisdictions adopt for the purpose of setting classification, performance and construction requirements for building work. It classifies buildings from Class 1 to 10. Significant classifications for remote communities include Class 1 (dwelling houses and boarding houses, guest houses, hostels etc. in which not more than 12 persons would ordinarily be resident), and Class 10 (non-habitable buildings, including a private garage, carport, shed or the like).

The code contains performance provisions for:

- damp and weather proofing
- fire safety
- safe movement and access

- health and amenity

In the case of Class 1 buildings, the health and amenity provisions relate to:

- wet areas
- room height
- facilities
- light
- ventilation
- sound insulation

The objective in each is aimed at safeguarding the occupant from illness, injury or loss of amenity. Indeed, it is interesting to note the extent to which the code has such a health and amenity focus.

3.4 The National Framework to Improve Indigenous Housing

This is an initiative of critical significance to remote communities in the action areas of water, waste and hazards in the built environment.

In April 1997, Commonwealth, State and Territory Housing Ministers resolved to improve housing for Aboriginal and Torres Strait Islander people and agreed that such improvements could also produce environmental health benefits for them. The national framework is an outcome of the Housing Ministers' resolution.

The national framework consists of four elements:

1. National principles for the design, construction and maintenance of Indigenous housing;
2. State and Territory remote area building standards;
3. The National Indigenous Housing Guide;
4. Reviewing the national framework.

1) The National Principles

The national principles for the design, construction and maintenance of Indigenous housing focus on the key housing issues:

a) safety
b) health
c) quality control
d) sustainability

The principles aim to change attitudes to the provision of Indigenous housing – poor design and construction practices will no longer be tolerated; houses that are not safe or adversely affect people's health will not be accepted.

For all four principles, the following issues are required to be considered:

- housing design should be appropriate to the location and cultural and social requirements of the community;
- houses should be designed in accordance with the ways Indigenous people use their houses; and

- the quality of Indigenous housing in rural and remote areas should be not less than the standard applying to urban areas.

a) Safety

This principle provides that houses for Aboriginal and Torres Strait Islander people will be designed, constructed and maintained for safety.

It is intended that new and upgraded houses will be of a standard that ensures people's lives are not put at risk. Houses will:

- have properly installed electrical and gas connections and appliances;
- be connected to a potable (drinkable) water source;
- be built with approval, safe and non-toxic materials; and
- have properly designed and soundly constructed waste removal systems.

Emergency and cyclical maintenance programs are seen as critical for achieving safe houses for Indigenous people.

b) Health

It is intended that houses will be designed, constructed and maintained to support healthy living practices (in order of priority):

1. washing people, particularly children under five years of age;
2. washing clothes and bedding;
3. removing waste safely from the living area;
4. improving nutrition – the ability to store, prepare and cook food;
5. reducing crowding and the potential for the spread of infectious disease;
6. reducing negative contact between people and animals, vermin or insects;
7. reducing the negative impact of dust;
8. controlling the temperature of the living environment; and
9. reducing trauma (or minor injury) around the house and living environment.

Emergency and cyclical maintenance programs for houses are again seen as critical to enable people to carry out the nine healthy living practices.

c) Quality Control

This principle aims to ensure that quality control measures will be adopted in the design and construction of houses.

- Houses should be designed and constructed, and construction supervised, to minimum standards as set by the State and local government regulations based on the Building Code of Australia and State and Territory remote area building standards.
- Housing should be constructed under a properly established quality control system that is subject to periodic monitoring and evaluation.
- Building inspections should be conducted at various stages of construction to ensure quality control. Payment to contractors can be linked to inspection points. The involvement of local government in building inspections should be encouraged.

d) Sustainability

It is intended that houses will be designed and constructed for long-term functions and ease and economy of maintenance.

- Water, waste removal and electrical facilities and building fabric – 'health hardware' – should be of a quality that meets the rigours of remote locations and provides good amenity.
- In order to sustain houses – to keep them functional and habitable – they should be maintained regularly. Establishing emergency and cyclical maintenance programs should be a priority.
- Access to tradespeople for maintenance of health hardware should be taken into account at the design stage.
- Long-term maintenance requirements and costs should be included in initial housing design and life-cycle budgets.
- Health hardware should be selected on the basis of quality, effectiveness and efficiency in reducing running costs and keeping the safety and health benefits provided by houses affordable.
- Indigenous community housing organisations should have access to the appropriate equipment and training for routine maintenance of essential health and safety items.

2) State and Territory Remote Area Building Standards

It is intended that the national principles are supported by State and Territory remote area building standards, to be used in conjunction with other building guidelines, such as the Building Code of Australia, Australian Standards, State and Territory environmental health, building and planning legislation and local government building regulations.

Several states have developed remote area building standards - Queensland, Northern Territory, South Australia, Western Australia and New South Wales.

3) National Indigenous Housing Guide

A detailed practical guide focusing on health hardware components essential for safe, healthy and sustainable housing has also been developed to complement the principles and remote area standards.

4) Reviewing the Process

The framework assumes a regular review of the quality of new and upgraded houses and the efficacy of the framework, and the use of workshops for these purposes on a biennial basis.

3.5 The Funding Role of ATSIC – The National Aboriginal Health Strategy

ATSIC has a significant role in influencing compliance with environmental health standards particularly where the application of mainstream laws is not clear.

ATSIC is Australia's national policy-making and service delivery agency for Aboriginal and Torres Strait Islander people. Section 14 of the *Aboriginal and Torres Strait Islander Commission Act 1989* empowers the Commission to make grants or loans on such terms and conditions as it sees fit for the purpose of furthering the social economic or cultural development of Aboriginal persons or Torres Strait Islanders.

A major funding program of ATSIC is the Community Housing and Infrastructure Program, of which the National Aboriginal Health Strategy (NAHS) is a significant element. NAHS provides capital funding for housing and infrastructure to improve the standard of environmental health and living standards, particularly in rural and remote communities.

A 1994 evaluation of NAHS was critical of the implementation of this program. This led to a number of changes aimed at better coordination and outcomes, including outsourced program and project management to ensure professional assessment and monitoring of design and construction. This was done under the Health Infrastructure Priorities Projects (HIPP) Scheme. In 1996, the program was further refined to become State based rather than a nationally administered scheme. New monies are now allocated under the NAHS Environmental Program.

All States except Tasmania have a Contracted State Program Manager (CSPM) to manage the program in that State. Each project has a Project Manager selected by the community being funded, with the advice and assistance of the CSPM. There are three tenders called for. The community meets the likely project manager face to face. There is a detailed contract between the community and the Project Manager, under which the Project Manager is responsible, amongst other things, for the day-to-day implementation of the project, checking that technical standards are met and approvals of all relevant agencies are obtained, and providing adequate supervision and control of contractors to ensure proper construction.

The CSPM in turn monitors progress of the project and the performance of the Project Manager on behalf of ATSIC and the granted community. The contract will frequently require compliance with remote area guidelines.

Another crucial element of the contract pointed out during consultation is the requirement for insurance by the Project Manager and any subcontractors. This helps protect communities in the event that there are problems with construction work.

While no doubt problems still exist, it was suggested that this approach and similar ones taken by other agencies had improved the situation from 5 years ago.

3.6 Summary

As indicated, there are a number of national initiatives in terms of guidelines, codes, frameworks and funding which have significant influence in the areas of water, waste and the built environment and in meeting the needs of remote communities in those areas.

4. Commonwealth

Commonwealth Legislation, Standards & Guidelines:

- *National Environment Protection Council Act 1994*
- *Aboriginal and Torres Strait Islander Commission Act 1989*
- *Aboriginal Councils & Associations Act 1976*
- *Native Title Act 1993*
- *Aboriginal Land Rights (NT) Act 1976*
- *Jervis Bay Territory Acceptance Act 1915*
- *Aboriginal Land Grant (Jervis Bay Territory) Act 1986*
- *Aged Care Act 1997*
- *Housing Assistance Act 1996*

4.1 Introduction

The Commonwealth Constitution provides the Commonwealth with a list of some 39 specified areas of power. Among this list there is no specific 'public health' power other than the power to make laws with respect to quarantine. The States and Territories can make laws with respect to public health generally. As a result, public health law has been seen as largely a State and Territory responsibility with some uncertainty as to the legislative role of the Commonwealth in this area.

From the earliest years of federation, the Commonwealth has enacted significant public health legislation on issues of national importance such as quarantine; the importation of narcotic drugs; the importation, manufacture and sale of therapeutic goods; food safety; tobacco advertising; and, most recently, gene technology. A range of constitutional powers has been used to underpin this activity including the quarantine, external affairs, customs, trade and commerce and corporations powers. Since 1966 the Commonwealth has also had power to make laws with respect to the people of any race for whom it is deemed necessary to make special laws, and has used this power to legislate for Aboriginal and Torres Strait Islander people.

However, the Commonwealth has not generally had laws which deal specifically with water, waste and built environment issues. These are public health matters that have traditionally been dealt with by public health laws of the States, due to the Commonwealth's limited law making powers in relation to health.

While the responsibility for much of the day-to-day legislation in public health remains with the States and Territories, there is a continuing role for the Commonwealth in facilitating coordination and collaboration between the States, and in demonstrating leadership on issues of national significance – see the 'National Standards and Initiatives' section of this report, in this regard.

In addition to the type of legislation traditionally enforced by public health agencies (such as the 'core' public health acts in each State and Territory) there are also other laws which have a significant effect on public health outcomes but which are not so readily seen as public health laws. These laws are usually administered by other agencies (such as those relating to environmental protection, product safety, occupational health and safety) and can also be perceived to include laws for planning and land use, and laws relating to professional accreditation and regulation in the health sector.

In this context, the following Commonwealth legislation may be of relevance to the water, waste and built environment issues discussed in this report, including in relation

to issues of application and enforcement as discussed in the individual State and Territory sections.

4.2 National Environment Protection Council Act 1994

The National Environment Protection Council is empowered to develop national environment protection measures, including those relating to fresh water quality, and environmental impacts associated with hazardous wastes. Its standards are then adopted by the States and Territories in their environmental protection legislation pursuant to the Intergovernmental Agreement on the Environment.

4.3 Aboriginal and Torres Strait Islander Commission Act 1989

The importance of ATSIC has already been highlighted. As indicated, ATSIC derives its power to operate from the Aboriginal and Torres Strait Islander Commission Act 1989.

Section 14 of the Act empowers the Commission to make grants or loans on such terms and conditions as it sees fit for the purpose of furthering the social economic or cultural development of Aboriginal persons or Torres Strait Islanders. ATSIC also advises governments, advocates on behalf of Aboriginal and Torres Strait Islander people and monitors delivery of services by government agencies.

The Act also establishes a structure of Regional Councils which are having an increasing influence in ensuring Aboriginal communities receive services they need. Regional Councils formulate regional plans and make decisions on ATSIC funding for their areas. Their increasing role reflects the wishes of Aboriginal and Torres Strait Islanders for more say over their affairs. A 1999 ATSIC Discussion Paper, Regional Autonomy for Aboriginal and Torres Strait Islander Communities, proposes changes to the Act to oblige government bodies to cooperate with ATSIC Regional Councils in the performance of their service delivery functions.

4.4 Aboriginal Councils and Associations Act 1976

This Act provides for the establishment of Aboriginal Councils with functions such as services relating to housing, health, water, sewage, garbage collection and disposal and community amenities. It also provides for an Aboriginal association to apply for incorporation and act like a corporation, with rights to hold property and to sue and be sued, and so on.

4.5 Aged Care Act 1997

This Act deals with the provision of residential care services and community care grants to aged persons. It includes provision for people with special needs, including Aboriginal and Torres Strait Islander communities and people who live in rural and remote areas. One of the criteria for community care grants is whether the grant would assist people in remote areas, or Aboriginal and Torres Strait Islander communities.

The Act also provides for Accreditation Standards for the provision of residential care. Those standards in turn may deal with issues such as safe practices and the physical environment in which residential care may be provided.

The Commonwealth Government provides significant funding under this legislation to improve aged care services to Aboriginal communities. Funding is administered with appropriate involvement of Aboriginal Hostels Ltd., a significant agency involved in the provision of aged care services to older persons in Indigenous communities.

One particular focus is a strategy aimed at identifying aged care and disability service needs in the East Arnhem Region.

4.6 Housing Assistance Act 1996

The Commonwealth State Housing Agreement is an agreement authorised under this Act, between the Commonwealth and the States and Territories. The purpose of the Agreement is to provide funding to assist those whose needs for appropriate housing cannot be met by the private market.

