

Case study 1

Climate change and the human rights of Torres Strait Islanders

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Imagine the sea rising around you as your country literally disappears beneath your feet, where the food you grow and the water you drink is being destroyed by salt, and your last chance is to seek refuge in other lands...¹

This is a reality that a group of Indigenous Australians – the Torres Strait Islanders – are facing. If urgent action is not taken, the region and its Indigenous peoples face an uncertain future, and possibly a human rights crisis.

The Torres Strait Islands are a group of over 100 islands spread over 48,000km², between the Cape York Peninsula at the tip of Queensland, and the coast of Papua New Guinea.

It is a unique region, geographically and physically, and it is home to a strong, diverse Indigenous population. Approximately 7,105 Torres Strait Islanders live in the Torres Strait region, in 19 communities across 16 of the islands.² Each community is a distinct peoples – with unique histories, traditions, laws and customs. Although the communities are diverse, the islands are often grouped by location,³ and together they form a strong region whose considerable influence is evidenced by the very existence of native title law today.

The Torres Strait is home to the group of Islanders from Mer who first won recognition of native title, with Eddie (Koiki) Mabo triggering the land rights case which recognised Aboriginal peoples and Torres Strait Islanders' native title to the land and affirmed that Australia was not *terra nullius*

1 Avaaz, 'Avaaz petition', *Email to the Australian Human Rights Commission*, 3 September 2008.

2 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

3 See www.tsra.gov.au. There are also two large Torres Strait communities on the mainland in Bamaga and Seisia. The Islands are grouped as: Northern Division (Boigu Island, Dauan Island, Saibai Island); Eastern Islands (Erub/Darnley Island, Mer/Murray Island, Ugar/Stephen Island); Western Division (Moa [which includes the Kubin and St Pauls communities], Badu Island, Mabuigai Island); Central Division (Masig/Yorke Island, Poruma/Coconut Island, Warraber/Sue Island, Iama/Yam Island); Southern Division (Waiben/Thursday Island [which includes the TRAWQ and Port Kennedy communities], and the Inner Islands of Hammond Island, Muralug/Prince of Wales Island, Ngurupai/Horn Island). There are a total of over 47,000 Torres Strait Islander people living throughout Australia. See Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians 2006*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

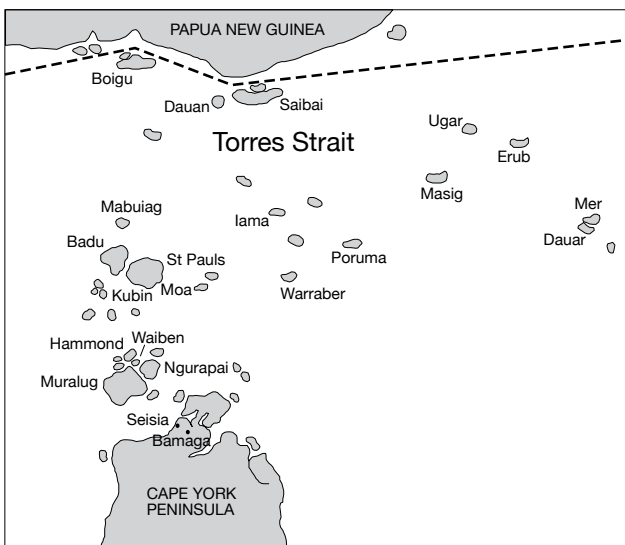
(belonging to no one) when the British arrived. It is also home to a group of Aboriginal people, known as the Kaurareg of the Kaiwalagal (inner) group of islands.

The Islanders were also successful in forming their own governance structure:

In 1994, in response to local demands for greater autonomy, the Torres Strait Regional Authority (TSRA) was established to allow Torres Strait [I]slanders to manage their own affairs according to their own *ailan kastom* (island custom) and to develop a stronger economic base for the region.⁴

Additionally, the region has its own flag symbolising the unity and identity of all Torres Strait Islanders,⁵ and the area is subject to a bilateral treaty with Papua New Guinea which recognises and guarantees their traditional fishing rights and traditional customary rights.⁶

Map 1: The Torres Strait region⁷



4 Australian Broadcasting Corporation Radio Australia, *Places: Torres Strait Islands*. At: http://www.abc.net.au/ra/pacific/places/country/torres_strait_islands.htm (viewed August 2008).

5 Torres Strait Regional Authority, *Torres Strait Flag*. At: <http://www.tsra.gov.au/the-torres-strait/torres-strait-flag.aspx> (viewed September 2008). In July 1995, the flag was officially recognised as a 'flag of Australia'. The flag was designed by the late Mr. Bernard Namok.

6 *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters*, Australian Treaty Series 1985, No 4. Article 11 provides for the free movement and traditional activities including traditional fishing and Article 12 provides for the exercise of traditional customary rights. At: <http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html> (viewed September 2008). For more information on the treaty see http://www.dfat.gov.au/geo/torres_strait/index.html (viewed September 2008).

7 Map recreated by Jo Clark based on the *Regional Map* provided by the Torres Strait Regional Authority located at <http://www.tsra.gov.au/the-torres-strait/regional-map.aspx>.

Despite these strengths, many Australians would be hard pushed to locate the region on a map, and the Torres Strait Islands and its Indigenous peoples are often overlooked in policy, research and Indigenous' affairs discourse in Australia. This is also true for many issues on the islands related to the environment. As one researcher has put it, the Torres Strait Islands have effectively been 'left off the map in research on biophysical change in Australia'.⁸

Yet the Islanders' cultures, societies and economies rely heavily on the ecosystem and significant changes to the region's environment are already occurring. For example, in mid 2005 and in early 2006,⁹ a number of the islands were subject to king tides which were so high that the life of one young girl was threatened, and significant damage was caused.¹⁰ Although there is no proof that these were attributable to climate change, Islanders believe that it is climate change that is threatening their existence.

Anecdotally, Islanders have voiced their concerns to me about the impact of climate change and the visible changes that are already occurring, such as increased erosion, strong winds, land accretion, increasing storm frequency and rougher seas of a sort that elders have never seen or heard of before. They have seen the impact these events have had on the number of turtles nesting, their bird life and sea grass. They feel that their lives are threatened both physically and culturally.¹¹

Abnormally high tides...the seasons are shifting, and the land is eroding. Birds' migration patterns have altered, and the turtles and dugongs (sea cow) that are traditionally hunted for meat have grown scarce. People are no longer certain when to plant their crops: cassava, yams, sugarcane, bananas and sweet potato.¹²

The potential impacts of climate change are severe. Ultimately, if predictions of climate change impacts occur, it poses such great threats to the very existence of the Islands that the government must seriously consider what the impact will be on the Islanders' lives, and provide leadership so that cultural destruction is avoided. As the United Nations Permanent Forum on Indigenous Issues recognised 'Indigenous peoples, who have the smallest ecological footprints, should not be asked to carry the heavier burden of adjusting to climate change.'¹³

8 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

9 There were a number of different incidences of king tides in the region. In 2005, king tides were experienced on the Island of Mer. In 2006, the islands of Boigu and Saibai, Poruma, Iama, Masig and Warraber were all subject to king tides. For further information see Queensland Government Environmental Protection Agency, *2006 King Tides in Torres Strait*, Fact Sheet 2006-1. At: <http://www.epa.qld.gov.au/publications?id=1864> (viewed September 2008).

10 L Minchin, 'Not waving but drowning at our back door', *The Age*, 12 August 2006. At: <http://universal-salvage.org.uk/pdf/AustraliaTidesRising.pdf> (viewed September 2008).

11 See for example, D Billy, Kulkalgal (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 18 September 2008; J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

12 The Independent, 'Sinking without a trace: Australia's climate change victims', *The Independent*, 5 May 2008. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

13 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008). At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

It is ironic that Torres Strait Islanders have been able to weather 400 years of European colonisation as a distinct Indigenous entity, only to have to face the problem of cultural annihilation as a result of rising sea level due to the greenhouse effect.¹⁴

Because of its geography, with many of the Islands being low-lying coral cays with little elevation, the Torres Strait Islands will be the inadvertent litmus test for how the Australian and Queensland governments distribute the costs and burden of climate change:

Socially, climate change raises profound questions of justice and equity: between generations, between the developing and developed worlds; between rich and poor within each country. The challenge is to find an equitable distribution of responsibilities and rights.¹⁵

The lessons learned will have wide application. FaHCSIA states that there are '329 discrete Indigenous communities across Australia located within 10 kilometres of the coast. The majority of these communities are located in remote locations.'¹⁶

1. Potential effects of climate change on the Torres Strait Islands

Both domestic and international research on climate change impacts identify the difficult situation that the Torres Strait Islanders face in order to survive:

Torres Strait Islanders and remote Indigenous communities have the highest risks and the lowest adaptive capacity of any in our community because of their relative isolation and limited access to support facilities. In some cases the Torres Strait islands are already at risk from inundation.¹⁷

Primarily there will be three major impacts with considerable flow on effects which overlap and form a cycle of destruction:

1. A temperature rise is predicted. 'By 2070, average temperatures are projected to increase by up to 6°C.'¹⁸
2. A rise in sea level is predicted. 'While global average sea level rise is projected between 9 and 88cm by 2100, sea level rise around some areas of the Australian coast and the Pacific region has recently shown short term larger-than-average variation.'¹⁹ Some of the Islands in the Torres Strait are barely a metre above sea level. However, the impact that sea

14 J Toscano, 'Torres Strait Islanders facing annihilation from rising sea levels', *Melbourne Independent Media Centre*, 17 August 2006, citing L Minchin. At: <http://melbourne.indymedia.org/news/2006/08/119708.php> (viewed September 2008).