This includes funding for Indigenous housing and in particular a specific Aboriginal Housing Rental Program. Funding under this program is directed towards construction and purchase of housing, providing essential health related infrastructure, maintenance and upgrading of housing stock, and funding of strategies to enhance the housing management capacity of Aboriginal communities (for example, training in asset and tenancy management).

4.7 Native Title Act 1993

This Act provides for native title to be recognised and protected in Australia.

As is discussed in this report, the basis on which land is held can be an issue in terms of the application and enforcement of public health legislation. In particular, where the agency holding the land is an instrumentality of the Crown, there can be doubts about the application of public health laws to it, unless the laws expressly bind the Crown.

Section 8 of the Native Title Act 1993 clarifies that this Act is not intended to affect the operation of any law of the State or Territory that is capable of operating with it concurrently.

This would seem to mean that public health and related State legislation will apply and be enforceable to maintain public health standards on native title land.

4.8 Aboriginal Land Rights (NT) Act 1976

As indicated in the chapter on Northern Territory, some 43% of land held by Aboriginal and Torres Strait Islanders in the Territory is land granted under the Commonwealth's Aboriginal Land Rights (Northern Territory) Act 1976. Sections 3A and 3B provide that the Act binds the Crown in right of the Commonwealth and of the Northern Territory, and that notwithstanding any law of the Northern Territory, the application of this Act in relation to Crown land extends to Crown land that is vested in the Northern Territory.

4.9 Jervis Bay Territory Acceptance Act 1915 Aboriginal Land Grant (Jervis Bay Territory) Act 1986

The 1915 Act provides for relevant ACT laws to apply to the Jervis Bay Territory. The 1986 Act gives to the Wreck Bay Aboriginal Community Council freehold title to land in the Jervis Bay Territory. It also gives to the Community Council responsibilities relating to the health needs of members of the community. The Commonwealth Government retains responsibilities for services to the Territory through arrangements with the ACT Government, the Shoalhaven City Council, and the Wreck Bay Aboriginal Community Council.

4.10 Summary

While the Commonwealth does not have public health laws dealing directly with water, waste and the built environment, it does have a number of important framework laws which assist in meeting the needs of remote communities.

5. Northern Territory

Northern Territory Legislation, Standards & Guidelines:

- *Public Health Act 1952 and Regulations*
- *Water Act*
- *Power and Water Authority Act 1987*
- *Waste Management and Pollution Control Act 1998*
- *Building Act and Regulations*
- *Local Government Act*
- *Environmental Health Standards for Remote Communities in the Northern Territory*
- *Water Supply and Sewerage Services Act 2000*

5.1 Introduction

The Northern Territory faces some unique challenges in meeting the environmental health needs of remote communities. It has the largest number of Aboriginal communities in Australia, it does not have a tradition of administration and enforcement of public health laws by local government, and at this stage, much of its public health legislation is outmoded. There is however, significant commitment to new public health laws, and to meeting needs through highly developed environmental health standards for remote communities.[10]

At present, the *Public Health Act 1952* provides a skeletal framework for regulations, under which the substantive law is to be found. It currently does not bind the Crown. The regulations include:

- *Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations;*
- *Public Health (Night Soil, Garbage, Cesspits, Wells and Water) Regulations; and*
- *Public Health (Nuisance Prevention) Regulations.*

The Act is under review.

5.2 Water

Relevant legislation includes the *Public Health Act 1952 and Regulations,* the *Water Act,* the *Power and Water Authority Act* 1987 and the recent *Water Supply and Sewerage Services Act 2000.*

Regulation 19 of the *Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations* protects against washing in or rubbishing the water supply system of the Territory. These Regulations also have a number of provisions to prevent mosquitoes breeding in tanks and other water supplies. Section 16 of the *Water Act* also provides controls over water pollution.

Section 73 of the *Water Act* enables the gazettal of quality standards in relation to water or class of water, although it seems that no particular standards have been specified for drinking water supplies.

The new *Water Supply and Sewerage Services Act 2000* will also regulate the water supply and sewerage services industries in the Northern Territory. The Act binds the Crown and also provides, under Section 45, that the Minister may specify minimum

[10] There is also significant funding of services for Aboriginal people with the Federal Government providing $69,925 million under its recent NAHS funding.

standards that a licensee must meet, including water quality standards (as does the *Water Act*). These minimum standards are to take into account relevant national benchmarks developed from time to time, and the cost of service delivery in the licence area. Section 46 further give the Chief Health Officer powers relating to ensuring minimum standards of drinking water in an emergency. It also provides that a licensee must notify the Chief Health Officer of any incident likely to affect the licensee's ability to comply with minimum standards specified.

In practice, the Territory Health Services (THS) and the Power and Water Authority (PAWA) work collaboratively to address water quality issues using the Australian Drinking Water Guidelines as a reference for safe water.

PAWA is required by the *Power and Water Authority Act* 1987 to supply drinking water to urban centres in the Northern Territory. It is also responsible through a community service obligation (CSO) for the provision of essential services, including water and sewerage, to rural and major remote Aboriginal communities.

The Commonwealth, in effect, retains responsibility for the provision of water supplies to outstations through ATSIC. Outstations, or homelands as they are also described, are small, autonomous, often kin or family based communities, established separately from larger settlements.[11]

5.3 Waste

Relevant provisions are to be found in regulations under the *Public Health Act 1952*,and more recent *Waste Management and Pollution Control Act 1998*.

The *Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations* contain a number of provisions to protect against waste and other built environment hazards.

They include:
- controls over refuse;
- keeping of animals and birds;
- keeping premises clean; and
- prevention of rats and vermin.

In particular, Regulations 26 and 27 require septic tanks to be approved and installed only with the written permission of the Chief Health Officer. The Chief Health Officer delegates installation approval to THS operational staff. Installation must comply with the *THS Code of Practice for Small On-site Sewage and Sullage Treatment Systems and the Disposal or Reuse of Sewage Effluent*. It has a number of provisions of specific references to remote communities, including daily flow allowances for Aboriginal Housing Remote Area Communities, which take into account the likelihood of large groups in housing.

The Chief Health Officer can also require repair and cleaning of a septic tank, which is, or is likely to become dangerous to health. Similar provisions relating to septic tanks are

[11] More information about outstations can be found in ATSIC's National Review of Resource Agencies Servicing Indigenous Communities, 1998.

also repeated in the *Public Health (Nightsoil, Garbage, Cesspits, Wells and Water) Regulations.*

The *Public Health (Nuisance Prevention) Regulations* also contain abatement provisions for the Chief Health Officer or a person authorised by the Chief Health Officer to deal with nuisances generally.

More recent initiatives to deal with Waste and Pollution are found in the *Waste Management and Pollution Control Act 1998*, which, among other things, provides for abatement of environmental nuisances and pollution, the setting of environment protection objectives, and environmental audits.

5.4 Built Environment

Relevant controls are in both the *Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations* and *the Building Act.*

The *General Sanitation Regulations* guard against overcrowding and houses becoming unfit for human habitation and provide for abatement of these problems (see regulations 12 and 13).

It is the *Building Act*, which governs building standards and approvals generally. The Act provides for building permits and occupancy permits for building work done in accordance with the Act and regulations. The Act also provides for the use of building certificates for this purpose, and relies upon private certification by registered certifiers for building approvals.

The Building Regulations in turn adopt the Building Code of Australia.[12]

The Act binds the Crown, not only in the right of the Territory, but to the extent that the legislative power of the Legislative Assembly permits, the Crown in all its other capacities. The substantive provisions however only apply to gazetted areas of the Northern Territory.[13] Most remote communities are outside the gazetted areas.

5.5 Remote Communities – Application and Enforcement

Northern Territory has the largest number of discrete Aboriginal and Torres Strait Islander communities in Australia with a total of 681. There are 53,690 Indigenous people in the Northern Territory or 28.3% of the population.[14]

Some 43% of land held by these communities is land granted under the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA).* Other land includes private and Crown land.

There has been some doubt over the application of Northern Territory laws to ALRA land in general. Section 74 of the ALRA provides:

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12 Regulation 4.

13 See sections 5 and 6 of the Act.

14 ABS, 1999, Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities, at p.11.

"This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act."

The 1998 report by John Reeves, QC, *Building on Land Rights for the Next Generation* refers to uncertainty in relation to the *Local Government Act*, particularly the demarcation between local government and land councils, and the *Water Act* in relation to matters of supply. Reeves notes that "detriment to the community, including of course, the Aboriginal community, would result if other Northern Territory legislation dealing with matters such as bushfires, conservation, public health, law and order and essential services did not apply in relation to Aboriginal land"[15].

Reeves recommends changes to the ALRA to clarify that laws of the Northern Territory with respect to environment protection and conservation, public health and safety etc. apply in relation to Aboriginal land in the Northern Territory, with a proviso that all reasonable steps should be taken to minimise any negative effects on the use and occupation of the land for the above purposes.

Reeves also recommends that the Northern Territory Government be given a limited power to compulsorily acquire Aboriginal land for public purposes, including for the purpose of water supply.

Similar recommendations are made by the Territory Health Services in its *Review of the Public Health Act Discussion Paper 2000* in proposing that any standards, guidelines and codes of practice, should apply in the same way to all lands and all persons in the Northern Territory.

It also notes that the current *Public Health Act* does not explicitly bind the Crown, which again creates an uncertainty as to the application of the Act to Aboriginal reserve land and Crown land. The more recent *Waste Management and Pollution Control Act* is explicit in binding the Crown.

The Discussion Paper recommends that the new *Public Health Act* should also bind the Crown. In particular the paper recommends that the new legislation should bind the Crown not only in right of the Territory, but so far as the legislative power of the Legislative Assembly permits, the Crown in all its other capacities. This means that the Commonwealth, for example, where it is carrying out functions in the Territory, will be bound by this legislation to the extent that it is possible for Territory laws to bind the Commonwealth.

The application of building standards is also a significant issue. Most of these communities are outside gazetted areas of the *Building Act*, which means the mainstream requirements of that Act do not apply to them.

It would seem also that there are no builders' registration requirements through the Northern Territory or builders' indemnity insurance as in other States. In practice, contracts for building works with remote communities now often require private certification and the employment of a building consultant as a condition of funding. In

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15 John Reeves QC, August 1998, Building on Land Rights for the Next Generation, Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976, second edition.

1998 at least, there were still many complaints about the quality of building work in communities.[16]

In the case of water quality, there are also many outstations which fall outside the ambit of water and power supply services provided by PAWA, including the testing and monitoring of the water supply. As already indicated, they remain the *de facto* responsibility of the Commonwealth through ATSIC to meet the gap.

Indeed, one feature of administration in the Northern Territory mentioned in consultation is the number of agencies dealing with remote communities and having an interest in public health issues. The end result, it would seem, is a lack of clarity as to who is responsible for what.

At a practical, day to day level, the functions of the Chief Health Officer under the existing *Public Health Act* are generally carried out through Territory Health Services rather than local government. Local government generally confines their activities to waste management and animal control, and has a limited role. Indeed, local government, including Community Government Councils, only covers 5% of the area of the Territory.

The *Local Government Act* provides for both Municipal and Community Government Councils. A number of Community Government Councils have been established to provide for local administration of small and remote communities in the Territory. There are 32 Community Government Councils, of which 25 are Aboriginal Community Government Councils. Section 182 of the *Local Government Act* confers the power on these Councils to make by-laws for their areas and these by-laws apply to everyone in the Council area. A number of Councils have made by-laws about pollution of water supplies, animal control and littering. Functions of Community Government Councils are set out in each Council's scheme within its written charter.

The Yugul Mangi Community Government Scheme for example, establishes garbage collection, sanitation facilities and sewage drainage and water supply facilities among others as functions.

The Community Government Councils do not have power to enforce the *Public Health Act,* although, presumably the Chief Health Officer could delegate these powers if this was appropriate.

The number of Community Government Councils is likely to be reduced under an initiative *'Local Government: The Next Step'*, which aims to establish a more 'effective, efficient accountable and culturally appropriate framework of local governance, particularly in rural and remote areas'[17]. It is hoped that this move and other strategies or ATSIC will lead to better services to remote communities, including outstations.

It should be noted that under the proposed new *Public Health Act,* responsibility for day-to-day monitoring of some public health functions may be delegated to the seven major Councils, with the Chief Health Officer being responsible for public health

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16 See ATSIC, Community Housing and Infrastructure Program Policy 1997-2000, in particular Attachment C by Alan Morton.

17 NT Department of Local Government, March 1999, Local Government – The Next Step, Questions and Answers, at p.2

functions not exercised by the Councils. This will presumably mean coverage for most remote communities will remain with the Chief Health Officer.

5.6 Local Initiatives

5.6.1 Environmental Health Standards for Remote Communities in the Northern Territory

This is a significant document prepared in 1998-99 by the Aboriginal Health Strategy Unit, THS, in conjunction with relevant departments and authorities.

It is very clear in indicating the application of mainstream laws where possible, and where special standards fit in, or are necessary. It uses the formatting and numbering of the Building Code of Australia (BCA), because many of the standards are based on the BCA.[18]

A major reason for its development is the fact that the BCA only applies to gazetted building areas, which do not include the majority of remote communities. It notes the particular dilemma of outstations, which do not obtain regular water or power supplies. As well, it recognises that mainstream standards or legislation may be inappropriate for geographical, climatic and social conditions in remote areas.

The *Environmental Health Standards for Remote Communities* is a performance based document which avoids being over prescriptive. It is a set of guidelines, although some of the requirements encompassed in the document are currently covered by legislation and are, therefore enforceable.
Since July 1998, compliance with the Environmental Health Standards has been a condition of grant for projects funded by the Indigenous Housing Authority of the Northern Territory, which delivers housing to Indigenous communities.

There are some operating principles set out in the Standards aimed at improving the environmental health conditions in which Aboriginal people live in remote areas of the Northern Territory.

The principles focus on:
- equity;
- participation;
- communication;
- collaboration;
- a holistic approach; and
- flexibility.

With respect to houses, the fundamental performance provisions in the BCA are adopted with additional special requirements. One example is room size to ensure adequate space to house a minimum of eight residents. The aim is to avoid overcrowding, particularly given the high mobility of some communities due to seasonal and cultural factors.

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18 The standards and environmental health activities undertaken in remote Territory communities have been greatly influenced by the excellent work of the Nganampa Health Council and Housing for Health.

Other performance standards relate to:

- community food stores;
- public buildings;
- public sanitation and ablution facilities;
- water supply;
- power supply;
- sewage disposal systems;
- rubbish collection and disposal;
- pest and animal control; and
- repair and maintenance of health hardware.

These performance standards are supported by a series of specifications. For example, the quantity and quality of water supply is to be in accordance with the 1987 NH&MRC guidelines.

Septic tank systems and on-site effluent disposal systems must comply with the *Code of Practice for Small On-Site Sewage and Sullage Treatment Systems and the Disposal or Reuse of Sewage Effluent (THS 1996).*

The document is also valuable in setting out approval processes – a crucial element in ensuring standards are met, ie:

- for housing works constructed under community housing grants funded by the Indigenous Housing Authority of the Northern Territory, the approval process is self-certification by a consultant appointed by the community.

- for sewage disposal systems, plans and specifications must be submitted for approval to the THS Environmental Health Officer for approval by the Chief Health Officer (or his delegate) as required under the *Public Health (General Sanitation, Mosquito Prevention, Rat Exclusion and Prevention) Regulations.*

5.6.2 The Public Health Bush Book

The Public Health Bush Book is a unique resource for people who work with remote communities in the Northern Territory. It aims to strengthen the capacity of individuals and communities to increase control over their own health.

It comprises two volumes:

I) Strategies and Resources
II) Facts and Approaches to three key public health issues
    - Alcohol and other drugs
    - Environmental health
    - Food and nutrition

With respect to environmental health, it identifies the following as key healthy living issues:

- Housing
- Health hardware
- Water supply
- Rubbish

The Bush Book is written in plain English and is supported by local case studies, diagrams and illustrations.

It is a resource which is highly complementary to Northern Territory public health laws and the more specific environmental health standards for remote communities. Anecdotal reports on its use are very positive and indicate it is used in a wide variety of settings and in different States.

5.6.3 Indigenous Housing Authority of the Northern Territory (IHANT)

IHANT is a response to the number of agencies involved in housing programs in the Northern Territory for Aboriginal people. It provides a single organisation responsible for the development of improved housing outcomes for Indigenous people and for the coordinated distribution of all available housing funds to ATSIC Regional Councils.

One of its aims is safe, healthy and sustainable housing. Its strategies to achieve this include:

- provision of annual grants of $1700 per house for maintenance to every community which collects rent and meets minimum standards for housing management;
- adoption of the Environmental Health Standards for Remote Communities in the Northern Territory as conditions of grant to housing organizations;
- continuous improvement strategies in the design and construction of new housing;
- technical audits of new housing construction to assess adherence to environmental health standards; and
- annual environmental health surveys in each house.

Rent collection is pooled for ongoing repair and maintenance of housing in remote communities.

5.7 Summary

Priorities for the Northern Territory include the development of modern public health laws, which bind the Crown, and hence clearly apply to Aboriginal land. Challenges remain to ensure building works for communities meet proper standards. This includes addressing issues around builders' registration and indemnity requirements that lend greater protection to remote communities. It may also require reconsideration of the application of the Building Act. However, the Environmental Health Standards for Remote Communities in the Northern Territory is a significant document in bringing both mainstream and special standards to remote communities.

6. Western Australia

Western Australian Legislation, Standards & Guidelines:

- *Water Services Coordination Act 1995*
- *Water Corporation Act 1995*
- *Health Act 1911*
- *Local Government (Miscellaneous Provisions) Act 1960*
- *Building Regulations 1989*
- *Code of Practice for Housing and Environmental Infrastructure Development in Aboriginal Communities in Western Australia*

6.1 Introduction

With a large number of remote communities and vast distances to cover in order to administer public health laws, Western Australia has similar challenges to the Northern Territory. Western Australia has been the scene of significant debate and complex legal argument about the application of public health laws to remote communities.

6.2 Water

Water supply services in Western Australia are, in the main, regulated by the Coordinator of Water Services, a statutory office established under the *Water Services Coordination Act 1995.* Generally, the Coordinator is responsible to the Minister for Water Resources for –

- the administration of a licensing scheme that, amongst other matters, licences water supply services operating in certain designated areas of the State; and
- the coordination of and provision of advice on water services policy.

Most drinking water supplies in Western Australia, including some in Aboriginal communities, have been designed, constructed and managed by the Water Corporation, a statutory body established under the *Water Corporation Act 1995,* and therefore are of a high standard.

Approximately 30 Aboriginal communities are served by water supplies managed by the Water Corporation, all of which are licensed by the Coordinator of Water Services.

The Western Australian Ministry of Housing funds the Remote Area Essential Services Repairs and Maintenance Program (the RAESP) which provides for the regular servicing of power, water and wastewater infrastructure to 67 Aboriginal communities with the capital works component of the RAESP being funded by ATSIC. ATSIC also currently funds the repairs and maintenance program to an additional 13 communities.

The remaining communities (approx 160) manage their own water supplies which are neither subject to licensing nor monitoring for water purity.

The Public Health Division of the Health Department of Western Australia (the HDWA) has an overview responsibility for drinking water quality issues through its representation on the State Advisory Committee for the Purity of Water, which it currently chairs. This Committee is a non-statutory group established to advise the Ministers for Water Resources and Health on drinking water quality issues.
While there are no specific regulations specifying the standard for testing drinking water, there are joint drinking water health directions which were issued by the

Ministers for Water Resources and Health in 1988. Amongst other matters, the joint drinking water health directions adopt the national guidelines (the Australian Drinking Water Guidelines 1996) for this purpose.

All drinking water supplies operating in Western Australia, other than the supplies used by the 160 communities mentioned above, are tested monthly by the Water Corporation, in accordance with the national guidelines. The results are reviewed by the Advisory Committee for the Purity of Water.

In addition, the Health Act 1911 provides powers for delegated legislation to be made to require an adequate water supply to be connected to a residential premises and to regulate, generally, water supplies drawn from water tanks, wells and bores for human consumption. Local governments normally regulate such matters under their health local laws made under the Health Act.

Local government is also empowered to prevent pollution of water supplies.[19] It can take legal action to prevent this, as well as close a water supply where a medical officer of health certifies that it is so polluted as to be unfit for human consumption.

6.3 Waste

Local government in Western Australia has a significant role in relation to waste and sanitation under Part IV of the *Health Act*. Part IV enables local governments to construct and maintain their own sewerage and drainage schemes. Twenty local governments operate their own schemes. Section 107(1) obliges each local government to provide that all sanitary conveniences and any "apparatus for the treatment of sewage" (eg septic tanks and aerobic treatment units) within the district are constructed and kept so as not to be a nuisance or dangerous or injurious to health.

Remote communities are, in the main, served by on-site septic tanks with only a number being connected to town sewerage schemes. Section 108 enables the local government to enter land and inspect any drain, sanitary convenience or apparatus for the treatment of sewage that it suspects is a nuisance or injurious to health.

It is an offence under the Act for a person to use, authorise or permit to be used any apparatus for the treatment of sewage which has not been constructed or installed with the approval of, and in accordance with the plans and specifications approved by, either the local government (generally for systems taking less than 540 litres of waste per day) or the Executive Director, Public Health (the statutory officer having responsibility for the general day to day administration of the *Health Act*) for systems exceeding 540 litres of input per day.[20] This is broad enough to apply not only to an owner or occupier, but also allows prosecution of contractors for unauthorised and inadequate work.

Section 112 empowers local governments to collect and deposit rubbish and refuse and clean sanitary conveniences. However, unless required by the Executive Director, Public Health to undertake such works, the local government is not obliged to provide any of those services.

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19 ss. 129, 130 and 131 of the Health Act.

20 S. 107 (4) *Health Act 1911*

An Environmental Health Officer (EHO) of a local government can also issue an abatement notice to an occupier or owner in the case of a nuisance and require its removal or destruction. If the notice is not complied with, the EHO may cause the work needed to be done and recover expenses from the owner/occupier.[21]

Local governments also have extensive powers to make local laws with respect to sanitary provisions and nuisances.

6.4 Built Environment

There are several provisions of the Health Act of relevance here. Part V enables a local government to declare a house or part of a house unfit for human habitation. The owner of the house can also be required to fix up or remove the house. If the owner fails to do this, the local government can take action itself, and where possible, recover all expenses from the owner.

Section 143 (1) of the Act makes compliance with health requirements a priority. Under that section, no building can be erected before the owner or occupier submits and has approved plans and specifications for ventilation, lighting and sanitary construction.

It is worth noting that while the *Health Act* does not expressly bind the Crown, the definition of "house" states that it is immaterial whether a building is on Crown land. Similarly the definition of "occupier" expressly provides that a person in occupation of Crown land should be treated as an occupier for the purposes of the Act.

Mainstream building controls are to be found under the *Local Government (Miscellaneous Provisions) Act 1960* administered by the Department of Local Government. Section 374 of the Act provides for plans of buildings to be approved by local government.

However, section 373 enables the Governor to declare by order, that provisions of the Act do not apply to the whole, or any part of any district or districts, in the State.

It also makes it clear that the provisions do not apply to any buildings owned or controlled by, or under the control or management of the Crown in right of the State or a department agency, or instrumentality of the Crown in the right of the State.

The *Building Regulations 1989* made under this Act adopt the Building Code of Australia for Western Australia.

6.5 Remote Communities – Application and Enforcement

Western Australia has the second largest number of discrete Aboriginal and Torres Strait Islander communities in Australia (264). The various communities are to be found on a range of landholdings, but the vast majority of lands are held by the Aboriginal Lands Trust (ALT), whether reserve, freehold, or leasehold, pursuant to the *Aboriginal Affairs Planning Authority Act 1972*.

[21] s. 181

It would seem clear that the Building Regulations and approval processes do not apply to most Aboriginal communities. This is because the buildings in most cases are owned or controlled by the ALT, which can be seen as an instrumentality or agency of the Crown.

As well, orders by the Governor in 1989, under section 373 of the *Local Government (Miscellaneous Provisions) Act 1960,* exclude portions of the Shire of Derby-West Kimberley and the Shire of Halls Creek from the Building Regulations, thereby leaving out many Aboriginal communities from the protection of the building requirements, regardless of the binding the Crown question.

It also seems likely that the land held by the ALT is not rateable land for the purposes of the *Local Government Act 1995*, arguably meaning that local government has less incentive to enforce environmental health standards in the case of most Aboriginal communities.