15 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008) p 1, citing the Rt Hon David Miliband MP. At: http://www.humanrights.gov.au/pdf/about/media/papers/hrandclimate_change.pdf (viewed September 2008).

16 Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts inquiry into climate change and environmental impacts on coastal communities* (5 August 2008) p 5. At: <http://www.aph.gov.au/HOUSE/committee/ccwea/coastalzone/subs/sub099.pdf> (viewed September 2008).

17 PMSEIC Independent Working Group, *Climate change in Australia: regional impacts and adaptation – managing the risk for Australia*, Report prepared for the Prime Minister's Science, Engineering and Innovation Council (2007) p 28. At: <http://www.dest.gov.au/NR/rdonlyres/CE5D024E-8F58-499F-9EEB-D2D638E7A345/17397/ClimateChangeinAustraliareport.pdf> (viewed September 2008).

18 Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: Summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008).

19 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

level rise will have on the Islands could vary. It could include loss of land, sediment supply and possibly island growth, or increased inundation events.

3. An increase in severe weather events is predicted. 'Rainfall patterns are also likely to become more extreme, with projected changes of between +17 to -35 per cent (in the wet and dry seasons respectively compared to 1990 levels) in the region. This suggests the potential for heavier downpours during the monsoon as well as more extended dry spells.'²⁰

We see the big trees near the beach... falling down. The seagrass that the dugongs eat you used to find long patches of it, but not any more. The corals are dying, and the sand is getting swept away and exposing rock.²¹

These three primary impacts will flow on to potentially effect every aspect of society, including:²²

- reduced freshwater availability
- greater risk of disease from flooded rubbish tips and changing mosquito habitats
- erosion and inundation of roads, airstrips and buildings near the shoreline
- degradation of significant cultural sites, such as graveyards near the shoreline
- change in the location or abundance of plants and animals (and their habitat), such as turtles, dugongs and mangroves. This could extend to a complete loss of some plants and animals
- change in coral growth or coral bleaching
- inundation or destruction of essential infrastructure such as housing, sewerage, water supply, power
- inability to travel between islands
- movement of disease borne/pest insects from the tropical north
- loss of land, accretion or creation of land.

20 Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008).

21 The Independent, 'Sinking without a trace: Australia's climate change victims', The Independent, 5 May 2008, citing Ron Day, a Murray Island elder and community leader. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

22 See Sharing Knowledge, UNSW, *Climate change in the Torres Strait, Australia: summary of climate impacts* (2007). At: http://www.ciel.org/Publications/Climate/CaseStudy_TorresStraitAus_Dec07.pdf (viewed September 2008). See also Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008). For more information on climate change impacts, see Council of Australian Governments, *National Climate Change Adaptation Framework* (2007). At: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/ (viewed September 2008).

Text Box 1: Impacts of climate change on small islands

The Intergovernmental Panel on Climate Change summarises the impacts of climate change on small islands as:²³

Small islands, whether located in the tropics or higher latitudes, have characteristics which make them especially vulnerable to the effects of climate change, sea-level rise and extreme events.

Deterioration in coastal conditions, for example through erosion of beaches and coral bleaching, is expected to affect local resources, e.g., fisheries, and reduce the value of these destinations for tourism.

Sea-level rise is expected to exacerbate inundation, storm surge, erosion and other coastal hazards, thus threatening vital infrastructure, settlements and facilities that support the livelihood of island communities.

Climate change is projected by mid-century to reduce water resources in many small islands, e.g., in the Caribbean and Pacific, to the point where they become insufficient to meet demand during low-rainfall periods.

With higher temperatures, increased invasion by non-native species is expected to occur, particularly on mid- and high-altitude islands.

The consequences of these impacts will be greater because the Islanders are Indigenous. It is widely recognised that Indigenous communities are much more vulnerable to climate change because of the social and economic disadvantage Indigenous communities already face:²⁴

Vulnerability to climate change can be exacerbated by the presence of other stresses... vulnerable regions face multiple stresses that affect their exposure and sensitivity as well as their capacity to adapt. These stresses arise from, for example, current climate hazards, poverty and unequal access to resources, food insecurity, trends in economic globalisation, conflict, and incidence of diseases such as HIV/AIDS.²⁵

Many of these stresses are found in the Torres Strait Islands' communities. The Islands are remote, the Islanders do not have access to the same services and infrastructure as other Australians and the health and other social statistics of the Islanders are similar to other Indigenous Australians, that is, they are significantly worse than non-indigenous Australians:

23 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7, p 15. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

24 Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Climate change: an overview*, United Nations Department of Economic and Social Affairs (2007), p 4. At: http://www.un.org/esa/socdev/unpfii/documents/Climate_change_overview.doc (viewed September 2008).

25 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7-22. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

Social and economic disadvantage further reduces the capacity to adapt to rapid environmental change, and so this problem is compounded on many of the Islands which lack adequate infrastructure, health services and employment opportunities.²⁶

2. Climate change and the human rights of Torres Strait Islanders

The predicted impact of climate change on the islands is severe. It threatens the land itself and the existence of the Islands. The impacts predicted above threaten the Islanders lives and their culture. If the serious predictions are not headed, and no action is taken, the Torres Strait Islands will face a human rights crisis.

In September 2007, the Interagency Support Group on Indigenous Issues pointed out that:

the most advanced scientific research has concluded that changes in climate will gravely harm the health of indigenous peoples' traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by the immediate impacts of climate change.²⁷

Yet to date, action on climate change has focused on environment and conservation, and there has been little recognition of the need to protect Indigenous peoples' rights in the response to climate change. This must change.

By ratifying various human rights instruments, Australia has agreed to *respect, protect and fulfil* the rights contained within it.²⁸

- The obligation to *respect* means Australia must refrain from interfering with or curtailing the enjoyment of human rights.
- The obligation to *protect* requires Australia to protect individuals and groups against human rights abuses – whether by private or government actors.
- The obligation to *fulfil* means that Australia must take positive action to facilitate the enjoyment of basic human rights.²⁹

26 D Green & K Ruddock, 'What are the legal dimensions to climate change in the Torres Strait?' (2007) 70 *University of New South Wales Faculty of Law Research Series*, p 48. At: <http://law.bepress.com/cgi/viewcontent.cgi?article=1072&context=unswrps> (viewed September 2008).

27 Economic and Social Council Permanent Forum on Indigenous Issues, *Interagency Support Group on Indigenous Peoples Issues*, UN Doc E/C.19/2008/CRP.2 (2008), p 1. At: http://www.un.org/esa/socdev/unpfi/documents/E_C19_2008_8.pdf (viewed September 2008).

28 United Nations Office of the High Commissioner for Human Rights, *What are Human Rights?* (2008). At: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (viewed September 2008).

29 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 9. See UN Committee on the Rights of the Child, *General comment No 5 – General Measures of Implementation of the Convention on the Rights of the Child* (2003), UN Doc CRC/GC/2003/5. At: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En) (viewed September 2008); UN Committee on Economic, Social and Cultural Rights, *General comment No 9 – the Domestic Application of the Covenant* (1998), UN Doc E/C.12/1998/24. At: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1998.24.+CESC.R+General+comment+9.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1998.24.+CESC.R+General+comment+9.En?Opendocument) (viewed September 2008); UN Human Rights Committee, *General comment 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant* (2004), UN Doc CCPR/C/21/Rev.1/Add.13. At: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) (viewed September 2008).

Thus, irrespective of the *cause* of a threat to human rights, Australia still has positive obligations to use all the means within its disposal to uphold the human rights affected.³⁰

Chapter 4 of this Report outlines some of the threats that climate change impacts pose to human rights generally. Some of the impacts that will be felt in the Torres Strait Islands are discussed here.

2.1 The right to life³¹

The right to life is protected in the *Universal Declaration of Human Rights* (UDHR)³² and the *International Covenant on Civil and Political Rights*³³ (ICCPR). Article 3 of the UDHR provides 'everyone has the right to life, liberty and security of person'. Article 6(1) of the ICCPR provides 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life'. The *Declaration on the Rights of Indigenous Peoples*³⁴ also includes a right to life and security.

Declaration on the Rights of Indigenous Peoples – article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

In its General Comment on the right to life, the United Nations Human Rights Committee warned against interpreting the right to life in a narrow or restrictive manner. It stated that protection of this right requires the State to take positive measures and that 'it would be desirable for state parties to take all possible measures to reduce infant mortality and to increase life expectancy...'³⁵

As articulated by the Deputy High Commissioner for Human Rights, climate change can have both direct and indirect impacts on human life. This is true for the Torres Strait region, where the effect may be immediate; that is, as a result of a climate-change induced extreme weather, a threat that has already been felt when a young girl's life was at risk in the 2006 king tides; or it may occur gradually, through deterioration in health, diminished access to safe drinking water and increased susceptibility to disease.