6.5.1 Application and Enforcement of the Health Act

The significant question remains : what then of the application and enforcement of the *Health Act?* Despite significant efforts to clarify the application of the *Health Act* to Aboriginal communities on Crown land, or held by instrumentalities of the Crown, recent developments have again raised doubts as to the ability of local authorities to enforce health provisions on such land.

Legal advice given in the early 90's to the HDWA concluded that even though many Aboriginal communities were on ALT land which could be seen as Crown land, the *Health Act* nevertheless applied to them. This was so even if the land was not rateable. The advice also indicated that the Act appeared to bind the Crown, except where specifically indicated otherwise.

The advice to the HDWA also considered that Aboriginal communities on Crown land have all the benefits of the laws relating to standards contained in the *Health Act.* The advice went further and indicated that local governments have a duty to carry out the provisions of the Act within their districts, regardless of the rateability of the communities. In other words, Aboriginal communities could not be treated less favourably than others.

This advice was given shortly after the case Bropho v State of WA, in which the High Court held that the *Aboriginal Heritage Act 1972* bound employees and agents of government instrumentalities in the course of their duties, even though the Act did not expressly bind the Crown. [22]

[22] 93 ALR 207

6.5.2 The Barker Report

This legal advice was reaffirmed in a significant report by a barrister, Michael Barker in 1994 on *Responsibilities of Local Health Authorities and Legal Entitlements of Aboriginal Communities to Environmental Health Services – a Report to a Working Party on Local Health Authority Services to Aboriginal Communities.*

Barker concluded that a local government, in common with the State Minister of Health, and the Executive Director, Public Health, has a common law duty of care to all residents in the municipal districts, including those in an Aboriginal community, to exercise powers and duties for their benefit.

His report also concluded that as a result of the High Court decision in Bropho, the Health Act binds the Crown and Crown agents, including the Aboriginal Affairs Planning Authority (AAPA), the ALT and Homeswest (the State housing authority). He recommended that the Health Act be amended to put it beyond doubt that the Health Act applies on Crown land, or at the least, on land vested in or owned by the AAPA, ALT and Homeswest.

At the same time as Barker reported, a report on *Assessment of Local Health Authority Service Delivery Needs in Aboriginal Communities* by D'Arcy Holman and Wayne Jolley took a similarly strong position on what it called entitled services for Aboriginal communities. In other words, it assumed that Aboriginal communities were entitled to services under the *Health Act*, regardless of land tenure.

The report noted that whatever the legal position on ratings, local government in fact got most of its funding from the Local Government Grants Commission, which factored in various service disabilities such as remote area service into its funding formulae. The end result was that revenue from the collection of rates comprised only a minor part of the total local government budget especially in remote areas.

6.5.3 Atyeo's Case

These positive directions of the early 90's were affected by a 1996 Supreme Court decision, Atyeo v Aboriginal Lands Trust.[23]

In this case, the Supreme Court held that the local Shire environmental health officer could not require the ALT to provide sanitary facilities to a house in Halls Creek, because the relevant part of the *Health Act* was deemed not to bind the Trust which was judged as an agent of the Crown.

Templeman J, in handing down his decision, relied heavily on the fact that another section of the Act, which obliged an owner to pay for septic tanks installed by a local government expressly bound the Crown. The provisions regarding sanitary facilities in a house as in this case did not have this express application.
This decision has again raised doubts as to the application of the *Health Act* to Aboriginal communities, particularly given that the ALT is the owner in many cases. It would seem from consultation that the involvement of local government in assisting communities today is 'fragile' and somewhat 'personality driven', and there is a reluctance to enforce the *Health Act* because of possible legal challenges. Local

[23] 1996 WASC 151

governments which receive additional tied funds from the HDWA, such as Derby-West Kimberley and Halls Creek are more active, but it was indicated that other local governments are less so, even though their Grants Commission grants may factor in Aboriginal health needs in an untied way. Indication was given during consultation that there was increasing keenness on the part of local government to help, but the untied funds were insufficient on their own.

6.6 Local Initiatives

6.6.1 Booklet on Local Government Services

One initiative identified during consultation was the 1995 publication by the Western Australian Municipal Association of local government services to Aboriginal communities. This is an information booklet on service delivery objectives and opportunities aimed at assisting local government in Western Australia in its role as a service provider to Aboriginal communities. It provides an overview of the statutory obligations of local government as well as indicating opportunities for local government to be proactive and obtain funds to assist.

The concept of such a booklet for local government seems worth pursuing in other jurisdictions.

6.6.2 Code of Practice for Housing and Environmental Infrastructure Development in Aboriginal Communities in Western Australia

The National Indigenous Housing Guide and the Environmental Health Standards for Remote Communities in the Northern Territory have influenced this recently released Western Australian Code of Practice.

The code aims to provide user friendly and practical assistance to Aboriginal communities and indicates principles, appropriate standards and approval processes in a clear and logical manner.

6.7 Summary

There have been longstanding efforts to clarify the application of public health laws to remote communities in Western Australia, and the role of local government in relation to those communities. However, there are several issues that create uncertainties and anomalies in relation to the application of relevant public health and related legislation to remote communities. They include:

- except where specifically expressed as binding the Crown, the *Health Act 1911* is currently held not to apply to land held by the Aboriginal Lands Trust, which is an agency or instrumentality of the Crown. This throws doubt over the role of local government in enforcing the Act with respect to most Aboriginal communities;
- land held by the ALT is not rateable under the *Local Government Act* and funding by the Grants Commission to local government for remote areas is seen as insufficient without top up from HDWA;

- building controls and approval processes also do not apply to most Aboriginal communities, because the buildings are in most cases owned or controlled by the ALT, and the Crown is not expressly bound under the *Building Regulations.*
- portions of the Shire of Derby-West Kimberley and the Shire of Halls Creek (with large Aboriginal communities) are also excluded from buildings requirements by order of the Governor.

The *Health Act* and building laws need to be amended to resolve the situation.

7. Queensland

Queensland Legislation, Standards and Guidelines:

- *Health Act 1937*
- *Environmental Protection (Water) Policy 1997*
- *Environmental Protection (Interim Waste) Regulation 1996*
- *Environmental Protection Waste Management Regulation 2000*
- *Environmental Protection (Waste Management) Policy 2000*
- *Sewage and Water Supply Act 1949*
- *Building Act 1975 and Standard Building Regulation 1993*
- *Integrated Planning Act 1997*
- *Water Act 2000*

7.1 Introduction

Queensland has a complex legislation framework with implications for the public health of its remote communities. A unique feature of Queensland is the status of two Aboriginal and Torres Strait Islander communities having their own local government, and thirty-two other communities with Community Councils, which have similar powers to deal with environmental health issues.

7.2 Water

The *Health Act 1937* is the primary public health legislation in Queensland, although a 1998 Draft Policy Paper recommends major changes to this legislation. [24] In particular, the Act does not reflect a division of responsibilities between State and local governments to the same extent as the modern *Local Government Act 1993*, even though in practice, local government is comprehensive in Queensland, and generally has the responsibility to control public health risks in its area. The Productivity Commission notes that in Queensland, the provision of urban drinking water is essentially a local government function, with the State's 125 local governments operating 430 water supply schemes, supplying 90% of Queensland's population of 3.4 million.[25]

The *Health Act* contains provisions aimed at protecting water courses or other accumulations of water from public health nuisance or becoming a breeding ground for mosquitos, as well as establishing the power of local government to abate nuisances involving pollution of water courses.[26]

There are however no specific requirements regarding drinking water standards under the *Health Act*, although in practice, Queensland Health and Local Government defer to the Australian Drinking Water Guidelines in monitoring water quality.

As well, the Environmental Protection (Water) Policy 1997 made under the *Environmental Protection Act* (with the same status as regulations) aims to protect the quality of Queensland waters, but its water quality objectives do not relate to drinking water in a domestic water supply system, such as water in a local government or privately owned water supply system.

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24 Queensland Health, February 1998, Review of the Health Act 1937 (Public Health) Draft Policy Paper.

25 Productivity Commission, April 2000, Arrangements for Setting Drinking Water Standards, International Benchmarking, at p.235.

26 see ss 21 and 77.

The *Water Act 2000* provides for water providers to report on Strategic Asset Management Plans and Customer Service Standards to the Queensland Government. These relate to adequacy of supply rather than microbiological quality or direct public health aspects. Providers include local government and Aboriginal Community Councils, although there are exemptions for small providers for which Community Councils may be considered. The Department of Aboriginal and Torres Strait Islander Policy and Development is investigating the application of the Water Act to Community Councils. The Water Act provides for local government to declare all or part of its area as service areas. The Act does not deal directly with the issue of remote communities, but may have implications for their water supplies.

7.3 Waste

The *Health Act* has a general provision to deal with nuisances and their abatement, including an accumulation or deposit that is injurious or prejudicial to health. There is also an obligation to keep sewers and storm water drains properly.[27]

In addition, the Environmental Protection (Interim Waste) Regulation 1996 provides for waste management and sanitary conveniences, and establishes the role of local government to superintend both issues within their areas.

There is also an Environmental Protection Waste Management Regulation 2000, which protects against littering and waste dumping, and governs waste transportation.

As well, local government is required by the Environmental Protection (Waste Management) Policy 2000 to prepare a waste management strategic plan for its area. The Standard Sewerage Law under the *Sewerage and Water Supply Act 1949* governs sanitary plumbing and drainage requirements. Clause 76 of that law requires small septic tanks and their installation to comply with AS/ANZ I546. On site sewerage facilities, including septic tanks, require local government approval for installation.

The Sewerage and Water Supply Act 1949 sets out requirements for licences for plumbers, drainers and others.

7.4 Built Environment

The *Health Act* in dealing with nuisances includes a house or part of a house so over-crowded as to be dangerous or injurious or prejudicial to the health of the residents, whether or not members of the same family.[28]

The Draft Policy Paper considers matters such as overcrowding to be better suited to a social rather than a legal response.

The most significant mainstream laws are the *Building Act 1975* and the *Integrated Planning Act 1997.*

Unlike the Health Act, the Building Act expressly binds the Crown, and local government is empowered to enforce the requirements of the Act.

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27 See ss 77 and 80

28 s. 77

The Act has detailed provisions relating to private building certificates. In particular, it provides for the authorisation of bodies to accredit building certifiers and for building certifiers to assess the building work component of a development application.

There are also provisions for the accrediting body and on appeal, the Chief Executive, to investigate complaints against building certifiers.[29]

Regulation 8 of the *Standard Building Regulation 1993* under the *Building Act* provides for the Building Code of Australia to form part of the Regulation.

Of particular relevance to remote communities is Regulation 99. It provides for a building certifier to issue an interim certificate of classification for a building where it is not practicable to have it inspected by a building certifier within a reasonable time. It remains in force until revoked, a Full Certificate is granted or six months elapses whichever is the earlier.

The *Integrated Planning Act* is of crucial importance. It provides for planning schemes for Councils, and in particular integrated development assessment (IDAS). Development under the Act is defined to include building work and plumbing or drainage work..[30] Local government is empowered to approve development work.

Like the *Building Act*, the *Integrated Planning Act* is stated to bind all persons, including the State and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.[31]

The Act however, exempts building work that is essential infrastructure (eg. a hospital) done by or on behalf of the State, a public sector entity or a local government from the IDAS assessment process, (although the requirements of the *Building Act* and BCA still must be complied with).

7.5 Remote Communities – Application and Enforcement

Queensland has 149 discrete Aboriginal and Torres Strait Islander communities.

A unique feature of Queensland is the status of two Aboriginal communities having their own local governments by virtue of the *Local Government (Aboriginal Lands) Act 1978.*

There are also thirty-two Aboriginal and Torres Strait Islander Councils established under the *Community Services (Aborigines) Act 1984* and the *Community Services (Torres Strait) Act 1984* to administer former reserve and mission communities. These Councils are often vested as Trustees of Deed of Grant Land (DOGIT) granted under the *Land Act 1962*.

These Community Councils do not have the express status of local governments under the *Local Government Act* but they do have powers and functions relating to health and sanitation matters, including by-laws making powers. They also have power to do

[29] Parts 5 and 12 of the Building Act
[30] s. 1.2.3 of the Integrated Planning Act
[31] s. 1.3.1

anything that local governments are required to do by any Act (other than the *Local Government Act 1993*). The Acts Interpretation Act also clarifies that references to local government in other Acts are taken to include Community Councils.

As well, when a Community Council assumes the discharge of the functions of local government, the local government for the area ceases to have the functions of local government for the area, and local laws cease to have effect.[32]

This does in fact mean that the Community Councils could be doing anything required of local government by the *Health Act, Building Act* and *Integrated Planning Act*, and indeed given that mainstream local government is out of the picture, it would seem crucial that they so act. However, in practice, they are not resourced for this role.

One resource hurdle mentioned in consultation is the lack of capacity of Community Councils to levy rates, given DOGIT land is generally non-rateable Crown Land. Nevertheless, there is power to levy fees, charges, fares and rents, and some do impose a charge on residents of residential premises. During consultation it was mentioned that some Community Councils do not necessarily know the extent of their powers under legislation.

The need for more Indigenous Environmental Health Workers employed at the community level to assist communities was also emphasised during the consultation.[33]

There was also some uncertainty within Queensland Health as to whether the Health Act applied to DOGIT communities, given that the Act does not expressly bind the Crown. It could be argued that the fact that the land is Crown Land granted in trust should not affect the application of the Health Act to DOGIT communities. Arguably it is merely instrumentalities or agencies of the Crown, which may not be bound, unless the law is explicit, rather than communities, which happen to be on Crown land. It would appear imperative that the new *Public Health Act* should be clear on this.

A similar uncertainty seems to exist with respect to the application of the *Integrated Planning Act* to Community Councils and land.

Recent advice has indicated that:

- the Community Councils are bound by the Act and therefore the development process (IDAS) must be complied with in the case of assessable development carried out on council land;

- a Community Council may be the assessment manager for a development application within its area.

Presumably in the case of essential infrastructure building work carried out by the State or a public sector entity etc, the above does not apply, given the exemption in the case of such work from the IDAS assessment process.

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32 ss. 24,25 Community Services (Aborigines) Act 1984

33 This was mentioned in several jurisdictions and was a central theme of the Indigenous Environmental Health Conference at Alice Springs in November 2000.

- Aurukun and Mornington Shire Councils as fully-fledged local governments have power under the IPA to make planning schemes for their Council areas, but not Community Councils.

- Community Councils may however be bound by planning schemes, although it is unclear just how such schemes would apply to their areas.

It would seem also that the Environmental Protection (Waste Management) Policy 2000, in obliging local government to prepare strategic waste management plans may in fact oblige Community Councils to do so.

Generally there is a lack of clarity as to responsibility for approval of works with public health implications. One example in the field is the need for approval and inspection of plumbing and drainage work by local councils as required by the Standard Sewage Law. This is not necessarily occurring in remote areas, because of distance and the unavailability of qualified plumbing inspectors to work in these areas, and presumably in the case of DOGIT communities, because of the lack of certainty and knowledge of their powers. Options are being considered, including the acceptance of compliance verification from a competent person that the work conforms with the law and does not present a health risk, or the issue of restricted drainer licences for restricted areas.

It was suggested that this was an area where Community Councils could play a role. It was also seen that there is scope for Indigenous Environmental Health Workers being authorised to inspect and approve work done, whether on behalf of Commuinity Councils, or in other cases, on behalf of mainstream local government.

In practice, in Queensland, it seems that contracts or conditions of funding are a major means of enforcement of standards and meeting environmental health needs. For example, the Queensland Aboriginal and Torres Strait Islander Infrastructure Program (ATSIIP) funds indigenous communities for infrastructure works to meet shortfalls in basic services, such as water, sewerage, waste disposal and transport. It has a particular focus on innovative community infrastructure projects such as projects that focus on environmental health and associated training of Indigenous people, including solid waste disposal infrastructure.

Under ATSIIP, conditions of funding include the appointment of a project manager. Management can be by a community-based organisation, private consultants or the Community Council, whatever the best arrangements may be. ATSIIP staff or agents periodically review progress and sign off on the contract stage when advised the work is completed.

With respect to health monitoring in Aboriginal and Torres Strait Islander communities, it would seem there are a number of different approaches. They include the work of the Queensland Health Public Health Unit Networks which has an environmental health section with a monitoring and training role in Aboriginal and Torres Strait communities. In addition, a number of Community Councils employ local Indigenous Environmental Health Workers to undertake health monitoring functions.

It should be noted that there are a number of Aboriginal groups in Queensland living on former reserve land, which does not have DOGIT status or a Community Council, or in outstations on Crown land. It seems that the delivery of infrastructure, or services, or

monitoring of health standards, in some of these outlying communities remains problematic.

7.6 Local Initiatives

7.6.1 Cape York Partnerships – Some Practical Ideas

While it does not specifically relate to public health legislation and its application and enforcement, this project is likely to impact on such matters, given its goals.

It aims, among other things, to achieve better health through partnerships between local Cape York Communities and Government agencies responsible for those factors which influence health.

It recognises that the underlying reasons why service delivery in health and other areas fails, includes:

- the failure of governments to address problems in a big picture or holistic way;
- Government being too remote to determine priorities which could best be determined at the grassroots level;
- the lack of coordination and cooperation between Government departments; and
- the historical reluctance to give Indigenous people greater ownership of programs to deliver services in these areas.

Recognising that each community has its own needs, its own priorities, and its own way of doing things, Queensland Health intends to enter into local partnership agreements with specific communities to settle the role and responsibilities of each partner in addressing the factors that impact on health.

This hopefully will assist in clarifying the powers and resources of Community Councils to act under the *Health Act*, the *Building Act* and the *Integrated Planning Act*.

7.6.2 Public Health Law and Indigenous Health Project (PHLIHP)

PHLIHP is a project being conducted in Queensland, with a view to future application in other jurisdictions nationally. It aims to improve the appropriate use of legislative strategies in response to the key determinants of public health in Aboriginal and Torres Strait Islander communities. It particularly aims to enhance the information provided in this report with respect to an understanding of how laws impact on public health in remote communities, and to enable a developmental approach to improving future use of legislation. The PHLIHP also seeks to clarify some of the issues which are identified as problematic in this report.

7.7 Summary

Priorities in Queensland include a modern *Public Health Act* which clarifies the role of local government in public health, responsibility for monitoring water quality, and the application of the Act to all people, including remote communities.

The powers and responsibilities of Community Councils of DOGIT land under the *Health Act*, the *Building Act*, and the *Integrated Planning Act* need to be clarified.

Community Councils also need increased clarity as to the extent of their powers and adequately resourced to carry out powers vested in them.

If it is inappropriate for the Community Councils to have the powers of local government, it should be made clear that mainstream local government should exercise these powers. At this stage the role of mainstream local government in relation to DOGIT communities would seem problematic.

8. South Australia

South Australian Legislation, Standards & Guidelines:

- *Public and Environmental Health Act 1987*
- *Water Resources Act 1997*
- *Environmental Protection Act 1994*
- *Code of Practice for the Provision of Facilities for Sanitation and Personal Hygiene*
- *Waste Control Regulations*
- *Development Act 1993*
- *Basic Specification, Aboriginal Housing*
- *Ministerial Specifications for designated Aboriginal Lands under Development Act 1993*

8.1 Introduction

South Australia has a history of law reform which has led to early recognition of land rights and clarification of administrative processes with respect to water, waste and built environment issues. Its major challenges have been the provision of services to remote communities given their isolation.

8.2 Water

The *Public and Environment Health Act 1987* clarifies that it is the local council where there is local government and the Minister where there is not, which is responsible for the protection of water supplies. There is no local government above Port Augusta, which means a large proportion of the state is not subject to local government.

Division III of the Act provides for the protection of water supplies by making it an offence to pollute a water supply. The relevant authority may by notice require the person responsible to take action to prevent the pollution and can close water supplies for human consumption if necessary.

The Water Resources Act 1997 aims to ensure the proper use and management of the water resources of the State. Among other things, it provides for water plans and regulates the use of effluent in the course of carrying on business in a water catchment area.

Similarly, Sections 61-64D of the *Environmental Protection Act 1994* aim to control water quality in water protection areas to prevent pollutants from entering surface or underground water.

The Australian Drinking Water Guidelines are used as a guide in monitoring water quality, but are not legislated for.

8.3 Waste

The *Public & Environmental Health Act, 1987* has a range of provisions relating to sanitation and drainage, including powers under section 15, to require owners to improve the condition of the premises, and desist from activities causing the insanitary condition.

If residential premises are by reason of their insanitary condition unfit for human habitation, an authority can direct that the premises not be occupied until specified action is taken to render the premises fit for human habitation.

Similar powers exist in relation to the controls over activities which result in the omission of offensive materials or odours. Section 18 makes it an offence to discharge waste into a public place. Again there are abatement powers. There are similar powers to require owners of premises to take action to provide adequate facilities for sanitation or personal hygiene.[34] These controls are supported by regulations under the Act. In particular, regulation 4 provides for the control of refuse on premises and the use of adequate receptacles to prevent insanitary condition.

A South Australian Health Commission *Code of Practice for the Provision of Facilities for Sanitation and Personal Hygiene* is also prescribed as a guide to assist local councils in administering the Act in these areas.

There are separate *Waste Control Regulations* under the Act, which include provisions to control septic tanks. In essence waste control systems must be installed, altered or used, in accordance with the approval of the relevant authority.

Again, the Minister is the relevant authority where there is no local council. The South Australia Health Commission *Standard for the Construction, Installation and Operation of Septic Tank Systems* in SA is a prescribed code for the purpose of the Act and regulations.

8.4 Built Environment

The *Development Act 1993* among other things provides for the regulation of building work. It applies throughout the State unless the regulations provide otherwise. Similarly, particular provisions of the Act can be excluded in their application.

Part VI controls the building work. A Council in relation to any development or building outside a local area is defined to include a person or body, or a person or body of a class, prescribed by the regulations for the purpose of this definition. The Development Assessment Commission is prescribed for this purpose. In other words, the Development Assessment Commission is the body responsible for approval of building works or planning development for the remote areas of South Australia.

Section 59 provides for Councils to be notified of proposed building work. Building work requirements are set out in the regulations which in turn pick up the Building Code of Australia.

Section 66 of the Act provides for classification of buildings. Section 67 provides for the council to issue a certificate of occupancy when it is satisfied that the building is suitable for occupation and complies with requirements. A person can occupy a building on a temporary basis with Council approval.

The Division dealing with classification and occupation does not apply to building owned and occupied, or to building work by the Government (or an agency, instrumentality, officers or employees of the Government).

As well, by virtue of the regulations, the provisions regarding classification and occupancy do not apply to any Class 1 or 10 building under the Building Code, which is not within the area of a Council. As mentioned previously, class 1 buildings are

[34] s. 20

dwelling houses and boarding houses, guest houses or hostels in which not more than 12 persons would ordinarily be resident. Class 10 buildings are non-habitable buildings or structures, including private garages, carports, sheds etc.

8.5 Remote Communities – Application and Enforcement

In South Australia, there are 106 discrete Aboriginal communities. In the majority of cases, they are located on Aboriginal lands under the *Aboriginal Lands Trust Act 1966.* This was the first legislation to transfer land titles to Aboriginal people in Australia.

South Australia also granted the first land rights with the *Pitjantjatjara Land Rights Act 1981* providing for the inalienability of land vested in the Anangu Pitjantjatjara. This was followed by the similar *Maralinga Tjarutja Land Rights Act of 1984.* Both Acts recognise the right of the Crown to continue to occupy part of the land for purposes connected with the health, education and welfare or advancement of the local Aboriginal people.

There is nothing under these Acts to indicate that public health laws do not apply. Indeed, in the case of the *Aboriginal Lands Trust Act*, the Trust is declared not to be an agent or servant of the Crown (S.12). Therefore its land is not Crown land.

In any case, the South Australian *Public Health and Environmental Health Act* expressly binds the Crown. And it is quite clear in empowering the Minister in relation to water and waste outside local council areas, where most of South Australia's remote communities are to be found. (It was mentioned in consultation that the responsibility for monitoring water quality could be clearer in practice.)

With respect to building requirements, they generally apply to remote communities. The Development Assessment Commission must approve of building works in areas outside local councils, but the exclusion of classification and occupancy requirements in the case of class 1 and class 10 buildings means that there is not the same obligations for external inspection of finished works.
However, signing off as to compliance with occupancy and other building standards or requirements can in practice be required by the Development Assessment Commission as a condition of consent to a development or buildings works in a remote community. In practice, all development applications outside local council areas are sent to the Department of Human Services for comment as to health issues, and this gives an opportunity to argue for signing off and standards to be insisted upon.

As well, while it seems there is still room for improvement, there is an increasing enforcement of appropriate standards through the program and project managers of ATSIC and other Government funded projects as a condition of funding contracts.