30 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008) p 9; United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 3 – On the Nature of State Parties' Obligations* (1990), UN Doc, E/1991/23, annex III. At: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument) (viewed September 2008).

31 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 3-4.

32 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 at 71 (1948). At: <http://un.org/Overview/rights.html> (viewed September 2008).

33 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, Australia ratified the convention on 13 August 1980). At: http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (viewed September 2008).

34 See chapter 1 for more information on the *Declaration on the Rights of Indigenous Peoples*.

35 UN Human Rights Committee, *General comment No. 6 – the Right to Life* (1982), UN Doc HRI/Gen/1/Rev.7 at 128, paras 1 and 5. At: <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3> (viewed September 2008).

2.2 The right to water³⁶

The right to water is intricately related to the preservation of a number of rights protected through the *International Covenant on Economic, Social and Cultural Rights*³⁷ (ICESCR). It underpins the right to health in article 12 and the right to food in article 11. The right to water is also specifically articulated in article 24 of the *Convention on the Rights of the Child*³⁸ (CRC), and article 14(2)(h) of the *Convention on the Elimination of Discrimination against Women*³⁹ (CEDAW). Various articles of the *Declaration on the Rights of Indigenous Peoples* refer to rights to water for both cultural and economic uses.

In 2002, the UN Committee on Economic, Social and Cultural Rights recognised that water itself is an independent right.⁴⁰ Drawing on a range of international treaties and declarations it stated, ‘the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival’.⁴¹ The same General Comment refers specifically to the rights of Indigenous peoples to water:

Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right...In particular, States parties should take steps to ensure that: ...

(d) Aboriginal peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for Aboriginal peoples to design, deliver and control their access to water;⁴²

In the Torres Strait region, the right to water will be threatened by a number of factors.

Both surface and ground water resources are likely to be impacted by climate change making resource management in the dry season difficult. In the past, many islands depended on fresh water lenses to provide drinking water, but overexploitation of this resource has caused problems and created the need for water desalination plants on many of the islands. Rainwater tanks and large lined dams are now used to trap and store water for use in dry season. Many of the islands have already reached the limits of drinking water supply and must rely on mobile or permanent desalination plants to meet demand. Other problems are likely to include an increase in extreme weather

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- 36 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 5-6.
- 37 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, Australia ratified the convention on 10 December 1975). At: http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (viewed September 2008).
- 38 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990, Australia ratified the convention on 17 December 1990). At: <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (viewed September 2008).
- 39 *Convention on the Elimination of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981, Australia ratified the convention on 28 July 1983). At: <http://www.un.org/womenwatch/daw/cedaw/> (viewed September 2008).
- 40 UN Committee on Economic, Social and Cultural Rights, *General comment No. 15 – the Right to Water*, UN Doc E/C.12/2002/11 (2002). At: <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (viewed September 2008).
- 41 UN Committee on Economic, Social and Cultural Rights, *General comment No. 15 – the Right to Water*, UN Doc E/C.12/2002/11 (2002). <http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94?Opendocument> (viewed September 2008).
- 42 See T McAvoy, ‘The human right to water and Aboriginal water rights in New South Wales’ (2008) 17(1) *Human Rights Defender*, p 6. At: http://www.ahrcentre.org/documents/Publications/HRD_Vol17_1_webextract.pdf (viewed September 2008).

events such as droughts and floods, and an increase in salt-water intrusion into fresh water supplies.⁴³

In addition, the rights that the right to water underpin, such as the right to food and the right to life, will also be threatened.⁴⁴

2.3 The right to food⁴⁵

The right to adequate food is recognised in several international instruments, most comprehensively in the ICESCR. Pursuant to article 11(1), state parties recognise 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', while article 11(2) recognises that more immediate and urgent steps may be needed to ensure 'the fundamental right to freedom from hunger and malnutrition'. Article 20 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to secure their subsistence.

Declaration on the Rights of Indigenous Peoples – article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

The UN Special Rapporteur on the Right to Food has defined the right as follows:

The right to adequate food is a human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear.⁴⁶

There is little doubt that climate change will detrimentally affect the right to food in a significant way. In the Torres Strait, it is predicted that food production will be severely affected because of increased temperatures, changing rainfall patterns, salinity which will turn previously productive land infertile, and erosion. Fishing, a major source of food for the region, will also be affected by rising sea levels, making coastal land unusable, causing fish species to migrate, and an increase in the

43 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 7. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

44 See T McAvoy, 'The human right to water and Aboriginal water rights in New South Wales' (2008) 17(1) *Human Rights Defender*, p 6 At: http://www.ahrcentre.org/documents/Publications/HRD_Vol17_1_webextract.pdf (viewed September 2008); D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

45 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 4-5.

46 J Ziegler, *The Right to Food*, Report by the Special Rapporteur on the right to food to the Commission on Human Rights 57th session, UN Doc E/CN.4/2001/53 (2001) p 2. At: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/f45ea4df67ecca98c1256a0300340453?Opendocument> (viewed September 2008).

frequency of extreme weather events disrupting agriculture.⁴⁷ Islanders have already identified a change a fish stocks, dugongs and turtles, affecting their right to food that corresponds with their cultural traditions.

2.4 The right to health⁴⁸

Article 25 of the UDHR states that ‘everyone has the right to a standard adequate for the health and well-being of himself and his family’. Article 12(a) of the ICESCR recognises the right of everyone to ‘the enjoyment of the highest standard of physical and mental health’. The right to health is also referred to in a number of articles in the CRC. Article 24 stipulates that state parties must ensure that every child enjoys the ‘highest attainable standard of health’. It stipulates that every child has the right to facilities for the treatment of illness and rehabilitation of health. Article 12 of the CEDAW contains similar provisions.⁴⁹ Article 24 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to health, their cultural health practices, and equality of health services.

Declaration on the Rights of Indigenous Peoples – article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Many of these impacts are predicted to occur in the Torres Strait region.

Climate change will have many impacts on human health, and this threat is even more prevalent for Indigenous peoples, who commonly don’t have access to the same standard of health care that non-Indigenous Australians enjoy. Additionally, the dietary health of [Indigenous] communities is predicted to suffer as the plants and animals that make up our traditional diets could be at risk of extinction through climate change.⁵⁰

47 D Green, A Dupont and G Pearman, *Heating up the Planet: climate change and security* Lowy Institute Paper 12 (2006) pp 30-31. At: <http://www.lowyinstitute.org/Publication.asp?pid=391> (viewed September 2008).

48 See: Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 6.

49 Article 12 of the CEDAW states ‘(1) States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (2) Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.’

50 Indigenous Peoples Organisations Network, *Response to Agenda Item 3: Climate Change Biological Diversity and Livelihoods: The Stewardship Role of Indigenous People’s and New Challenges*, Seventh Session of the United Nations Permanent Forum, New York, 21 April – 2 May 2008.

Climate change may affect the intensity of a wide range of diseases – vector-borne, water-borne and respiratory.⁵¹ Changes in temperature and rainfall will make it harder to control dengue fever and other diseases carried by mosquitoes, and there is a risk that the range and spread of tropical diseases and pests will increase.⁵²

Increasing temperatures may lead to heat stress, while rising sea levels and extreme weather events increases the potential for malnutrition and impoverishment. This is particularly true for communities such as those in the Torres Strait which rely on traditional harvest from the land and oceans, and small crops.

However, in addition to the direct physical impacts on health, there are health implications from disturbing Indigenous peoples' connection to country and their land and water management responsibilities:

Many Indigenous people living in remote areas have a heightened sensitivity to ecosystem change due to the close connections that exist for them between the health of their 'country', their physical and mental well-being and the maintenance of their cultural practices. A biophysical change manifested in a changing ecosystem has, for example, the potential to affect their mental health in a way not usually considered in non-Indigenous societies.⁵³

The impact of climate change on the mental well-being of Torres Strait Islanders has already been predicted:

The mental well-being of Islanders who feel that they can no longer predict seasonal change is another factor that needs to be considered in any assessment of Islander health. Given the close cultural connection between the natural environment and Islander culture, habitat change that impacts significant fauna (for example, reduction in turtle nesting beaches, migratory bird foraging or sea grass bed decline) is likely to affect Islanders' mental well-being.⁵⁴

2.5 The right to a healthy environment⁵⁵

In Australia, and elsewhere, there have been discussions about the existence of an internationally recognised human right to an environment of a particular quality. The Advisory Council of Jurists of the Asia-Pacific Forum on National Human Rights Institutions endorsed the idea that the protection of the environment is 'a vital part of contemporary human rights doctrine and a sine qua non for numerous human rights, such as the right to health and the right to life'.⁵⁶

51 Working Group on Climate Change and Development, *Up in Smoke? Asia and the Pacific Report No. 5* (2007), p 6. At: <http://www.oxfam.org.au/campaigns/climate-change/docs/Up-in-Smoke-ASIA-EMBARGO-19-11-07.pdf> (viewed September 2008).

52 D Green, 'Climate change and health: Impacts on remote Indigenous communities in Northern Australia' (2006) *CSIRO Marine and Atmospheric Research Paper 012*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed September 2008).