It is worth mentioning that Anangu Pitjantjatjana have established their own Development Committee to vet and monitor developments on their own lands.

8.6 Local Initiatives

8.6.1 Housing Guidelines

The work of the Nganampa Health Council which serves the North West of the State, in collaboration with the then Aboriginal Health Organisation of South Australia and others, was mentioned during consultation. The concept of healthy living practices with an emphasis on basic health infrastructure in housing began in the 80's with this work.[35]

This in turn led to the development of the Basic Specification, Aboriginal Housing which lays down design and construction specifications for the rural and remote housing program of the Aboriginal Housing Authority. Although, this has no legal status, compliance with it is often insisted on as a condition of development consent or contract.

As well, the Minister under the *Development Act* can make additional specifications to those set out in the *Development Act* and regulations. Such a specification exists in relation to a number of designated Aboriginal lands to take into account the need for increased levels of durability, sustainability and health and safety for housing in harsh environmental conditions with limited access to maintenance facilities. The requirements include provisions to ensure spaces within and beneath a dwelling exclude animals for hygiene purposes and for sanitary drainage.

The work done in SA can be seen to have led to the National Indigenous Housing Guide and the Health Infrastructure Priority Program of ATSIC, as well as remote area standards in the Northern Territory.

8.6.2 Cooperative Approaches

Problems remain in ensuring remote communities get the services they need, but mention was made in consultation about the degree of cooperation between Government agencies and community bodies over a long period of time which has led to improvements.

Recent examples of cooperation include the 1996 South Australian Aboriginal Health Partnership under which regional health plans for Aboriginal communities have been developed.
Another relevant partnership initiative has been the use of a Memorandum of Understanding between the Department of Human Services (which encompasses the Health Commission), the District Council of Ceduna, ATSIC, and the Ceduna / Koonibba Aboriginal Health Service to provide necessary infrastructure for Anangu visitors to, and permanent homeless residents of, Ceduna.

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[35] Nganampa Health Council Inc., South Australian Health Commission and Aboriginal Health Organisation of SA. 1987 Report of Uwankara Palyanyku Kanyintjaku, An Environmental and Public Health Review within the Anangu Pitjantjatjara Lands.

8.7 Summary

Most remote communities in SA live outside council areas, which means a challenge for the provision of services and the monitoring and enforcement of standards and guidelines. South Australian legislation is clear as to the application of laws and the administrative processes to be followed by remote communities and those assisting them. There has also been cooperation between government and local communities which has influenced national policy relating to health infrastructure. However, there are some problems created by the fact that the certificate of occupancy requirements of the *Development Act 1993* do not apply to most remote communities, because they are outside council areas. In addition, there is a need for greater clarity (in practice) with respect to responsibility for monitoring water quality in remote communities.

9. New South Wales

9.1 Introduction

New South Wales Legislation, Standards & Guidelines:

- *Public Health Act, 1991*
- *Local Government Act 1993*
- *Environmental Planning and Assessment Act, 1979*

New South Wales has modern public health and related laws. Responsibilities for the administration and enforcement of the Public Health Act are shared between NSW Health, Public Health Units located in Area Health Services, and local government.

Local government also has public health related roles and functions by virtue of the Local Government Act 1993, such as the power to make orders in relation to a number of matters, including threats to public health.[36]

9.2 Water

The provision of water supply and sewage services to country NSW is largely the responsibilities of local government under the *Local Government Act 1993.* Local government covers nearly all the State except for part of the Western Division of the State and Lord Howe Island. NSW Health is responsible for assessing whether suppliers comply with the monitoring requirements specified in the NHMRC guidelines.

NSW Health has endorsed and adopted the 1996 Australian Drinking Water Guidelines (although not in regulation). These guidelines are set as standards in the operating licences of both Sydney Water Corporation and Hunter Water. They are also set as performance criteria in the Memorandum of Understanding between NSW Health and those companies.[37]

The Department is about to formally articulate to rural water supply authorities, its requirements for monitoring and reporting on drinking water quality. A statewide rural drinking water quality database is being established by the Department, which will store all testing results and enable system performance reporting on a local, regional and statewide level.

Suppliers are subject to the enforcement provisions set out in the *Public Health Act 1991*. There is a special Safety of Drinking Water Part 2A of the Act, which empowers the Minister to take such action or give such directions as considered necessary in order to restrict or prevent the use of water which is unfit for drinking or domestic purposes, or which is suspected to be a risk to public health. This is supported by powers to require monitoring by suppliers, provision of information relevant to water supply, rectify treatment operations and plant equipment, correct misleading information, and enter and inspect premises related to water supply. Except for the power of closure, the other powers can and are delegated to environmental health officers in the department and local government. The *Public Health Act* expressly binds the Crown.

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36 S. 124

37 Productivity Commission report, at p.208

9.3 Waste

Section 68 of the *Local Government Act 1993* makes it clear that local council approval is required to install, construct or alter a waste treatment device, human waste storage facility, or a drain connected to any such device or facility.

The *Local Government Act* also governs nuisances. A council may abate a public nuisance or order a person to abate it.[38]

9.4 Built Environment

Local Government is empowered under section 124 of the *Local Government Act 1993* to make orders to ensure land or premises are placed or kept in a safe or healthy condition. However, the most significant legislation is the *Environmental Planning and Assessment Act 1979,* which set out provisions for development consent. Local government is the consent authority for developments such as building work.[39]Provision is also made for a construction certificate to be issued by a consent authority or an accredited certifier before construction can commence, and an occupation certificate before occupation can take place.

The certifying authority must be satisfied that the requirements of the regulations have been complied with before issuing a construction certificate. Section 78A of the *Environmental Planning and Assessment Regulations 1994* requires building work to comply with the Building Code of Australia in most cases. A similar obligation exists in the case of occupation certificates, and a specific requirement that the authority be satisfied that the building is suitable for occupation or use in accordance with its classification under the *Building Code of Australia.* Part 4B of the Act provides for the accreditation and auditing of accredited providers.

The Act, and regulations bind the Crown.[40]

However, a consent authority must not refuse its consent to a Crown development application or impose a condition of its consent except with the written approval of the Minister or the applicant.[41]

There is also a separate provision for building work by the Crown. This requires compliance with the "technical provisions of the State's building laws" as prescribed by the regulations, compliance being certified by or on behalf of the Crown.

A Minister can also by notice, exempt buildings, or a class of buildings, from a specified technical provision of the State's building laws. The construction certificate provisions of the Act do not apply when the Minister has made this determination.

However, importantly, the provisions of the Building Code of Australia are prescribed by regulation 81 NN of the *Environmental Planning and Assessment Regulation 1994* as the technical provisions of the State's building laws.

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38 s. 125

39 It should be noted local governments can exempt developments from needing development consent under local environmental planning instruments.

40 s. 6

41 s. 115L and on.

The end result of this complex picture would appear to be that building work done by an instrumentality or agency of the Crown for a remote community requires development consent from local government. (Although some local governments may have exempted some building work from requiring development consent). Beyond that, there is an obligation for the agency to comply with the Building Code of Australia, but certification as to compliance is an internal matter.

It is worth noting that the *Environmental Planning and Assessment Act 1979* does not cover all building works.

Section 68 of the *Local Government Act 1993* requires Council approval to install movable dwellings or associated structures on land. However, section 69 does not require the Crown to obtain the approval of a Council to do anything that is incidental to the erection or demolition of a building. This does mean that services relating to water, sewage and waste management, provided by the Crown in relation to such dwellings are not subject to local government approval. This is under review.

9.5 Remote Communities – Application and Enforcement

The ABS lists NSW as having 67 discrete Aboriginal communities.[42] Many of the communities are on land held by Local Aboriginal Land Councils or the NSW Aboriginal Land Council under the *Aboriginal Land Rights Act 1983 (NSW)*. Under this Act, land is granted freehold except for some land in the west of NSW where it is held by way of lease in perpetuity.

The functions of the LALCs include acquisition and management of land. They also become involved in issues such as Aboriginal housing. There are also Regional Aboriginal Land Councils, which coordinate activities for certain areas and link with the NSW Aboriginal Land Council – the peak body.

Importantly, an Aboriginal Land Council is not, for the purposes of any law, a statutory body representing the Crown (see s. 65 of the Act). There would therefore seem to be no barriers to the *Public Health Act* applying to Land Council land, since it is not then Crown land. In any case, the *Public Health Act* expressly binds the Crown (s.81)

Given that Land Councils are not Crown agencies, building works in the name of a Land Council should be regarded as subject to all requirements of the *Environmental Planning and Assessment Act*, including local government approval and a construction certificate. There may however be local environmental planning instruments of particular local governments which exempt certain works.

If the work is done in the name of a Government Agency (the Aboriginal Housing Office for example is defined for the purposes of any Act, as a statutory body representing the Crown), then the separate provisions relating to Crown development discussed above would presumably be applicable. But unless there is an exemption as discussed, again there should be local government consent to the development.

Also, the Building Code of Australia would seem to be generally applicable, whether work is done in the name of an instrumentality of the Crown or not.

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42 ABS 1999, Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities p.11

Yet, it is worth noting that some uncertainty was expressed during consultation by senior NSW Health staff as to the legal position and the applicability of these Acts to remote communities, and particularly the role of local government. The application of building standards in remote communities, or indeed, any communities on Aboriginal land was also seen as very patchy. The oversighting of contractors was also seen as a weakness in the current system.

There seems to be no legal reason why local government and NSW Health should not be monitoring and enforcing public health standards under the *Public Health Act* and *Local Government Act* in relation to remote communities. Building Standards should also be applicable. It may be useful, given some of the uncertainties addressed, for a formal legal opinion to confirm this view of the law and this advice to be disseminated.

One other barrier to application and enforcement may be rateability. Section 555 of the *Local Government Act* exempts from rates land vested in the NSW Aboriginal Land Council or a Local Aboriginal Land Council, and declared to be exempt under the *Aboriginal Land Rights Act.*

However, it is understood that as in Western Australia, local government is funded to compensate for the lack of ratings in remote areas.

Another disincentive for local government to enforce public health standards, it seems, is the lack of resources of communities to remedy problems. It was, however, suggested that decisive action by local government in a particular case could help to highlight problems and the need for funding.

9.6 Local Initiatives

9.6.1 Aboriginal Community Development Program

The Aboriginal Community Development Program is an across-agency initiative which has existed for the three years. The fixed intent of this program is to coordinate the efforts of all agencies involved in providing and maintaining housing in Aboriginal communities including the Commonwealth (ATSIC).

The Program has adopted the guidelines for Indigenous Housing developed by the Commonwealth Department of Housing.

An extensive Housing for Health Program is underway in NSW. This program involves both surveying and fixing, and will use the Housing for Health methodology in over 30 communities in NSW over the next four years.

9.6.2 Aboriginal Local Government Network

The Network was established in 1988 to provide information exchange and act as a forum for discussion of local government issues relating to Aboriginal communities. It has grown into the leading advocacy body for Aboriginal people within the Local Government area.

The Network aims to provide:

- an understanding of current issues in local government affecting Aboriginal people;
- a mechanism for support and avenue for information exchange on existing and new programs and services in local government relevant to Aboriginal Communities;
- a useful opportunity to promote reconciliation.

Since the inception of the Network, the number of elected Aboriginal Councillors has grown from 4 to 31.

9.7 Summary

New South Wales has modern public health and related legislation which applies to its remote communities. This legislation includes special Safety of Drinking Water requirements which would be a useful model for other States.

However, in practice, there seems to be a need to clarify the role of local government in relation to remote communities, and to understand the barriers, including rateability, to their involvement.

There are also complex provisions relating to development (including building works) and formal legal advice would be useful to clarify their application to remote communities around the State. This is particularly the case when work is done in the name of a Crown agency or instrumentality.

10. Victoria

Victorian Legislation, Standards and Guidelines:

- *Health Act 1958*
- *Health (Quality of Drinking Water) Regulations1991*
- *Health Infectious Disease Regulations 2001*
- *Environment Protection Act 1970*
- *Building Act 1993*
- *Building Regulations 1994*

10.1 Introduction

Victoria has two discrete Aboriginal communities and both are within Council areas. Indeed, nearly all of Victoria falls within Municipal Council areas. With modern public health laws as well, there are not the same application and enforcement issues in Victoria as there are in some States. However, it needs to be acknowledged that there are significant Aboriginal populations within mainstream communities in Victoria, with health needs requiring recognition and attention.

10.2 Water

The Department of Human Services as the lead Government agency is responsible for administering water quality regulation and incident management under the *Health Act 1958* to ensure that drinking water supplies in Victoria do not pose a risk to public health. Section 80 of the Act gives the Department power to take action if a water supply presents a threat or potential threat to public health, including the power to close a water supply.

The *Health (Quality of Drinking Water) Regulations 1991* requires water authorities to take reasonable precautions to ensure water supply systems and catchments are protected from contamination where the water is intended for human consumption. Monitoring and sampling obligations are also placed on suppliers, who must report risks to the water supply to the Department.

At present, there are no regulations that directly specify the standard of drinking water quality to be adhered to by the State's water suppliers (which include 15 non-metropolitan suppliers). In practice, the Department refers to the Australian Drinking Water Guidelines 1996 and the 1993 WHO Guidelines for drinking water quality. There are also memoranda of understanding with the non-metropolitan suppliers which require standards to be met. These memoranda are administered by the Department of National Resources and Environment.

The Departments are considering the option of developing legislation and regulations, which include the most relevant sections of the Australian Drinking Water Guidelines 1996. This is seen as increasing the clarity and transparency of requirements and responsibilities in this area. A Consultation Paper *'A New Regulatory Framework for Developing Water Quality in Victoria'* was jointly issued by these Departments in August 2000.

Section 39 of the *Environmental Protection Act 1970* also creates an offence to pollute waters in various ways.

10.3 Waste

Specific provisions relating to sanitation in the *Health Act* have been repealed, leaving these issues to the general nuisance provisions of the Act. Section 44 of the Act enables Councils to serve a notice on the person causing a nuisance, or, if that person cannot be found, on the owner or occupier of the land or person in charge of the land from which the nuisance emanates, requiring the nuisance to be abated. A Council can get a court order to ensure compliance with the notice. The court can also order that a house cannot be used for human occupation while the house is unfit for human occupation.

The installation of septic tank systems is governed by the *Environment Protection Act 1970.* A person must not construct, install or alter a septic tank system unless a person holds a permit issued under this Act by the council in the case of small systems, and the EPA in the case of larger ones. A septic tank system cannot be used until the municipal council has inspected the system and issued a certificate approving its use.

10.4 Built Environment

The *Building Act 1993* and *Building Regulations 1994* governs building work in Victoria. Section 16 provides that a person must not carry out building work without a building permit in most cases from the local Council. An occupancy permit is also required generally. The Building Code of Australia is adopted under the regulations.

Most provisions of the Act and regulations bind the Crown and apply to public authorities, including building standards and the need for permits, but under section 219, a municipal building surveyor is not required to inspect building work carried out by or on behalf of the Crown or a public authority.

10.5 Remote Communities – Application and Enforcement

The ABS lists two discrete Aboriginal communities in Victoria.[43] There is one at Framlingham, and another at Lake Tyers.

The *Aboriginal Lands Act 1970* provided for Aboriginal reserve land at these 2 places to be vested in Aboriginal Trusts. The *Aboriginal Lands Act 1991* revoked the reservations and granted inalienable freehold title to local representative bodies.

From consultation, it would seem that while Framlingham and Lake Tyers obtain funding from various agencies such as ATSIC (such as the Health Infrastructure Priority Program), mainstream requirements do apply to these communities. For example, building works and septic tanks installation must go to the local council and there would seem to be no question that the *Health Act* applies to Lake Tyers and Framlingham. The East Gippsland Shire advised that the Lake Tyers community was like any other ratepayer.

Having said that, a study on *Lake Tyers Aboriginal Trust Environmental Health* in December 1995, (a joint project of the Lake Tyers Aboriginal Trust and Health and Community Services Gippsland Region) was critical of environment health conditions

43 Ibid., p.11

at Lake Tyers, including housing standards, refuse collection and disposal and sewage treatment and disposal.

Some improvements have been made since, through joint Government (including local government) and local community consultation.

As already mentioned, there are significant Aboriginal populations living elsewhere in Victoria than the two discrete communities, for example in the Healesville area and in the northern suburbs of Melbourne. There are 21 Aboriginal Community Health Organisations in Victoria.

A Needs Assessment Study of Indigenous Health in the Outer Eastern Metropolitan Region of Melbourne in March 1998 indicated a poor health status and complex service needs for Aboriginal people in this area.[44]

There is a growing recognition that local government must play its role. One study indicated that 10% of local councils have included specific Koori health programs, strategies or action plans in their Municipal Public Health Plans.[45]

10.6 Local Initiatives

10.6.1 Local Government Indigenous Network

Taking the issue of local government involvement further, the Municipal Association of Victoria (MAV) is establishing a Local Government Indigenous Network with the following terms of reference:

a) to promote positive relationships between Councils and Indigenous communities.
b) to share, on a statewide basis, experiences, knowledge and resources relating to the Indigenous communities' relations with Victorian local government and to develop and actively promote Protocol Model(s) that will assist local governments' engagement with relevant Indigenous communities.
c) to promote the political representation of Indigenous people on Victorian's 78 Councils.
d) to promote the employment of Indigenous people on Victoria's 78 Councils, both in targeted positions and as part of the general workforce.
e) to advise Victoria's Indigenous communities of the roles and responsibilities of local Councils and the potential for positive relations with this sphere of government.
f) to promote the signing of Local or Regional Agreements between Councils and Indigenous communities as a way of enhancing the economic, social and cultural well being of Indigenous people.
g) to establish and promote a resource data base of Council/Indigenous profiles which will record best practice examples, cross-cultural training, advisory committees, joint initiatives, employment strategies, etc. for Victoria's 78 Councils.
h) to consider and develop mechanisms for educating non-Indigenous people within the community of the rights and cultures of Indigenous people.
i) to support the activities of the Aboriginal Policy Officers employed by local governments across the State.

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44 Indigenous Health, 1998, Yarra Valley Community Health Service

45 Hooton, Hudson and Maebus, 1995, Research thesis, Planning for Koori Health at the Local Government Level in Victoria

j) to liaise with the NAIDOC Committee for the purposes NAIDOC Week local Council activities.
k) to liaise with statewide Indigenous peak bodies for the purposes of furthering their roles in the local government sphere.
l) to provide advice to the MAV Management Board on policy positions and appropriate actions to advance the status of Indigenous people in Victoria's 78 Councils.

10.6.2 Protocol for the Negotiations of a Native Title framework Agreement for Victoria

Native title issues remain important for Aboriginal communities in Victoria. This protocol has been developed between the Victorian Government, ATSIC and the Mirimbiak Nations Aboriginal Corporation as the representative Aboriginal/Torres Strait Islander body for the whole of Victoria. The protocol acknowledges the spiritual, social and economic importance of land to Aboriginal people and the desirability of native title applications being settled by negotiation rather than litigation.

10.7 Summary

Victoria does not have the same structural application and enforcement issues as other States. This is not to say that its Aboriginal communities, whether discrete or otherwise, do not have environmental or other health needs, which require addressing.

Victoria's plans to adopt the most relevant sections of the *Australian Drinking Water Guidelines 1996* is an important initiative and model for elsewhere. The proposed Local Government Indigenous Network could also be useful in other States.

11. Tasmania

Tasmanian Legislation, Standards & Guidelines:
- *Public Health Act 1997*
- *Tasmanian Water Guidelines*
- *Local Government Act 1993*
- *Environmental Management and Pollution Control Act 1994*
- *Local Government (Building and Miscellaneous Provisions) Act 1993*

11.1 Introduction

Tasmania has modern public health legislation and a comprehensive local government structure, which applies to the State's remote communities.

11.2 Water

The *Public Health Act 1997* has modern provisions regarding water quality. An agency, public authority or person managing or in control of water must do so in a manner that does not pose a threat to public health. On becoming aware that the quality of water is or is likely to become a threat to public health the Director of Public Health must be notified in accordance with any relevant guidelines. The director must in turn notify the local Council.

If an environmental health officer confirms the concern, the Council must take action in accordance with guidelines to prevent the threat by:

- restricting or preventing the use of the water;
- restricting or preventing the use of any food product in which the water has been used;
- rendering the water safe; and
- giving warnings and information to the public about the safe use of the water or risks of using the water.

The relevant guidelines are the Tasmanian Water Guidelines, which pick up the Australian Drinking Water Guidelines and the Guidelines for Recreational Water Quality. The Director or the Council can make orders to enforce these actions.[46]

A Council is obliged to monitor the quality of water within its municipal area, as is an agency, public authority or manager if required by the Director. The Director can also require such an agency etc to carry out a health evaluation of water under its management or control. The Director can direct an authorised officer to do this, if the agency etc. fails.[47] The Director must provide an annual water quality report for the purposes of public accountability.

[46] ss. 128, 129.
[47] ss. 130, 132

11.3 Waste

Under the *Local Government Act 1993,* councils have broad powers to deal with nuisances, which can include pollution or risks to public health.[48]

Similar powers lie in Council officers to deal with environmental nuisances under the *Environmental Management and Pollution Control Act 1994.*

On-site disposal systems (as defined in the Act and Regulations, and including septic tanks) are controlled by the *Plumbing Regulations* under the *Local Government (Building Miscellaneous Provisions) Act 1993* and permits are required from the Local Council. Those Regulations call up the Tasmanian Plumbing Code which in turn calls up the relevant Australian Standards for on-site disposal systems. The regulations require all on-site disposal systems to be accredited under the Tasmanian Plumbing Code.

11.4 Built Environment

Under Section 86 of the *Public Health Act,* an environmental health officer can certify premises to be so unhealthy that no person can safely occupy them. The Director may issue guidelines on this and a building surveyor can report on what is required to put the premises in reasonable order.

A Council can make a closure order requiring the owner to make the premises safe for human occupation within a specified period. The Council must have regard to cost and value of the premises in setting requirements. The Council can if necessary forbid human occupation or habitation, or cause the premises to be demolished. Under the *Local Government (Building and Miscellaneous Provisions) Act 1993,* a person must not without the approval of the Council, inhabit a building which is not built as a dwelling for more than one month.[49] A certificate of occupancy is generally required to occupy a building by virtue of section 48.

Section 35 enables a Council to order the installation of adequate washing facilities. Section 35A requires there to be sanitation facilities. Section 44 requires building work or plumbing work to be carried out in accordance with the Act and regulations. Regulation 46 of the *Building Regulations* under the Act in turn requires compliance with the Building Code of Australia.

11.5 Remote Communities - Application and Enforcement

There would not seem to be the same application and enforcement problems in relation to remote communities in Tasmania as there are in some States.

The whole State of Tasmania is under the control of local councils. The Flinders Council has responsibility for Cape Barren Island, where there is a discrete Aboriginal

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48 s. 199

49 s. 31

community, and Flinders Island, where there are a number of Aboriginal people living in the general community.

The *Public Health Act* explicitly binds the Crown. The *Local Government (Building and Miscellaneous Provisions) Act 1993,* generally applies to buildings, including buildings built for and by Government department or agencies.

Under the *Aboriginal Lands Act 1995,* the Tasmanian Government established the Aboriginal Land Council of Tasmania and has vested twelve parcels of land with cultural and/or spiritual significance for Tasmanian Indigenous people in the Land Council. The land is vested in trust in perpetuity. This land comprises a number of islands as well as other significant sites on mainland Tasmania. This land is used for cultural practices rather than as residential land.

The Cape Barren Island community occupies a mix of private Aboriginal land and Crown land.

The Flinders Local Government Council requires mainstream building, water and waste requirements to be met within its Council area, including facilities on Aboriginal land. The Aboriginal Land Council is exempt from general council rates, but liable for rates and charges for services such as water supply, sewage, and garbage removal.

The Cape Barren Island has fully reticulated potable water and sewerage, and modern facilities, including new housing and a medical centre.

On Flinders Island, where a number of Aboriginal people also live, it seems that septic tanks in the town of Lady Barron are soon to be replaced by a reticulated system. During consultation, some criticism was made of the level of services provided by the Flinders Council. For example, on Cape Barren Island, the local Aboriginal community and not the Council do the rubbish collection. However, there would appear to be no structural impediment to the provision of services or the application of public health laws to Tasmania's remote communities.

11.6 Local Initiatives

11.6.1 Public Health Requirements and Cultural Pursuits

It is interesting to note an example where modern, mainstream public health requirements are being combined positively with traditional cultural pursuits. Recently, mainstrream public health requirements have been applied to mutton-bird sheds and processing facilities, requiring upgrading to be undertaken. This has included both building and food hygiene requirements. This insistence on standards is assisting in enabling mutton-birds to be sold on the open market.