53 D Green, 'Climate change and health: Impacts on remote Indigenous communities in Northern Australia' (2006) *CSIRO Marine and Atmospheric Research Paper 012*, p 1. At: http://www.cmar.csiro.au/e-print/open/greendl_2006.pdf (viewed September 2008).

54 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 7. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

55 See Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), pp 3-4.

56 Per: C G Weeramantry J, in his separate opinion in the International Court of Justice's decision in *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97, 110; 37 ILM 162, 206 (1998).

The link between the environment and human rights has been the subject of many ‘soft law’ instruments of international environmental law.⁵⁷ This includes the first international law instrument to recognise the right to a healthy environment, the 1972 *Stockholm Declaration on the Human Environment*.⁵⁸ Others followed, including the 1992 *Rio Declaration*⁵⁹ and the 1994 draft Declaration of Principles on Human Rights and the Environment which ‘demonstrates that accepted environmental and human rights principles embody the right of everyone to a secure, healthy and ecologically sound environment, and it articulates the environmental dimension of a wide range of human rights.’⁶⁰

Article 29 of the *Declaration on the Rights of Indigenous Peoples* protects the right of Indigenous peoples to the conservation and protection of the environment.

Declaration on the Rights of Indigenous Peoples – article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

There are domestic laws in Australia that are related to the protection of a healthy environment. Chapters 4 and 5 of this report, outline some of these mechanisms.

Relevant to the Torres Strait region is the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA) which was passed in response to the International Convention on Biodiversity. The EPBCA provides a legal framework to protect and manage matters of national and international environmental significance and it aims to balance the protection of these crucial environmental and cultural values with our society’s economic and social needs.

There are significant concerns about the threats to biodiversity in the Torres Strait. The Intergovernmental Panel on Climate Change has predicted a significant loss of biodiversity in surrounding regions.⁶¹ Already, turtle nesting failures and other impacts on biodiversity have been identified by Islanders. Acting on this concern, the Torres Strait Regional Authority has recommended to the government:

57 M Byrne and M Iljadica, ‘There goes the neighbourhood’ (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

58 *Declaration of the United Nations Conference on the Human Environment*, 1972. At: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503> (viewed September 2008).

59 *Rio Declaration on environment and development*, 1992. At: <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163> (viewed September 2008).

60 1994 draft Declaration of Principles on Human Rights and the Environment. At: <http://cesr.org/draft-declarationenvironment> (viewed September 2008).

61 Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), ‘Summary for Policy Makers’ in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 7, p 13. At: <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-intro.pdf> (viewed September 2008).

that there are further studies of island processes and projected climate change impacts on island environments, including uninhabited islands with problems such as turtle nesting failures.⁶²

2.6 The right to culture⁶³

While the focus of media and political debates in Australia presently rests with the environmental and economic impacts of climate change, inextricably linked to environmental damage is damage to Indigenous peoples cultural heritage and identity. The devastation of sacred sites, burial places and hunting and gathering spaces, not to mention a changing and eroding landscape, cause great distress to Indigenous peoples.⁶⁴

Indigenous peoples across the world have a right to practice, protect and revitalise their culture without interference from the state. Governments have an obligation to promote and conserve cultural activities and artefacts.⁶⁵ The right to culture is entrenched in a number of international law instruments. Article 27 of the ICCPR protects the rights of minorities to their own culture. The Human Rights Committee's General Comment 23 makes it clear that this right applies to Indigenous peoples. The Committee also confirmed that this may require the states to take positive legal measures to protect this right.⁶⁶

The right to culture is also found in a number of other instruments including article 15 of the ICESCR which upholds the right of everyone to 'take part in cultural life', the *Convention on the Elimination of All Forms of Racial Discrimination*⁶⁷ (ICERD), commits all states to 'ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.'⁶⁸ The General Comment to the ICERD also provides that 'no decisions directly relating to [Indigenous communities]' rights and interests are taken without their informed consent.'⁶⁹

Article 30 of the CRC protects the rights of children to their culture. Article 8 of *International Labour Organisation Convention 169* provides a specific protection for indigenous peoples stating that: '[Indigenous peoples] shall have the right to retain their own customs and institutions, where these are not incompatible with

62 Torres Strait Regional Authority, *Submission to the House of Representatives Standing Committee on climate change, water, environment and the arts inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

63 See the Human Rights Education Associates website at: http://www.hrea.org/index.php?base_id=157.

64 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, p 12. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed November 2008).

65 See Human Rights Education Associates, *Right To Culture*, http://www.hrea.org/index.php?base_id=157 (viewed September 2008).

66 United Nations Office of the High Commissioner for Human Rights, *General Comment No. 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5 (1994). At: <http://www.unhcr.ch/tbs/doc.nsf/0/fb7fb12c2fb8bb21c12563ed004df111?Opendocument> (viewed September 2008).

67 *Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969. Australia ratified the convention on 30 September 1975). At: http://www.unhcr.ch/html/menu3/b/d_icerd.htm (viewed September 2008).

68 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* Gen. Rec. No. 23 (1997). At: <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed September 2008).

69 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* Gen. Rec. No. 23 (1997). At: <http://www.unhcr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?Opendocument> (viewed September 2008).

fundamental rights defined by the national legal system and with internationally recognized human rights.⁷⁰

Importantly, under the *Declaration on the Rights of Indigenous Peoples*, Indigenous peoples have a number of rights related to the right to practice and revitalisation of their cultural practices, customs and institutions.⁷¹

Declaration on the Rights of Indigenous Peoples – various articles

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights.
 - (d) Any form of forced assimilation or integration.
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

70 *Convention (No. 169) concerning Indigenous and Tribal peoples in Independent Countries* (entered into force 5 September 1991). At: <http://www.unhchr.ch/html/menu3/b/62.htm> (viewed September 2008).

71 See *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007), articles 5, 8, 11, 12 and 25 among others. At: <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (viewed September 2008).

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

In 2000, the United Nations Human Rights Committee expressed concern about Australia's recognition of the cultural rights of its Indigenous population:

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing, gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.⁷²

This recognition could become even more limited with climate change, as there is expected to be a significant threat to cultural rights as a result. One way this will occur is through damage to the land, which in turn can damage cultural integrity:

Indigenous people don't see the land as distinct from themselves in the same way as maybe society in the south-east (of Australia) would. If they feel that the ecosystem has changed it's a mental anxiety to them. They feel like they've lost control of their 'country' — they're responsible for looking after it.⁷³

In the Torres Strait Islands, the threats to culture from climate change are already being felt; for example graveyard sites have already been threatened and damaged by recent king tides, and the nesting behaviour of turtles has already become unpredictable because of changing weather patterns and erosion. Many aspects of *Ailan Kastom* are threatened if the predicted impacts of climate change eventuate:

Islander culture, or *Ailan Kastom*, refers to a distinctive Torres Strait Islander culture and way of life, incorporating traditional elements of Islander belief and combining them with Christianity. This unique culture permeates all aspects of island life...*Ailan Kastom* governs how Islanders take responsibility for and manage particular areas of their land and sea country; how and by whom natural resources are harvested, and allocation of seasonal and age-specific restrictions on catching particular species. The strong cultural, spiritual and social links between the people and the natural resources of the sea reinforces the significance of the marine environment to Islander culture. One major component of *Ailan Kastom* relates to the role of turtle and dugong, which have great significance as totemic animals for many Islanders.⁷⁴

72 Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc 1/55/40, (2000), paras 498-528. At: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.55.40,paras.498-528.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.55.40,paras.498-528.En?OpenDocument) (viewed September 2008).

73 Friends of the Earth International, *Climate change: voices from communities affected by climate change* (2007), p 6. At: <http://www.foei.org/en/publications/pdfs/climate-testimonies> (viewed September 2008).

74 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 4. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

(a) Dispossession and relocation

The land and waters are such an integral part of *Ailan Kastom*, that before native title law, one author wrote:

The Strait does not have to worry about custom; the society of Islanders there remains axiomatic as long as they are in occupation of their ancestral islands and are living off resources which, whatever the legality, are theirs by customary right.⁷⁵

Yet, if climate change predictions are accurate, some Islands in the region may disappear completely, and others may lose large tracts of land (see page 264 of this Report for photos of sea level predictions for Masig Island). Because of this, some Islanders will be dispossessed of their lands and be forced to relocate, threatening the existence of *Ailan Kastom*.

An Islander from Saibai has said ‘But we will lose our identity as Saibai people if we scatter. If we separate, there will be no more Saibai’.⁷⁶ Another, the TSRA chairman John Toshie Kris, has been quoted as saying that relocation has been discussed as a last resort; however, he believes it can be avoided with the help of government, but ‘at the moment, you cannot move these people, because they are connected by blood and bone to their traditional homes.’⁷⁷

This outcome would be in breach of Australia’s international human rights obligations that protect a right to culture. General comment 23 to the ICERD explicitly deals with returning lands to Indigenous peoples:

The Committee especially calls upon State parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁷⁸

Article 10 of the *Declaration on the Rights of Indigenous Peoples* also confirms that Indigenous peoples cannot be moved from their lands without having given their free, prior and informed consent.