11.6.2 Policy Framework for Improving Service Delivery to Aboriginal Communities

The Office of Aboriginal Affairs has developed a range of Government policy framework for improving service delivery to Aboriginal communities and this is currently under consideration by the Tasmanian Government. The Government has also now included negotiations for Partnership Agreements with Local Government. These

agreements consist of a standard set of issues aimed at improving service delivery to the Aboriginal community and will include:

- development of strategies to improve the level of participation of Aboriginal people in Local Government;
- provision of educative material to improve the non-Indigenous community's level of understanding of the Indigenous community;
- sustaining reconciliation through public support and participation in the process;
- taking effective action to assist in the elimination of social disadvantage that the Aboriginal community faces; and
- identification and development of regional economies and specific industry sectors which will enhance economic growth and employment opportunities for the Aboriginal community.

11.7 Summary

It is only recently that Tasmania has recognised land claims of its Aboriginal people. However, its modern public health laws and comprehensive local government structure, do assist in ensuring that mainstream standards apply to its remote communities.

12. Australian Capital Territory

ACT Legislation, Standards & Guidelines:

- *Public Health Act 1997*
- *Public Health Regulations 2000*
- *ACT Drinking Water Quality Code of Practice*
- *Environment Protection Act 1997 and Regulations*
- *Energy and Water Act 1988*
- *Water Pollution Ordinance 1984*
- *Water and Sewerage Act 2000*
- *Building and Services Act 1924 and Garbage Regulations*
- *Building Act 1972*

12.1 Introduction

The Australian Capital Territory (ACT) has extensive provisions dealing with public health issues. These laws are administered by the ACT Government and apply to all inhabitants of the ACT. There are no remote Indigenous Communities situated in the ACT. However, the laws of the ACT also apply in the Jervis Bay Territory, in which the Wreck Bay Aboriginal Community is situated. For this reason, the application of ACT public health laws to remote communities is discussed in this paper.

12.2 Water

The principal Act in the Australian Capital Territory relating to water quality and provision is the *Public Health Act 1997.*

The *Public Health Act 1997* gives the Chief Health Officer broad powers to issue orders to prevent or alleviate significant public health hazards in relation to water, food, air or elsewhere in the environment. The Act imposes penalties upon persons who fail to notify the Chief Health Officer of any potential significant public health hazards, where the person has reasonable grounds to believe that a hazard exists. If the Chief Health Officer has reasonable grounds to believe that a significant public health hazard is in existence or is imminent, he or she has the power to issue directions necessary to prevent or alleviate the situation.[50]

The *Public Health Act 1997* allows the Minister for Health to declare activities that may result in the transmission of disease or pose a risk to the wider health of the community, as a public health risk activity. A licence must be sought from the Health Minister to carry on a public health risk activity. An example of a health risk activity is the provision of the domestic water supply. In the ACT the ACTEW Corporation (ACTEW) must have a licence under the *Public Health Act 1997* to carry on with the provision of the domestic water supply. The licence also states that ACTEW will conform with the ACT Drinking Water Quality Code of Practice 2000. This Code draws heavily upon the Australian Drinking Water Guidelines.

ACTEW also publishes a monthly *Water and Wastewater Performance Report* which provides an analysis of the previous month's water supply in comparison with the Australian Drinking Water Guidelines set by the NHMRC. The *Environment Protection Regulations* in force under the *Environment Protection Act 1997* also provide water quality standards which must be complied with in order to reach particular environmental standards.

[50] ss. 4, 112, 113

The *Energy and Water Act 1988* gives the Minister powers to declare an emergency where he or she has reasonable grounds to believe that the supply of water or the maintenance of the provision of sewerage services in the ACT is, or is about to be, so affected that there could be a threat to public health. While the declaration is in force, ACTEW may prohibit, or otherwise regulate the use of electricity or water, or the provision of sewerage services, in accordance with a set emergency plan.[51]

The *Public Health Act 1997* allows for public health regulations to be made to enforce further the objectives of the Act (s 138). Under the *Public Health Regulations 2000* it is prohibited for persons to bathe or wash in the Canberra water supply, or put anything in the Canberra water supply that would be detrimental to the quality of the water.[52]

12.3 Waste

The *Water Pollution Ordinance 1984* established the Water Pollution Advisory Committee which has the function of making recommendations to the Minister with respect to the control of pollution of the waters of the ACT.[53]

The *Water Pollution Ordinance 1984* makes it an offence to discharge waste into waters of the Territory without a licence. In a similar way, the *Environment Protection Regulations 1997* also impose harsh penalties on those who allow waste and pollutants to enter Territory waterways or stormwater systems.[54]

The ACT also has in place *Garbage Regulations,* in force under the *Building and Services Act 1924,* which stipulate the type of waste which can be disposed of using garbage bins and containers and the frequency of collection.

Septic tanks are controlled by the *Public Health Regulations 2000* which stipulate that septic tanks must not be installed unless authorised by a Public Health Officer. The Public Health Officer also has powers to give written directions to occupiers to alter or replace a toilet in order to comply with the Regulations.[55]

The keeping of animals and birds is regulated under the *Public Health Regulations 2000* which state that persons must not keep animals or birds so as to cause an insanitary condition. The Chief Health Officer has powers to order the destruction of animals or birds that develop conditions that are potentially injurious to humans and represent a serious risk to public health.[56]

The *Public Health Act 1997* gives the Chief Health Officer or Public Health Officers the right to issue abatement notices if there are reasonable grounds to believe that an insanitary condition exists. If this notice is not complied with the Chief Health Officer can apply to the Magistrates Court for an order that the abatement notice be complied with.

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51 ss. 62, 63, 70,71

52 reg 68

53 ss. 9,10,11

54 s. 38

55 reg 70,76

56 regs 65,66,67

The recent *Water and Sewerage Act* 2000 provides for the certification of plumbing or sanitary drainage work other than for a single residential building and the licensing of sanitary plumbers and water supply plumbers.

12.4 Built Environment

As in other jurisdictions, the Building Act 1972 provides mechanisms for building approval and inspection, and generally requires compliance with the Building Code.

Section 46 of the Act stipulates that if completed buildings have deteriorated to an extent that they are considered unfit for use, the Building Controller can issue a notice to the owner of the parcel of land, directing that they carry out building work to alleviate the situation.

12.5 Remote Communities - Application and Enforcement

For the purposes of this paper, the Indigenous population of the ACT includes Aboriginal and Torres Strait Islander peoples living in Jervis Bay.

The *Jervis Bay Territory Acceptance Act 1915* (Cth) provides for laws in force from time to time in the ACT to be in force in the Jervis Bay Territory, subject to any modifications by ordinance of the Governor General. This means that the ACT Public Health 1997 and the Building Act 1972 apply to those living in the Jervis Bay Territory. The Federal Government is responsible for most of the State and local government services to Jervis Bay ensures services are delivered through arrangements made with the ACT government, the Shoalhaven City Council and the Wreck Bay Aboriginal Community Council. There are 12 Service Delivery Agreements in place between the Federal Government and the ACT and NSW governments for the delivery of services in the Jervis Bay Territory.

On 14 March 1987, the Wreck Bay Aboriginal Community Council was established and granted inalienable freehold title to land in the Jervis Bay Territory under *the Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth).* This Act gives the Wreck Bay Aboriginal Community Council many responsibilities, especially in relation to the housing, social welfare, education, training or health needs of the members of the Community.

The Wreck Bay Aboriginal Community Council does not have to pay rates or other ACT taxes, in relation to Aboriginal land. The Council may make by-laws for or with respect to such activities as economic enterprise, cultural activities and the management, access, conservation, fire protection, development and use of Aboriginal land.[57]

[57] ss 45,52A

12.6 Summary

Through somewhat complex arrangements, the ACT has extensive provisions dealing with water, waste and the built environment which apply to the Wreck Bay Aboriginal Community at Jervis Bay, while the Federal Government ensures service delivery.

13. Key Issues in Application and Enforcement

There are some key issues in application and enforcement which can be identified from the information obtained during this mapping exercise. It is envisaged that their identification will facilitate the NPHP in focussing further investigation and strategies for the future.

- In several jurisdictions, there is a lack of clarity as to both the application of public health and related laws to remote communities and the responsibility for monitoring standards and granting of necessary approval. In particular, many remote communities are on Crown land or land vested in instrumentalities of the Crown. Some relevant laws in Western Australia, Queensland and Northern Territory do not expressly bind the Crown and the application of these laws to these remote communities is therefore unclear. The legislative framework is also quite complex in some States. As a result, health administrators, local governments and remote communities do not always know their responsibilities, powers or rights.
- The lack of clarity as to the application of laws in some jurisdictions means that the role of local government in relation to remote communities under these laws can also be unclear. The situation is further exacerbated because Aboriginal land is generally not rateable and the other compensatory funding to local government is not always sufficient to enable councils to carry out their role adequately.
- Gaps in State laws and the particular needs of remote communities have led to the development of frameworks such as the *National Framework to Improve Indigenous* Housing and remote area guidelines such as *the Environmental Health Standards for Remote Communities in Northern Territory, the Basic Specification, Aboriginal Housing in South Australia,* and the *Code of Practice for Housing* and *Environmental Infrastructure Development in Aboriginal Communities in Western Australia.* One cannot really discuss public health laws in this area without acknowledging the primary importance of these initiatives.
- Compliance with these remote area guidelines has subsequently been required by conditions of funding for housing and other infrastructure by ATSIC and other State agencies. This assists in overcoming the gaps in State legislation and limitations in local enforcement of public health requirements. This practical, ad hoc, approach is leading to the development of a parallel system to the mainstream system.
- Notwithstanding the value and role of special standards and guidelines for remote communities, mainstream laws and standards should apply to remote communities wherever possible as a matter of principle and to ensure that fundamental public health issues are addressed.
- The modernisation of public health laws provides an opportunity to clarify the application of public health and related laws to remote communities. It is notable that the legal position is clearer in jurisdictions with modern public health laws, such as South Australia and Tasmania.
- The approach taken in New South Wales and South Australia to clarify the application of public health and other related laws should be noted. By clarifying that the agency holding Aboriginal land is not an agency of the Crown, those States have ensured that the laws automatically apply to that land and can be enforced regardless of the question whether the Crown should be bound.

- In several jurisdictions, Aboriginal and Torres Strait Islander community councils are empowered to carry out local government type functions and maintain public health standards. The ability of these community councils to carry out these functions would be enhanced if there were greater clarity with regard to their powers and responsibilities together with appropriate resourcing for these functions. In particular, the need for more Aboriginal Environmental Health Workers to assist communities was emphasised during the consultation.

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Appendix – Persons Assisting

This report has been prepared by Ian Bidmeade, Project Officer with the NPHP Secretariat, with assistance from the following people:

Helen Cameron	(Commonwealth)
Craig Steel	(SA)
Jim Dadds	(SA)
Helen Findlay	(NT)
Brian Dixon	(SA)
Steve Corbett	(NSW)
Sue Cowie	(NSW)
Stephan Rainow	(Nganampa Health Council)
Alan Morton	(Consultant)
Jim Dodds	(QLD)
Kevin Buckett	(Commonwealth)
Veronica Hancock	(Commonwealth)
Fiona Dalton	(Commonwealth)
Chris McCarthy	(ATSIC)
Paul Jenkins	(Indigenous Land Council)
Bruce Morton	(QLD)
Ian Anderson	(Uni of Melbourne)
Trevor Davies	(WA)
Wayne Jolley	(WA)
Natalie Dunham	(NPHP Secretariat)
John Scott	(QLD)
Debra Blumel	(QLD)
Lynne Dixon	(QLD)
Joe Conti	(TAS)
Stanley Nangala	(HAHU)
Puggy Hunter	(NACCHO)
Sabrina Stow	(NPHP Secretariat)
Karen Roger	(NPHP Secretariat)
Xavier Schobben	(NT)
Sharon Tuffin	(Commonwealth)
Sophie Couzos	(NACCHO)
Phil Callan	(Commonwealth)
Ray Goudey	(VIC)
Suzie Goldman	(VIC)
Tasha Latham	(VIC)
Chris Larkin	(Aboriginal Housing Authority (SA))
Peter Blackman	(ATSIC – VIC)
Kate Purcell	(NSW)
Barry Lynch	(ACT)

Persons attending the 3rd National Indigenous Environmental Health Conference, Alice Springs, 14 – 16 November 2000.