Declaration on the Rights of Indigenous Peoples – article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

75 D Green, ‘How Might Climate Change Affect Island Culture in the Torres Strait?’ (2006) *CSIRO Marine and Atmospheric Research Paper 011*, p 3 citing Jeremy Beckett, *Torres Strait Islanders: Custom and colonialism* (1987). At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

76 L Minchin, ‘Sea wall no match for tide’s fury’, *Sydney Morning Herald*, 12 August 2006. At: <http://www.smh.com.au/news/national/sea-wall-no-match-for-tides-fury/2006/08/11/1154803102257.html> (viewed September 2008).

77 L Minchin, ‘Not waving but drowning at our back door’, *The Age*, 12 August 2006. At: <http://universal-salvage.org.uk/pdf/AustraliaTidesRising.pdf> (viewed September 2008).

78 Committee on the Elimination of Racial Discrimination, *General Comment No. 23: Indigenous peoples* (1997), para 5. <http://www.unhchr.ch/tbs/doc.nsf/0/73984290dfea022b802565160056fe1c?OpenDocument> (viewed September 2008).

The history of dispossession of the Indigenous peoples of Australia has resulted in various state, territory and federal laws being passed in recent years with an intention of making reparation for dispossession.⁷⁹ However, if any Islanders are relocated and dispossessed of their lands, it will not only affect their culture, but it will impact on their existing legal rights to the land, and potentially the legal rights of other Indigenous people. All of these impacts must be considered by government.

(b) Native Title

As I noted at the beginning of this chapter, the Torres Strait Islands are the birthplace of native title law. All inhabited islands in the region, and some uninhabited islands have native title rights determined over them. Other uninhabited islands and the surrounding sea have native title claims over them, but are yet to be determined. However, with the impacts of climate change predicted above, those hard won native title rights may be lost.

Erosion and the threat of extreme weather events including king tides have already damaged and ruined sites that have native title rights and interests determined over them. It has also already forced some to move off the lands that they have native title determined over, onto higher ground.

The possibility of native title being extinguished by climate change raises questions about what remedies the Islanders might be able to seek if this occurs. This is discussed later in this chapter.

(c) Relocation

The Council of Australian Governments' (COAG) adopted National Climate Change Adaptation Framework (the Framework) states that a potential area of action is to 'identify vulnerable coastal areas and apply appropriate planning policies, including ensuring the availability of land, where possible, for migration of coastal ecosystems.'⁸⁰ The Framework discusses the expected need for Islanders to migrate to the mainland or urban centres.

Currently, the discussion about intra-Australia relocation has focused on relocation as a predominantly economic issue with social implications, particularly the resulting strain on infrastructure.

However, culture and cultural practices will have implications on the social and economic dimensions of relocation, something which has not been acknowledged by the federal government. But '[s]ocial conflicts stemming from ecological changes are not easily resolved'.⁸¹

For Torres Strait Islanders, there are two possible relocations that may occur, depending on what impacts of climate change eventuate.

Firstly, some Islanders may be forced to move onto higher land on their island or another Torres Strait Island. Some have already started to negotiate such a move, and some families have already made agreements with another family that when the impact of erosion gets too bad, they can move onto the other's land.⁸² However this is not guaranteed.

79 This includes the *Native Title Act 1993* (Cth), and various state and territory land rights regimes.
80 Council of Australian Governments, *National climate change adaptation framework* (2007). At: http://www.coag.gov.au/coag_meeting_outcomes/2007-04-13/ (viewed September 2008).
81 R White, *Climate change, social conflict and environmental criminology* (2008), p 13.
82 See for example, D Billy, Kulkalgal (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 18 September 2008.

Well on Murray Island what we'll do is go up the hill a bit further. The only thing we'll have to do is every Island community is owned by a particular family or clan; so for argument's sake, if I need to move because I live down the bottom, I'd have to start negotiating with another family or clan to move into their area. If they refuse, I'd have to go back down.⁸³

Secondly, Islanders may be forced to move onto the mainland. This would probably mean moving to the Cape York region – closest to their homes and where some of their relatives may now reside.⁸⁴ However, this is land that traditionally belongs to the Aboriginal people of that area, and some of that land has in fact been handed back to the Traditional Owners by the Queensland government. Some has also had native title determined over it.

Relocation to the mainland occurred in the 1940s, when in response to a flood, some Islanders decided to move. However:

This relocation, however, did not take account of the potential cultural sensitivities of moving Islander people on to what is now recognised as Aboriginal land. These concerns would need to be at the forefront of any relocation negotiations in the future (Jensen Warusam pers. comm. 2006).⁸⁵

The impacts of such a move on the land rights and cultural rights of Aboriginal people and Torres Strait Islanders, is a serious issue that the government must factor in to its decision making on climate change adaptation. It is a complicating factor, as one Islander put it:

...if there's an influx of a thousand people settling in Cairns or somewhere, it's going to cause a lot of major problems.⁸⁶

3. What is already being done?

Recognising the impacts of climate change that are already being felt in the region, and the vulnerable position that the Islanders are in, a number of initiatives have begun. However, many of these projects are in their initial stages and need to be supported, improved and complemented so that the potential human rights crisis in the Torres Strait is averted. The primary state, regional and federal responses to climate change in the Torres Strait are listed below.

83 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

84 Some of the communities in Cape York are predominantly Torres Strait Islander communities, for example Bamaga. See Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians*, 4705.0. At: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument> (viewed September 2008).

85 D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO marine and atmospheric research paper 011*, p 10. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

86 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

3.1 The Torres Strait Coastal Management Committee⁸⁷

The Torres Strait Coastal Management Committee (the Committee) was established by TSRA in 2006 to enable a whole-of-government coordinated response to coastal issues in the Torres Strait. It consists of representatives from the Queensland government, the islands, and recently it has included a federal government representative. It coordinates and oversees a range of projects that were initially developed to deal solely with coastal care. However, in recognition of the link between coast care and the predicted significant impacts of climate change, the Committee's work has recently expanded to include projects dealing with climate change. Some projects include:

- Investigation of sea erosion affecting communities and solution development
- Sea level survey and land datum corrections
- Sustainable land use planning
- Climate impacts in the Torres Strait, and incorporation of traditional environmental knowledge
- Development of a climate change strategy for the Torres Strait
- A survey to develop high level resolution digital evaluation model for low lying areas to assist in planning for sea level rise and storm tide inundation.⁸⁸

The Committee actively involves island communities in decision making and project activities⁸⁹ and considers community support for any action to be vital.

One of the projects the committee has established is the Coastal Erosion Project. It too has been developed and expanded to deal with climate change impacts on erosion through inundation and extreme weather events.

(a) Coastal Erosion Project: Masig, Warraber, Poruma, Iama

In December 2005, the Natural Heritage Trust approved funding for a Coastal Erosion Impacts Project in the Torres Strait to be undertaken by James Cook University with the communities of Warraber, Masig and Poruma Islands. The project, which commenced in April 2006, was extended to include Iama Island, and is due to be finalised in very near future.⁹⁰

87 For additional information on this section, see Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

88 J McNamara, Executive Director, Indigenous Services, QLD Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008.

89 D Shankey, Senior Policy Adviser, Office of the QLD Minister for Sustainability, Climate Change and Innovation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 September 2008.

90 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, Iama* (Presentation to the board of the Torres Strait Regional Authority, 2008).

The long term outcome that the project is seeking is management of erosion on the cay islands, which are the lowest lying islands in the Torres Strait.⁹¹ In order to achieve this, the project aims to:⁹²

1. Work with communities to identify and prioritise threats. The project has a strong focus on community participation and decision making and it 'engage[s] the community to understand the cultural and social aspects of the problem and determine what it most important to the community'.⁹³
2. Identify the underlying causes of coastal erosion on Torres Strait reef islands, and to develop long-term, sustainable solutions that work with, rather than against, the natural processes.
3. To provide real data about the processes involved and the way in which solutions may address these, these can be used to develop strong funding applications for appropriate works.

At the conclusion of the project, the community is to decide a suitable long-term response to the problem.

(i) *Masig's response*⁹⁴

To date, the only island that has made a decision about how they will adapt to erosion is Masig Island. Masig will be severely affected by climate change if the Intergovernmental Panel on Climate Change sea level rise predictions occurs. This will include inundation of most of the inhabited areas of the island (see page 264 of this Report for photos of Masig Island).

With the assistance of the coastal erosion project, the Masig community has made some decisions about their future and how they want to progress an adaptation strategy.

The people of Masig reaffirm that they wish to continue to live on Masig into the future. The people of Masig understand that much of the island (and in particular the area around the village) is low, and that flooding events may become more regular and more significant in the future due to climate change. However, it is also understood that flooding will only happen occasionally, on the highest tides and when weather conditions are unfavourable, at least for the foreseeable future.

- The people of Masig are prepared to participate in a process of adaptation to environmental and climate change which may include things such as:
 - As houses or other infrastructure reaches the end of its usable life, not rebuilding in the same place if that place may be subjected to erosion or inundation due to rising sea levels

91 K Parnell, *Management of coastal erosion and inundation* (Presentation at Sharing Knowledge: A Workshop on Climate Change Impacts and Adaptation Strategies for Northern Australian Indigenous Communities, Darwin, March 30-31, 2006). At: http://pandora.nla.gov.au/pan/77805/20071019-0751/www.dar.csiro.au/sharingknowledge/files/parnell_darwin2006.pdf (viewed November 2008).

92 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).

93 K Parnell, *Management of coastal erosion and inundation* (Presentation at Sharing Knowledge: A Workshop on Climate Change Impacts and Adaptation Strategies for Northern Australian Indigenous Communities, Darwin, March 30-31, 2006.). At: http://pandora.nla.gov.au/pan/77805/20071019-0751/www.dar.csiro.au/sharingknowledge/files/parnell_darwin2006.pdf (viewed November 2008).

94 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).

- Not building new infrastructure in hazardous locations unless absolutely essential.
 - Over time, moving the focus of the island village towards higher parts of the island
 - Managing boeywadh (berms) with the intention of building them higher and wider, and managing access tracks through them to ensure that water cannot enter the island interior
 - Allowing some parts of the island to erode, where that erosion is not causing harm to people, infrastructure or important cultural sites, while monitoring the situation.
- The Masig community recognises that adaptation will raise issues that must be addressed within the community, such as land ownership and traditional rights, and the community is willing to work through these issues.
 - The community wants to further explore the possibility of dredging off-reef sand to renourish the island beaches.
 - The community is willing to be involved in the testing of innovative solutions to coastal erosion, where appropriate.
 - The community will do the important things that they can, such as implementing management plans for the buoywadh and coastal vegetation.
 - The community is willing to work with government at all levels, researchers and infrastructure providers to make a case to obtain funds to progress these measures, and to make decisions when options are put before the community.⁹⁵

The project must continue to be supported so that it can be implemented in its entirety. In addition, further strategies will be needed to complement these activities which primarily deal with only one aspect of climate change.

3.2 A federal study: climate change for northern Indigenous communities

The Australian Government is funding a study on 'how climate change will impact on Indigenous communities in northern Australia'. For the purpose of the study, northern Australia includes the Torres Strait region. In announcing the initiative, the Minister for Climate Change and Water recognised that the Government has 'limited understanding of how climate change will affect Indigenous communities, their resilience and their capacity to adapt.' Positively, the study will take a more holistic approach than most climate change policy to date, and will examine the impacts on health, the environment, infrastructure, education, employment and opportunities that may arise from climate change. The study, which should be completed by April 2009, will enable the Government to determine what action needs to be taken to reduce the impact of climate change in the region.⁹⁶

95 Masig Island also made site specific decisions (relating to the problem sites) as well as the broader decisions listed here.

96 Minister for Climate Change and Water, 'New climate change study for northern Indigenous communities', (Media Release, 8 September 2008). At: http://www.environment.gov.au/minister/wong/2008/mr2008_0908a.html (viewed September 2008).

4. What next?

The Australian Human Rights Commission has outlined what a human rights based response to climate change must involve:

[A] human rights-based approach...should focus on poverty-reduction, strengthening communities from the bottom up, building on their own coping strategies to live with climate change and empowering them to participate in the development of climate change policies. It needs to be locally grounded and culturally appropriate...the human rights-based approach...emphasises the importance of local knowledge and seeks the active participation and consultation of local communities in working out how best to adapt to climate change. This could mean, for example, incorporating the traditional cultural practices of indigenous communities into climate change responses.⁹⁷

Such an approach is being followed by the Coastal Erosion Project, where the ultimate decision makers are the communities. If the power to make decisions is taken away from communities, the project would lose legitimacy and run the risk of failure:

Decisions made without consultation of Indigenous communities can force unwelcome lifestyle changes for them. Westerners don't listen to worries about land—but we want natural protection from climate change that doesn't conflict with traditional ways of life.⁹⁸

A human rights based approach to climate change can easily be integrated into the various stages of 'adaption as a process' identified by the Intergovernmental Panel on Climate Change. The adaptation process includes:⁹⁹

- knowledge, data, tools
- risk assessments
- mainstreaming adaptation in to plans, policies, strategist
- evaluation and monitoring for feedback and change
- awareness and capacity building

All of these areas have been identified as lacking in the Torres Strait where improving knowledge, information, risk assessment, planning, and capacity building, have all been identified as urgent priorities.

4.1 Information, knowledge, data

The lack of data and information on climate change impacts in the Torres Strait region has been acknowledged by many parties.

The TSRA, CSIRO and Queensland government submissions to House of Representatives Standing Committee Inquiry into climate change and environmental impacts on coastal communities both identified a lack of data as an issue. In response, the Queensland government is undertaking some projects in the Torres Strait Islands such as the Tide Gauge Project:

97 Australian Human Rights Commission, *Background paper: Human rights and climate change* (2008), p 17.

98 Traditional Owner, cited in D Green, 'How Might Climate Change Affect Island Culture in the Torres Strait?' (2006) *CSIRO marine and atmospheric research paper 011*, p 11. At: http://www.cmar.csiro.au/e-print/open/greendl_2006a.pdf (viewed September 2008).

99 K Hennessy, B. Fitzharris, B.C. Bates, N. Harvey, S.M. Howden, L. Hughes, J. Salinger and R. Warrick, '2007: Australia and New Zealand' in Intergovernmental Panel on Climate Change, 2007: M.L. Parry, O.F. Canziani, J.P. Palutikof, P.J. van der Linden and C.E. Hanson, (eds), 'Summary for Policy Makers' in *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, 507, p 513. 7, p 13. At: <http://www.ipcc.ch/> (viewed September 2008).

Tidal data for the Torres Strait Islands region is insufficiently accurate to manage and respond to events such as storm surge and projected sea level rise. The project will provide accurate data to inform such activities as storm surge and sea-level rise mapping for the Islands.¹⁰⁰

This lack of information is not unique to the Torres Strait. The COAG adopted National Climate Change Adaptation Framework identifies the lack of information and knowledge gaps as integral to the two priority areas for potential action. However, the timeframe for implementing the framework is up to seven years.

It is an urgent priority in the Torres Strait. The TSRA, in its submission, has identified the lack of local data and science as a major impediment to their planning and projects to deal with climate change. It has proposed that the Australian Government fund long term monitoring of sea levels through the installation of gauges and mapping, which could contribute to an inundation warning system. It has also proposed that the Government undertake specific regional scale modelling of changes to climate, which hasn't been undertaken in the Torres Strait to date.¹⁰¹

One aspect of remedying this problem, which is consistent with a human rights based response to climate change, is recognising and utilising traditional environmental knowledge, which has already been identified by natural scientists as an under-used resource for climate impact and adaptation assessment. Recognition is slowly beginning to grow of the untapped resource of Indigenous knowledge about past climate change in Australian and internationally, which could be used to inform adaptation options.¹⁰² However, as chapter 7 highlights, it is important that the legal ownership of this knowledge remains with its true owners.

4.2 Governance, planning and strategies

It is integral that agencies' roles, responsibilities and accountability for governance of climate change issues in the Torres Strait Islands is clear.

There are unique characteristics of the Torres Strait region that make this particularly important. There are complex international border issues with Papua New Guinea, and the area is governed by an international treaty. The Torres Strait Regional Authority, the Torres Strait Regional Islands Council, the Queensland Government and the Commonwealth all have some jurisdiction over the governance of the region. Within each of these there are additional layers of complexity about which portfolio is responsible for what. For example, there are 22 Queensland government agencies responsible for carrying out the actions outlined in the State's *ClimateSmart Adaptation* plan over the next 5 years.¹⁰³ Further, there are numerous Non-Government Organisations (NGOs) operating in the region, who are eager to play a role in supporting the Islanders to mitigate and adapt to climate change impacts.

100 Queensland Government, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (18 June 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub091.pdf> (viewed December 2008).

101 Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on climate change, water, environment and the arts inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

102 D Green, *Submission to the Garnaut climate change review* (February 2008), p 14.

103 Queensland Government, *ClimateSmart Adaptation 2007-12: An action plan for managing the impacts of climate change* (2007), p 18. At: http://www.climatechange.qld.gov.au/response/adaptation_plan.html (viewed September 2008).

The CSIRO has highlighted the need for clear governance responsibilities in order for climate change responses to be effective:

Coastal governance should seek to maintain a flow of multiple values from multiple natural and built assets, across several scales, to diverse stakeholders, including future generations... each coastal region faces different challenges and opportunities from climate change. Meanwhile, overlapping, unclear or juxtaposed jurisdictions across local, state and Commonwealth governments do hamper integrated and coordinated responses.¹⁰⁴

In its submission to the House of Representatives Committee, the CSIRO noted the need for governance and decisions to be made at the right scale.¹⁰⁵ Consistent with the human rights based approach outlined above, the governance of climate change issues should primarily involve clear decision making responsibilities and powers that rest with the community.

4.3 Evaluation and monitoring

At the moment there are only a small number of projects being undertaken in the Torres Strait, but it is important to ensure that all projects that are undertaken include evaluation and monitoring in their design. Consistent with the human rights based approach, this monitoring and evaluation should be done with particular emphasis on the Islanders themselves identifying the impacts that climate change, and the projects undertaken, are having on their lives. The United Nations Permanent Forum on Indigenous Issues recommends:

Monitor and report on impacts of climate change on indigenous peoples, mindful of their socio-economic limitations as well as their spiritual and cultural attachment to lands and waters.¹⁰⁶

4.4 Awareness and capacity building

Any information or data that is available must be distributed to the communities so that they can engage in the decision making process.

Our duty as Indigenous peoples to Mother Earth impels us to demand that we be provided adequate opportunity to participate fully and actively at all levels of local, national, regional and international decision-making processes and mechanisms in climate change.¹⁰⁷

104 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 21. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

105 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 29. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

106 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008), para 22. At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

107 Economic and Social Council Permanent Forum on Indigenous Issues, *Impact on climate change migration measures on Indigenous peoples and on their territories and lands*, UN Doc E/C.19/2008/10 (2008), p10, citing Indigenous peoples statement to the UNFCCC, Delhi, 2002. At: http://www.un.org/esa/socdev/unpfii/documents/E_C19_2008_10.pdf (viewed September 2008).

The CSIRO considers that successful adaptation requires investment in leadership, skills, knowledge, and adaptable infrastructure so that communities can self organise and respond quickly and effectively.¹⁰⁸

To ensure this can occur, the United Nations Permanent Forum on Indigenous Issues recommended that all states ensure Indigenous peoples are well resourced and supported to make those decisions including through providing policy support, technical assistance, funding and capacity-building.¹⁰⁹

Text Box 2: TSRA recommendations

The TSRA has made the following recommendations to the House of Representatives Standing Committee Inquiry into climate change and environmental impacts on coastal communities.¹¹⁰

Recommendation 1: That there is further support for all Torres Strait Island communities and regional institutions to access information about projected climate change impacts at a locally and regionally relevant scale, to enable informed decision making and adaptive planning.

Recommendation 2: That there are further studies of island processes and projected climate change impacts on island environments, including uninhabited islands with problems such as turtle nesting failures.

Recommendation 3: That reliable data is obtained on island interior heights and elevations to support more accurate predictions of inundation levels.

Recommendation 4: That a feasibility study be undertaken to investigate and recommend the most suitable renewable energy systems for servicing the Torres Strait region, including the investigation of tidal, wind, solar and other systems suitable for the region's environmental conditions and demand for power.

Recommendation 5: That the Torres Strait region is considered as a potential case study for small scale trials of solutions to coastal erosion and inundation problems, as well as sustainable housing and building design and construction for remote communities in tropical environments.

108 CSIRO, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (May 2008), p 29. At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub102.pdf> (viewed September 2008).

109 Economic and Social Council Permanent Forum on Indigenous Issues, *Recommendations on the special theme, 'climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'*, UN Doc E/C.19/2008/L.2 (2008), para 28. At: <http://daccessdds.un.org/doc/UNDOC/LTD/N08/317/04/PDF/N0831704.pdf?OpenElement> (viewed September 2008).

110 Torres Strait Regional Authority, *Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

*TSRA proposal to address coastal management and climate change issues in the Torres Strait:*¹¹¹

The proposal details a comprehensive approach to investigate, monitor and plan for adaptation to climate change. It covers:

- Basic data collection and monitoring, including a tide gauge network, accurate bathymetry (targeted nearshore surveys) and topographic mapping
- Climate science (eg detailed modelling of regional sea level rise, winds, waves, storm surge, water chemistry etc) to determine changes to key regional climate variables. Island process modelling/ impact assessment – to determine impacts of coastal hazards and climate change on an island by island basis.
- Dredge feasibility study – A feasibility study to examine the potential for dredging for harbour maintenance and possibly beach renourishment or sand placement to address sea level rise.
- Adaptation planning – to determine the best suite of adaptation measures to address impacts of coastal hazards and climate change at the community level. (This would build on current projects and address the islands that have yet to be included and more fully address climate change issues – particularly sea level rise at Boigu and Saibai).
- Identification of sustainable energy options suitable for Torres Strait and ways of encouraging more sustainable practices in the region.
- Implementation of adaptation plans. Potential options/works/costs to address sea level rise/inundation.

5. If things continue as they are? Torres Strait Islanders rights of action

Less than twenty years ago Australian law did not recognise Torres Strait Islanders' rights to their land. But the Islanders fought for their rights through the courts and won. However, '[t]oday it is the sea, not the law, that is taking their land',¹¹² and the Islanders may once again want to consider how the law can be used to enforce their rights if government action is inadequate.

Internationally, communities are testing domestic and international legal frameworks in an attempt to protect themselves from the impacts of climate change.

Climate-related litigation is a reality, particularly in the United States where action has been taken against private companies, administrative decisions and government agencies...In relation to the impacts on Indigenous peoples, in February 2008 the Alaskan native village of Kivalina filed a lawsuit against a number of oil, coal and power companies for their contribution to global warming and the impacts on homes and country disappearing into the Chukchi Sea. The village is facing relocation due to sea erosion and deteriorating coast. The Kivalina seek monetary damages for the defendants. Past and ongoing contributions to global warming, public nuisance and damages caused by certain defendants, acts in conspiring to suppress the awareness of the link between their emissions and global warming...Based on examples from the United States, there

111 Torres Strait Regional Authority, *Submission No 2 to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (27 November 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007b.pdf> (viewed December 2008).

112 L Minchin, 'Torres Strait: going under', *Sydney Morning Herald*, 12 August 2006. At: <http://www.smh.com.au/news/national/going-under/2006/08/11/1154803102254.html> (viewed September 2008).

may be scope for litigation outside administrative review in Australia. Other possible climate related legal action may exist in negligence or nuisance. Indigenous people do and will continue to suffer loss, damage and substantial interference with their use or enjoyment of country as a result of climate change.¹¹³

There are currently no laws in Australia that deal specifically with protecting people from climate change impacts¹¹⁴ but there may be other laws the Islanders can use to seek a remedy. Some of those possibilities are explored here.

5.1 *Environmental Protection Act 1994 (Qld)*

In Queensland, the principal law dealing with environment protection is the *Environmental Protection Act 1994 (Qld)* (EPA). The object of the EPA is to 'protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends', that is, 'ecologically sustainable development'.¹¹⁵ It includes an offence of causing serious or material environmental harm.

The notion of 'environmental harm' is widely defined, with people and culture being recognised as an integral part of 'environment' under the legislation and, although it has not been judicially tested, could foreseeably encompass the emission of greenhouse gases and consequential climate change.

One of the benefits of the *Environmental Protection Act 1994 (Qld)* is that it does not require a particular power station to be the sole cause of climate change, which is caused by many contributing factors. The benefit of this type of action is that a court could potentially order the power station to pay for the cost of repairs to infrastructure caused by storms or even the costs of relocating homes and people. One of the difficulties in bringing such an action is that the power station might present a number of arguments in response, including that it had all the necessary approvals.¹¹⁶

5.2 Negligence

The tort of negligence essentially considers whether there has been a failure to take reasonable care to prevent injury to others. There is some potential to argue that various local, state and commonwealth authorities have failed in their duty of care to protect Torres Strait Islander communities from the impacts of climate change and are therefore liable for the damage to those communities.¹¹⁷ It may be difficult for the Islanders to prove a duty of care, but if one could be established, it may be possible to apply such an argument to large emitters of greenhouse gas emissions. However, the greatest obstacle will be proving who has caused the injury.

113 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, pp 12-13 citing *Native Village of Kivalina and City of Kivalina v ExxonMobil Corporation and others* Complaint for Damages and Demand for Jury Trial, (US District Court, Northern District of California, 28 U.S.C. §§ 1331, 2201) and *Hargrave v Goldman* (1963) 110 CLR 40. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed September 2008).

114 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

115 *Environmental Protection Act 1994 (Qld)* s 3.

116 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

117 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

5.3 Public nuisance¹¹⁸

The tort of public nuisance focuses on an interference with the right to use and enjoy land. Public nuisance is defined as an unlawful act, the effect of which is to endanger the life, health, property, or comfort of the public. Public nuisance must affect the public at large.

It is not a defence to a nuisance action based on pollution for the polluter to prove that the environment was already polluted from another source or that the polluter's individual actions were not the sole cause of the nuisance.¹¹⁹ This may mean that public nuisance is better suited to climate change actions than negligence because causation issues are likely to be less complex. However, if all polluters were acting legally, then the action may fail.

5.4 Human Rights Remedies

Although the Australian Government may have no obligations to Pacific and Indian islanders and other non-Australians under human rights law, because it has ratified and implemented all the major human rights treaties it does already have human rights obligations towards its *own* citizens...¹²⁰

This chapter has laid out a number of the human rights implications of climate change on the lives of Torres Strait Islanders. It threatens their lives, health, food, water and culture among others. Without a federal or Queensland charter of human rights, there are only a few human rights mechanisms that the Islanders could pursue. However, in summary 'Australia's current human rights laws do not provide adequate protection to Torres Strait Islanders faced with damage to their culture and possible relocation as a result of climate change'.¹²¹

(a) Native title

The Native Title Act is intended to protect and recognise native title.¹²² As I've already stated, all the inhabited islands in the Torres Strait have had native title rights and interests determined over them, and under the Act, those native title rights cannot be extinguished contrary to it.¹²³

Yet, one of the real risks posed by climate change is that those native rights and interests will be lost as a result of climate change – through damage or complete loss of particular sites and land. So how can the NTA protect the native title rights and interests of the Torres Strait Islanders'? Is sea level rise an 'act' in the sense contemplated by and protected under the Act?¹²⁴

118 D Green & K Ruddock, 'Climate change impacts in the Torres Strait, Australia' (2008) 7(8) *Indigenous Law Bulletin*.

119 D Green & K Ruddock 'Climate change impacts in the Torres Strait, Australia', *unpublished*.

120 M Byrne and M Iljadica, 'There goes the neighbourhood' (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

121 M Byrne and M Iljadica, 'There goes the neighbourhood' (2007) 12 *Uniya Occasional Paper*. At: http://www.uniya.org/talks/byrne_may07-op1.html (viewed September 2008).

122 *Native Title Act 1993* (Cth) s 3.

123 *Native Title Act 1993* (Cth) s 11.

124 The *Native Title Act 1993* (Cth) refers to 'acts' which affect or extinguish native title. See section 11 and s 226.

Section 226 of the NTA defines ‘acts that affect native title’ to include not only positive acts such as the making of legislation or granting of a licence, but the ‘creation, variation, extension, renewal or extinguishment of any interest in relation to land or waters’. Sea level rises will extinguish certain rights and interests over land because they will disappear. The question will be whether the flooding of land will be interpreted as an ‘act’ despite the fact that the cause of that rise is essentially inaction on the part of governments to protect native title interests by taking steps to prevent climate change. Under section 227, such an act will ‘affect’ native title as it is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title rights and interests.

The NTA regulates activities or developments that may ‘affect’ native title rights. These acts are known as ‘future acts’. Government inaction to prevent the impact of climate change on the Torres Strait Islands could constitute a ‘future act’. In addition, those persons or companies who are taking actions that contribute to global warming and hence impacts on sea levels and native title rights in due course may also be undertaking ‘future acts’ which require different procedures in the NTA to be complied with. At present, the requirements of the future acts provisions in the NTA, such as notifying Traditional Owners, are not being undertaken by any of these parties. If this line of argument can be proven, the acts would be invalid under s 24OA of the NTA.

The NTA provides various circumstances in which native title holders may be eligible to receive compensation for acts which have impaired their native title rights or would have otherwise been invalid.¹²⁵ It could be argued that the failure to take steps to mitigate climate change means that the Commonwealth and Queensland governments in particular have contributed to the extinguishment of native title rights and they are liable to pay compensation.

As I reported in my *Native Title Report 2007*, there have been no successful claims for compensation under the NTA.¹²⁶ This is partly because native title must be proved before an application for compensation can be successful, and as my native title reports show, native title is extraordinarily difficult to prove. However, native title has already been proven and determined in much of the Torres Strait. The compensation they could claim would be based on market value plus any amount to reflect the cultural value of the land, and could be of significant value. It won’t, however, keep their land above water.

(b) International human rights law

In 2005, the Inuit (the Indigenous inhabitants of the Arctic region of North America and Greenland) brought a petition to the Inter American Commission of Human Rights¹²⁷ requesting its assistance in obtaining relief from human rights violations resulting from the impacts of climate change caused by the acts and omissions of the United States. In particular, the petition argued that the US had violated a number of rights set out in the *American Declaration of the Rights and Duties of Man*, the ICCPR, and the ICESCR.

125 See for example: *Native Title Act 1993* (Cth) ss 17, 20, 22G, 22L, 23J, 50, 51, 51A.

126 See chapters 7 and 8 of T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008).

127 Inuit Circumpolar Conference, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*, 7 December 2005 (“Inuit Petition”). At: http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf (1 November 2007)? (viewed September 2008).

Similar to the impacts expected in the Torres Strait, climate change is, and will continue to, impact on the Inuit people's rights under international human rights law.

However, unlike the Americas, Australia does not have a regional human rights body. Nonetheless, it is possible that Torres Strait Islanders could bring their complaints to United Nations bodies. In particular, the United Nations Human Rights Committee can receive individual complaints of violation of rights under the ICCPR, and actively investigate and rule upon them.¹²⁸ While the Human Rights Committee cannot make binding decisions, its recommendations can highlight the problem and put pressure on the government to act.

6. Conclusion

I have written this brief chapter to highlight the breadth and seriousness of the potential consequences of climate change on the human rights of one of Australia's Indigenous populations – the Torres Strait Islanders. The possible challenges the Islanders will face in the coming years are overwhelming and potentially devastating.

In order to avoid a human rights crisis, the Australian Government must respond immediately.

It's been said to me by some Islanders that they're very happy that the Australian government is investing in the Pacific, to help their brothers and sisters deal with the impact of climate change. But they wonder why they government is not more strongly investing in similar communities in Australia, and they feel a bit overlooked.¹²⁹

The Islanders are seeking attention and support from government, and are committed to working with all layers of government to protect and ensure their future. In one of my discussions, James Akee, an islander from Mer, invited Senator the Hon Penny Wong, Minister for Climate Change and Water, and The Hon Kevin Rudd MP, Prime Minister to the island to see for themselves the difficult situation they face.¹³⁰ However, if that assistance, guidance and support is not forthcoming, then the consequences for the Islanders, and the rest of Australia could be very grim.

It is hoped that the progress toward a carbon-constrained future involves collaboration and opportunity as opposed to litigation. However the pathway will no doubt be shaped by the action or inaction of government and the private sector...The alternative, if this relationship further deteriorates, lies in litigation for loss and damage of lifestyle, identity, sacred places, cultural heritage and impairment of human rights and native title rights and interests. Investment in relationships is, in effect, an investment in mitigating the ecological, economic and human risks associated with climate change.¹³¹

128 Australia acceded to the Optional Protocol to the ICCPR on 25 September 1991.

129 The Independent, 5 May 2008, *Sinking without a trace: Australia's climate change victims*, citing Donna Green. At: <http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html> (viewed September 2008).

130 J Akee, Mer Gedkem Le (Torres Strait Islanders) Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008*, 29 September 2008.

131 E Gerrard, 'Impacts and opportunities of climate change: indigenous participation in environmental markets' (2008) 3(13) *Australian Institute of Aboriginal and Torres Strait Islander Studies*, p 14. At: <http://ntru.aiatsis.gov.au/publications/2008pdfs/Issues%20Paper%20Vol%203%20No%2013.pdf> (viewed November 2008).

Climate change and the human rights of Torres Strait Islanders

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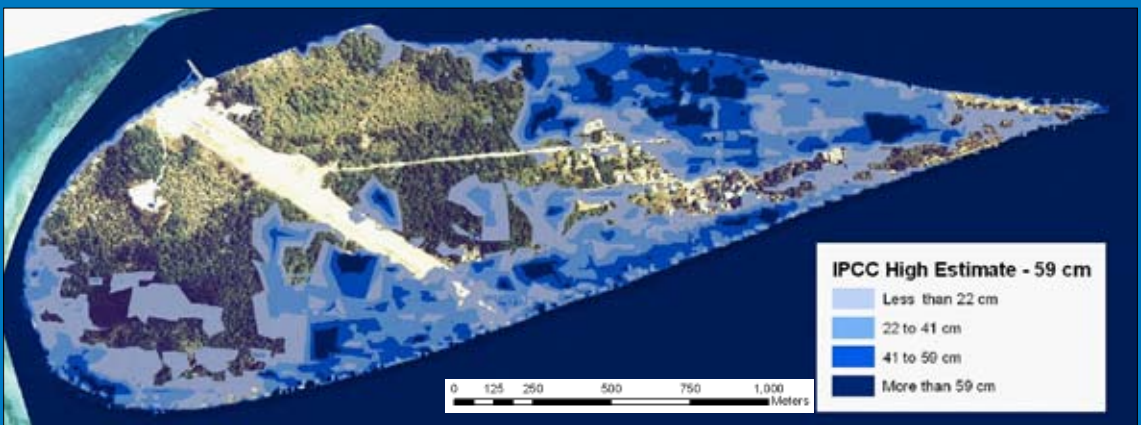
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Iama Island after the king tide in February 2006.¹

1 Torres Strait Regional Authority, *Supplementary Submission to the House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts: Inquiry into climate change and environmental impacts on coastal communities* (15 September 2008). At: <http://www.aph.gov.au/house/committee/ccwea/coastalzone/subs/sub007a.pdf> (viewed November 2008).

Masig Island



Masig Island: highest tides now.²



Masig Island: IPCC high tide estimate for 2100.³

The Murray-Darling Basin: an ecological and human tragedy

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Arial View of Mildura – the Murray-Darling Basin, December 2008.⁴

- 2 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008).
- 3 K Parnell and S Smithers, *Coastal erosion project: Masig, Warraber, Poruma, lama*, (Presentation to the board of the Torres Strait Regional Authority, 2008). Note, these are predicted maximum high tides (without storm surge) for a few hours over the highest of the high tides.
- 4 Photograph taken by Katie Kiss.



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Bottle Bend Lagoon December 2008, Arial View.⁵



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Bottle Bend Lagoon in October 2001.⁶



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Bottle Bend Lagoon in May 2007.⁷

5 Photograph taken by Katie Kiss.

6 Photograph provided courtesy of NSW Murray Wetlands Working Group.

7 Photograph provided courtesy of NSW Murray Wetlands Working Group.